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Evidence

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A B R I E F
ON THE
MODES OF PROVING THE FACTS

**MOST FREQUENTLY IN ISSUE OR COLLATERALLY IN
QUESTION ON THE TRIAL OF CIVIL OR
CRIMINAL CASES**

BY AUSTIN ABBOTT

FOURTH EDITION BY
ALLAN J. CARTER

Of the Chicago Bar

THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY
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PREFACE TO FOURTH EDITION.

During the ten years which have elapsed since the third edition of Abbott's "Brief on the Modes of Proving the Facts" was published, a great many new authorities on the subject have been decided. On some matters new lines of authorities have come into existence which had been hardly thought of ten years ago, and on others newer authorities are indispensable to any adequate understanding of the subjects.

The general plan of this edition is not greatly changed. Many new authorities have been added throughout the work, but no attempt has been made to make changes except where new authorities made them necessary. Entirely new chapters are added on "Moving Pictures," on "Changing the Rules of Evidence," and on parol evidence to explain the "Indorsement of a Bill or Note."

The chapter on "Admissions and Declarations" has been much enlarged so as to include admissions and declarations against interest in pleadings, both civil and criminal. Among the chapters practically rewritten are those on the opinion of medical experts as to cause of death, disease, or injury; declarations as to the pedigree, state of mind, or intention; dictagraph evidence; and some others.

Among other topics also on which there is much new matter are the following: Evidence of insanity in blood relatives; presumption of payment from lapse of time; proof of genuineness of letter other than by proof of handwriting or typewriting; evidence of trailing by bloodhounds; and finger-print evidence.

Few works have been so highly appreciated for ready and constant reference as these well-known Briefs of Mr. Austin Abbott; and this appreciation, which has continued through all the editions, is confidently expected for the present edition.

Rochester, N. Y., November, 1922.

PREFACE TO THIRD EDITION.

The original edition of this Brief on Facts by Austin Abbott proved very valuable and was highly appreciated by the profession. The Second Edition was greatly enlarged and its value greatly increased. The present edition, retaining everything of value in the former edition, includes much that is entirely new, as well as a full development of many other matters.

Among the entirely new subjects prepared are such as Bloodhounds, Dédication, Dictagraph, Marriage, Mortality Tables, and Phonographs, while other topics almost entirely new include Dying Declarations, Insanity, Judicial Notice, Maps, Notice, Opinions, Photographs, etc. Among the many other topics on which new matter of very material value has been added are Abandonment, Accident, Accounts Stated, Acknowledgment, Admissions and Declarations, Boundaries, Care, Death, and Intent. Every chapter has been made materially more valuable.

November, 1912.

PREFACE TO SECOND EDITION.

The practical usefulness of the Brief on Mode of Proving Facts has been demonstrated by its extensive use by many lawyers. But since its preparation there have been so many valuable decisions on the subject treated that a new edition of the work has become needed. Some entirely new chapters have been added, such as those on Insanity, Paternity, and Survivorship. There are others mostly new, such as Boundaries. The extent to which new sections have been added to the other chapters is readily seen by a moment's comparison. For instance: Abandonment is enlarged from two sections to forty-eight; Ability from three sections to nine; Abstracts from one section to six. Even when the additions to the number of sections are few, as in the case of Handwriting, or none, as in the case of Ambiguity, much careful work has been done to make the law of the subject appear with greater clearness and certainty. In short, there has been done in the preparation of this edition the same kind of careful, thorough, and painstaking work as that done on the second edition of the Civil Trial Brief, which has received unusually appreciative and generous commendation from the profession.

PREFACE TO FIRST EDITION.

Every practitioner knows the aid afforded on a trial by the little brief of a few selected authorities he may have made in preparation for getting in his own evidence and keeping out that of his adversary.

A number of such briefs that have stood the test of experience I have here consolidated into one systematic whole, which I have enlarged so as to include all the topics most commonly contested, and have condensed by pruning away whatever was peculiar to a particular action, or not likely to be both useful and safe in general practice.

It is a familiar elementary principle that the rules of evidence are the same in civil and criminal cases, so far as concerns the *mode* of proof. It is when we come to the effect of evidence that the distinction appears. This work, therefore, is adapted to use both in civil and criminal cases. Those questions of evidence which are peculiar to criminal cases, such as the Testimony of the Accused and of Accomplices, Confessions, Consciousness of Guilt, and the like, I have treated in the Criminal Trial Brief; and none of that matter is repeated here, but only referred to in its appropriate place. So, the rules which are peculiar to civil jury trials, such as the Pleadings Considered as Evidence, etc., are rarely repeated here.

I assume that the reader is familiar with the general principles of the law of evidence, and with the appropriate sphere of rules applicable to but a single class of cases; and that when he takes up this volume he is concerned with the rules either of admission or exclusion, which aid him in dealing with a particular fact or class of facts not peculiar to a particular action. In support of such rules, civil and criminal cases are alike instructive authority, and both are accordingly cited.

A word of explanation of the arrangement of the work and

its relation to the two other Brief books may facilitate its use.

For convenience of ready reference the order of subjects is strictly alphabetical. It is an Alphabet of Evidence. But to find what he wishes the reader should not search for the general rules of evidence, such as Documentary Evidence, Hearsay, etc., but should ask himself what is the object of his proof; what fact does he wish to get in or keep out. For instance, if he wishes to know whether hearsay and opinion are competent for the purpose of proving the age or the health of a person, he should look, not for Opinion or Hearsay, but for Age or Health. The arrangement is that of an Index of the Evidentiary Facts common to various classes of litigation.

In the preparation of the work, and settling on the terms in which I should state the rules I set forth, I have used the aid of an analytic or logical method, and considered the facts in groups according to their nature, such as facts of Consciousness, facts of ordinary Physical Observation, Scientific facts, etc., but for convenience of reference the results are arranged in this indexical order. A few deviations allowed from this arrangement, for obvious reasons, are indicated by cross references.

Several distinct advantages are to be found in the systematic preparation for trial, which is here illustrated. (1) The practitioner, by surveying the several modes of proof, is enabled to select his evidence more judiciously. (2) Having refreshed his memory on the precedents, he stands with much more confidence on his position, and speaks with more persuasiveness, even if, as is usually the case, he refrains from citing authorities; and (3) if the exigency of the argument calls for authority, he has it at hand.

AUSTIN ABBOTT.

71 Broadway, New York, May, 1889.

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1

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TABLE OF CONTENTS.

ABANDONMENT.

I. CONTRACTS	2
1. Burden of proof	2
2. Direct testimony	3
3. Letters	3
4. Parol evidence of abandonment	3
5. Opinions	4
6. Sufficiency of proof	4
7. Stipulated damages	5
8. Right of party abandoning contract to recover for partial performance	5
II. DOMICIL	6
9. Burden of proof	6
10. Presumptions	6
11. Documentary evidence	7
12. Declarations	7
13. Mode of proof	8
III. EASEMENTS	8
14. Effect of nonuser generally	8
15. Of abutting owner	10
16. Highways	11
a. Burden of proof	11
b. Presumptions	11
c. Weight of facts	12
17. Railway right of way	13
a. Inference of intent	13
b. Mode of proof	13
c. Materiality	13
d. Weight of facts	13
18. Ways	14
a. Nonuser generally	14
b. Deviation or use of substituted way	16
c. Obstructing of, or cutting off access to, way	17
d. Whose acts in attempting to abandon way are binding on dominant owner	18
e. Declarations	19

TABLE OF CONTENTS.

19. Water rights	19
a. Presumptions and burden of proof generally	19
b. Right of flowage	20
c. Irrigation rights; ditches; prior appropriation	20
20. Mills	24
IV. HOMESTEAD	24
21. Burden of proof	24
22. Presumptions	25
23. Opinions	25
24. Hearsay	25
25. Declarations	25
26. Mode of proof	26
V. HUSBAND AND WIFE	28
27. Declarations	28
28. Presumptions	29
29. Relevancy, sufficiency, and weight of evidence	29
VI. INSURANCE	30
30. Presumptions	30
31. Declarations	30
32. Proof of right to abandon	31
VII. PATENTS AND TRADEMARKS	31
33. Burden of proof	31
34. Presumptions	31
35. Declarations	32
36. Delay	32
VIII. RIGHTS GENERALLY	33
37. Burden of proof	33
38. Presumptions	33
39. Adverse possession	34
40. Mining rights	34
41. Pleading	34
42. Proof of intent	35

ABBREVIATIONS.

1. Judicial notice	36
2. Parol evidence	38
a. In general; general usage	38
b. Usage of writer	39
3. Pleading—variance	40
4. Question to witness	40

TABLE OF CONTENTS.

xi

ABILITY.

1. Judicial notice	41
2. Presumptions	41
3. Direct testimony	41
4. Expert testimony	42
5. Experiments in court	43
6. Experiments out of court	43
7. Witness's ability	44
8. Conclusions	44
9. Relevancy and materiality	44

ABSENCE.

1. Reputation	45
2. Fact of letters received	46
3. Contents	46
4. Telgerams	46
5. Entries by deceased person	46
6. Answers to inquiries	47
7. Presumption of continuance	47
8. Public officer's absence	48
9. Reason or motive for absence	48
10. Opinions	49
11. Relevancy and sufficiency	49

ABSTRACTS.

1. Voluminous documents	50
2. Lost or destroyed documents	51
3. Abstracts of title	52
a. In general	52
b. Admissibility under Illinois burnt records act	52
4. Extracts from reports	53
5. Extracts from books and records	54

ACCEPTANCE.

1. Judicial notice	55
2. Burden of proof	55
3. Presumptions	56
a. Acceptance of beneficial instrument or grant	56
(1) In general	56
(2) By corporation or officer thereof	58

b. Acceptance of bill of exchange 59

 c. By carrier, of goods for transportation 59

 d. Acceptance of highways 60

4. Documentary evidence 60

5. Parol evidence concerning written acceptance 61

6. Direct question 62

7. Admissions 62

8. *Res gestæ* of receiving 62

9. Relevancy and materiality; acceptance of deed or lease; of order 63

10. Acceptance of goods or work 63

11. Acceptance of land patent 64

12. Weight, effect, and sufficiency 65

 a. Acceptance of land dedicated to public use 65

 b. To satisfy statute of frauds 66

 c. Of bill of exchange 67

ACCIDENT.

1. Presumptions and burden of proof 68

 a. In general 68

 b. Suicide or accident 69

2. Documentary evidence; verdict of coroner's jury 70

3. Direct testimony 70

4. Opinions 71

5. Declarations 71

6. Relevancy 71

ACCORD AND SATISFACTION.

1. Burden of proof 72

2. Presumption 72

3. Parol evidence to vary writing 72

4. Weight, effect, and sufficiency 73

ACCOUNTS.

I. PROVING BOOKS OF ACCOUNT IN FAVOR OF ONE INTERESTED IN KEEPING 76

1. Entries by the party himself 76

 a. Rule independent of statute 76

 b. Statutory rule 78

2. Entries by party who has since deceased	81
a. Common-law rule	81
b. Statutory rule	83
3. Entries by party who has since become insane	83
4. Entries in partnership books by absent or deceased partner	84
5. Entries made by bookkeeper:	84
a. Common-law rule	84
(1) When the bookkeeper is accessible	84
(2) When the bookkeeper is not accessible	85
(3) When the bookkeeper is insane	86
(4) When the bookkeeper is dead	86
b. Statutory rule	87
6. Effect of statute making party competent witness for self	87
7. Effect of statute prohibiting party from testifying	87
8. Effect of statute of limitations	88
9. Effect of amount in controversy	88
10. Rule when the party keeps a clerk	89
a. Generally	89
b. Who are clerks	89
11. Form and requisites as to book and entry	90
a. Generally	90
b. Alterations, erasures, and mutilations	91
c. Omission to affix price, weight, etc.	92
12. Entries; original or transferred	92
a. General rule	92
b. Entries transferred from memoranda	93
c. Ledgers	94
d. Balances	95
13. Time for making the entries	95
a. General rule	95
b. Undated entries	96
c. Lump charges	96
14. Regularity as to course of business	97
a. General rule	97
b. Entries relating to party's business	98
15. Entries showing intent to charge	98
16. Authentication and correctness of books and entries	98
a. Necessity generally	98
b. Oath of the party himself	99
c. Proof by customers	99
17. Knowledge of the person making the entries	100
a. In general	100
b. Entries on information verified by informant	100

- c. Proof of knowledge of the persons making the entries in a modern business establishment 100
- 18. Bringing home to adverse party 101
- 19. What accounts are provable by books 102
 - a. Generally 102
 - b. Delivery of goods to third person 102
 - c. Professional services 104
 - d. Work done by servant 104
 - e. Bank accounts 104
- II. EXPLANATIONS, CORRECTIONS, AND DISCREDITING 104
 - 20. Accounts not exclusively the best evidence 104
 - 21. Photographs 106
 - 22. Secondary evidence not rebuttable 106
 - 23. Interpreting symbols 107
 - 24. Time of entries 107
 - 25. Explaining 107
 - a. In general 107
 - b. By expert 108
 - 26. Discrediting 109
 - a. By opinion 109
 - b. By specific errors 109
- III. PROVING ACCOUNT IN AID OF ORAL TESTIMONY 110
 - 27. Contemporaneous entries 110
 - 28. Written details of facts testified to 110
- IV. MUTUAL ACCOUNTS 111
 - 29. Account rendered 111
 - 30. Pass books 111
 - 31. Conclusiveness 112
- V. PROVING AGAINST ONE INTERESTED IN KEEPING 112
 - 32. Authentication 112
 - 33. As admissions 113
 - 34. Agent's books 113
 - 35. Joint books 113

ACCOUNT STATED.

- 1. Account rendered and not objected to 115
- 2. Part payment on account rendered 118
- 3. Reservation of objection 118
- 4. Objections to part 119
- 5. Reasonable time 119
- 6. Giving note implies accounting in full 120
- 7. To impeach 121
- 8. Account admissible without original books 121

9. Authority of agent to make a settlement having the effect of an account stated	121
---	-----

ACKNOWLEDGMENT.

1. Burden of proof	122
2. Presumptions	123
3. Best and secondary evidence	123
4. Unacknowledged or defectively acknowledged deed, or record thereof, as evidence	123
a. Necessity of acknowledgment	123
b. Time of acknowledgment	124
c. Defective acknowledgment	125
5. Parol and extrinsic evidence	126
6. Privileged communications to notary	128
7. What defects disregarded	128
8. Sufficiency of evidence to impeach certificate of acknowledgment	128

ACQUIESCENCE.

1. Burden of proof	129
2. Acts and declarations	130
3. Relevancy	130

ADDRESS.

1. Privileged communications	131
2. City directory	132

ADMISSIONS AND DECLARATIONS.

1. Witness not hearing or understanding whole conversation	134
2. Recollection of exact words	134
3. Identifying the speaker	135
4. Reference to things not specified	136
5. Statute requiring writing	136
6. Undelivered writing	137
7. Admissions or declarations against interest in civil pleadings	137
a. In general	137
b. Sworn and unsworn pleadings	138
c. Parties against whom the admissions contained in the pleadings may be shown	139

d. Withdrawn or superseded pleadings	140
e. Conclusiveness of admissions in pleadings	140
f. Admissibility of one plea or count on issue raised by another	141
g. Necessity of introducing pleadings in evidence	141
8. Admissions or declarations against interest in criminal pleadings	142
a. Plea of <i>nol contendere</i>	142
b. Plea of guilty	142
9. Admissions or declarations in a judicial proceeding	143
a. In general	143
b. In unauthenticated document used	144
c. Admission made on former trial for purpose of de- feating continuance	144
d. Testimony given upon preliminary examination by witnesses not available at time of trial	144
e. Admissions made by one accused of crime during a trial or in a judicial proceeding	146
10. Admissions by silence	146
11. Records of one's society	148
12. Best and secondary	148
13. Knowledge	148
14. Admissions pending compromise, privileged	149
15. Contradicting	152
16. Change of opinion	152
17. Entire statement or conversation	152
18. Conduct against admissions	153
19. Declarations by injured person to physician examining him in order to qualify as a witness	154
20. Statements by assured outside of his application as evi- dence against beneficiary	156
21. Proof against one person of declarations by another to show partnership	159
22. Declarations against title by former owner whether he is available as a witness or not	160
23. Declarations of one since deceased against his own mar- riage	161
24. Declarations of testator	162
a. To show undue influence	162
b. On issue of testator's intention in destroying will...	162
c. To overcome or sustain presumption of revocation, where will cannot be found	163
d. To prove existence or contents of lost or destroyed will	164

25. Declarations of deceased subscribing witness to will	164
26. Admissibility of declarations of persons who would be incompetent as witnesses	165
a. Declarations of infants too young to be sworn as wit- nesses	165
b. Declarations by husband and wife as <i>res gestæ</i>	166
c. Declarations by convicts and unpardoned felons as <i>res</i> <i>gestæ</i>	166
d. Declarations of insane persons	166
27. Admissibility of statements in presence of party as affected by his mental or physical condition at the time	167
28. Reports by agent or employee to employer, to prove fact in issue	168
29. Declarations out of court by one whose name is charged to have been forged	169
30. Declarations as to pedigree	170
31. Declarations as to a state of mind	170
a. Declarations concerning the alienation of affections ..	170
b. Declarations of deceased parent as to paternity of child	171
32. Declarations of intention	171
33. Declarations of deceased confessing a crime	172

ADULTERY.

1. Circumstantial evidence; presumptions	172
2. Cogency and relevancy of proof	173

ADVERSE POSSESSION.

1. Burden of proof	175
2. Presumptions	176
3. Conclusion	178
4. Declarations—hearsay	178
5. Relevancy	178
6. Weight, effect, and sufficiency	180

AFFINITY, 181.

AGE.

1. Presumption	182
2. Records and inscriptions	182
3. Direct testimony	185

d. Withdrawn or superseded pleadings	140
e. Conclusiveness of admissions in pleadings	140
f. Admissibility of one plea or count on issue raised by another	141
g. Necessity of introducing pleadings in evidence	141
8. Admissions or declarations against interest in criminal pleadings	142
a. Plea of <i>nol contendere</i>	142
b. Plea of guilty	142
9. Admissions or declarations in a judicial proceeding	143
a. In general	143
b. In unauthenticated document used	144
c. Admission made on former trial for purpose of de- feating continuance	144
d. Testimony given upon preliminary examination by witnesses not available at time of trial	144
e. Admissions made by one accused of crime during a trial or in a judicial proceeding	146
10. Admissions by silence	146
11. Records of one's society	148
12. Best and secondary	148
13. Knowledge	148
14. Admissions pending compromise, privileged	149
15. Contradicting	152
16. Change of opinion	152
17. Entire statement or conversation	152
18. Conduct against admissions	153
19. Declarations by injured person to physician examining him in order to qualify as a witness	154
20. Statements by assured outside of his application as evi- dence against beneficiary	156
21. Proof against one person of declarations by another to show partnership	159
22. Declarations against title by former owner whether he is available as a witness or not	160
23. Declarations of one since deceased against his own mar- riage	161
24. Declarations of testator	162
a. To show undue influence	162
b. On issue of testator's intention in destroying will...	162
c. To overcome or sustain presumption of revocation, where will cannot be found	163
d. To prove existence or contents of lost or destroyed will	164

25. Declarations of deceased subscribing witness to will	164
26. Admissibility of declarations of persons who would be incompetent as witnesses	165
a. Declarations of infants too young to be sworn as wit- nesses	165
b. Declarations by husband and wife as <i>res gestæ</i>	166
c. Declarations by convicts (and unpardoned felons as <i>res</i> <i>gestæ</i>	166
d. Declarations of insane persons	166
27. Admissibility of statements in presence of party as affected by his mental or physical condition at the time	167
28. Reports by agent or employee to employer, to prove fact in issue	168
29. Declarations out of court by one whose name is charged to have been forged	169
30. Declarations as to pedigree	170
31. Declarations as to a state of mind	170
a. Declarations concerning the alienation of affections..	170
b. Declarations of deceased parent as to paternity of child	171
32. Declarations of intention	171
33. Declarations of deceased confessing a crime	172

ADULTERY.

1. Circumstantial evidence; presumptions	172
2. Cogency and relevancy of proof	173

ADVERSE POSSESSION.

1. Burden of proof	175
2. Presumptions	176
3. Conclusion	178
4. Declarations—hearsay	178
5. Relevancy	178
6. Weight, effect, and sufficiency	180

AFFINITY, 181.

AGE.

1. Presumption	182
2. Records and inscriptions	182
3. Direct testimony	185

4. Hearsay	186
5. Opinion	186
6. Cross-examining witness as to capacity to judge	188
7. Inspection	188
8. Age of document	189
9. Age of horse	190

AGENCY.

I. PROVING AGENCY OR AUTHORITY	191
1. Reputation	191
2. Direct testimony	192
a. In general	192
b. By agent; implied authority	192
3. Necessity of written authority	193
a. In general	193
b. Of sealed authority	193
4. Best and secondary evidence of authority	194
5. Conditions precedent	195
6. Admissions of principal	195
7. Admissions and declarations of agent	195
a. In general	195
b. In connection with evidence of ratification	198
8. Appearing to be in charge of business	199
9. Ownership and use	200
10. Form of commercial documents	200
11. Charging a commission	201
12. Opinion as to powers	202
13. Course of dealing	202
a. In general	202
b. Transactions with other persons	204
c. Similarity of transactions	206
d. Single transaction not enough	207
14. Unauthorized signing of name without indication of agency	207
15. Unauthorized acts of wife or child	207
16. Relationship of husband and wife or parent and child as affecting proof of agency	208
a. Agency of a husband for his wife	208
b. Agency of a wife for a husband	209
c. Agency of parent for child or child for parent	209
17. Joint interest	210
18. Presumption of continuance	210

19. Scope of authority	210
a. Local or trade usage	210
b. To indorse check	212
c. To take note payable to himself	212
d. To cancel contract	212
e. To receive payment of price	213
f. To receive payment of negotiable paper	214
g. To receive payment of bond and mortgage	214
20. Ratification	215
II. DISPROVING AGENCY OR AUTHORITY	218
21. General reputation	218
22. Separation of husband and wife	218
23. Revocation	218
a. In general	218
b. By death or incapacity	219

ALTERATIONS.

1. Allegation	220
2. Presumptions and burden of proof	221
3. Effect of alteration on competency as evidence	225
4. What is material	226
5. Inspection	227
6. Signature and body	227
7. Effect of call for explanation	227
8. Effect of failure to explain	229
9. Effect of attempted explanation	229
10. Effect of alteration on validity	230
11. Competency of witness to explain	231
12. Description	231
13. Explaining, as immaterial	232
a. In general	232
b. As made by third person	232
c. As made by consent	233
14. Extrinsic evidence to supply obliteration	233
15. Abstract or memorandum corroborating the testimony....	234
16. Official document; ancient instrument	234
17. Certified copy	234

AMBIGUITY.

1. Symbol	235
2. Absence of dollar mark	235
3. Illegibility	236

4. Blank	236
5. Patent and latent	237
6. Surrounding circumstances	238
7. Usage of the business	240
8. Practical construction	240
9. Creating by extrinsic evidence	241
10. Technical meaning	242
11. Identity	243
12. Insurance contracts	244

AMOUNT.

1. Voluminous books, records, papers, etc.	245
2. Alternative computations by experts	246

APPLICATION OF PAYMENTS.

1. Burden of proof to show direction; presumption	246
2. Oral evidence	247
3. Direct testimony	247
4. Direct and circumstantial evidence	247

APPRAISAL.

Competency	248
------------------	-----

APPROVAL.

1. By judge	248
2. By corporation	249

ARBITRATION AND AWARD.

1. Presumptions and burden of proof	249
2. Parol evidence generally	250
3. Testimony of arbitrators	251
4. Sufficiency of evidence	252

ASSENT.

I. ASSENT WITHOUT SIGNING	253
1. Instrument delivered to be retained as evidence	253
a. Presumption generally	253
b. Conclusiveness of presumption; rebuttal	255

2. Instrument delivered, but to be surrendered again	255
3. Direct testimony	256
II. NONASSENT NOTWITHSTANDING SIGNING	256
4. Presumptions	256
5. Neglect to read	256
6. Direct testimony	257
7. Conditional delivery	257

ASSIGNMENT.

1. Necessity of proof	258
2. Oral evidence	258
a. In general	258
b. Notwithstanding written evidence exists	259
3. Form	259
4. Proof by entries in books of account	260
5. Proof by proof of substitution of party	260
6. Description	260
7. Principal and collateral	260
8. Qualifying the schedules	261
9. Reservation	261
10. Impeaching	261
a. By motive or purpose	261
b. By evidence of abandonment	261
11. Defeasance	262

AUTOPSY.

1. One of several physicians	262
2. Irregularity	262

BAD CASE, 263.

BELIEF.

1. Belief as characterizing one's own act	263
2. Cross-examining	264
3. Asking for impression	264
4. Belief at the time of the transaction	265
5. Reason for belief	265
6. Qualifying words as to belief	265

BIAS.

1. In general; presumption	266
2. Cross-examining on details	267
3. Calling witness's attention	268
4. Repelling	268

BIRTH.

1. Premature or still birth	269
2. Presumption	269
3. Hearsay	269
4. Date of birth	270

BLOOD.

1. Direct testimony	271
2. Examination of blood for disease	271

BLOODHOUNDS, 272.**BOUNDARIES.**

1. How proved in general	274
2. Presumptions and burden of proof	275
3. Documentary evidence	276
4. Parol evidence	279
5. Opinions and conclusions	280
6. Hearsay; declarations	281
7. Variance	284
8. Practical location	285

BREED.

1. Expert may testify to	286
2. Published herd book	286

BUSINESS.

1. Nature and usual course	287
2. Scope of particular trade	289
3. Practice of particular house	289
4. Contradiction of ground of belief	290
5. Who proprietor	290

CAPACITY.

1. Qualification of witness 291
2. Comparison with similar machine 292
3. Capacity of minor to comprehend and avoid danger 293

CARBON COPIES, 294.

CARE.

1. Opinion evidence 295
 - a. In matter of special knowledge 295
 - b. In matter of common life 297
2. Form of question to witness 300
3. What might have been done 301
4. Whether injury might have been avoided 302
5. Conduct of the witness 302
6. Observation dependent on minutiae 302
7. General habit 303
8. Taking advice 304
9. Evidence of other accidents 304
10. Precautions 305
 - a. In general 305
 - b. Subsequent to the fact 306
11. Variance 307
 - a. In general 307
 - b. Degree of negligence 308
12. Circumstantial evidence 308
13. Presumptions and burden of proof 308
 - a. In general 308
 - b. Presumption of want of care from fact of loss or injury 310
 - (1) In general 310
 - (2) Statutes making injury prima facie evidence of negligence 324
 - c. Contributory negligence 326
 - (1) Burden of proof 326
 - (2) Presumptions 332
 - (3) Care required of children 333
14. Cogency of evidence 335

CAUSE.

1. Expert testimony 337
 - a. Matter involving special knowledge, generally 337

b. Common inference—conjecture 339

c. Experiments to corroborate opinion 340

d. As to cause of death, disease, or injury 340

 (1) In general 340

 (2) Form of question 344

 (3) Probable position 345

 (4) Exhibiting instrument 346

 (5) Cause of suicide 346

e. Case unknown to expert 346

f. What would have been 346

2. Nonexpert testimony 347

3. Direction of blow, force, or fluid 349

4. Other similar occurrences or injuries 350

5. Suggestion of another cause 353

 a. In general 353

 b. Cross-examination 354

 c. Rebutting evidence of other cause 354

6. Demonstrative evidence 354

7. Declarations as part of *res gestæ* 355

8. Admissions 356

9. Findings of coroner to show cause of death 356

10. Repairs after injury as proof of causation and possibility
 of prevention 358

CHANGING THE RULES OF EVIDENCE.

I. STATUTORY CHANGES 359

 1. In general 359

 2. Rules as to weight of evidence 359

II. CONTRACTS CHANGING THE RULES OF EVIDENCE 360

 3. In general 360

 4. Particular contract clauses relating to rules of evidence .. 360

 a. Contracts to dispense with the presumption of death
 from seven years' absence 360

 b. Contracts requiring the testimony of an eyewitness
 to death or personal injury 361

 c. Contracts to accept the oath or certificate of a third
 person as conclusive evidence 362

 d. Contracts to accept obligee's statement as proof of
 amount due 362

 e. Contracts leaving the question of one party's satisfac-
 tory performance entirely to the discretion of the
 other party 363

f. Contracts waiving the privilege against corporal inspection of the party	363
g. Contracts waiving the privilege as to communications from a patient to a physician	363

CHARACTER.

I. REPUTATION	364
1. Good character, when competent	364
2. How proved	368
a. General reputation	368
b. Particular facts	370
c. Evidence referring to time subsequent to the fact ...	370
d. Competency of witness	371
II. COMPETENCY AND SKILL	371
3. Direct testimony	371
4. General reputation	372
5. Single instances	373
6. Intoxication	373
7. Inspection of witness	373

CHILD BEARING, 374.

CITIZENSHIP.

1. Distinguished from residence	375
2. Presumption	375
3. Naturalization	376
4. Passport	376
5. Hearsay	376
6. Declarations to show lack of citizenship	377
7. Citizenship of foreign-born wife	377

CLAIM.

Direct testimony	377
------------------------	-----

COLLATERAL ISSUES, 378.

COLLATERAL ORAL AGREEMENT.

The rule against oral evidence	379
--------------------------------------	-----

CONTRADICTION.

1. Contradicting witness	433
a. In general	433
b. Own witness	435
2. Usage to contradict contract	435

CONVERSATION.

1. Interpreted conversation	436
2. Signs	437
3. Denial and rebuttal	437
4. Fact of conversation does not let in substance	437
5. Calling for entire	438

COPIES.

1. Copy proceeding from adverse party	438
2. Where original is beyond the jurisdiction of the court ...	439
3. Copy of filed or recorded instrument	439
a. In general	439
b. Sufficiency of foundation	441
c. Instrument not entitled to record	442
d. Effect of statute making copy equal evidence	442
e. Form of authentication	443
f. Defect in authentication superseded by oath to the truth of copy	444
4. Imperfect or erroneous copy	444
5. Oral, to vary	444
6. Copies made by mechanical means as original	444
7. Copy of lost or destroyed will	445

CORROBORATION.

1. Reason for positiveness	446
2. Corroboration of hearsay	446
3. Corroboration before contradiction	447
4. Corroboration let in by contradiction	447
a. Probability of truth	447
b. Conduct of adverse party	450
c. Accounts	451
d. Subsequent memorandum	451

e. Character of witness	451
f. Prior consistent statements	453
g. <i>Ex parte</i> declarations in own favor	453
5. Contradicting corroboration	454

CREDIT.

1. Presumptions and burden of proof	455
2. Subsequent promise by agent	455
3. Direct testimony	456
a. In general	456
b. Concurrent intent	456
c. One act on the faith of another	457
4. Subsequent credit	457
5. Account not conclusive	457
6. Other like purchases	458
7. <i>Res gestæ</i>	458
8. General reputation	458
9. Rebuttal of presumption of credit	459

DATE.

1. Hearsay as evidence to fix date	459
2. Refreshing memory	460
3. Collateral record and memoranda	460
4. Date of letter received	460
5. Contradicting or corroborating	461
6. Part of document	461
7. Day of the week of a given date	461
8. Presumptions	463
9. Contradicting documentary date by oral evidence	463
10. Date of filing	464

DEATH.

1. Mode of proving generally	465
2. Presumptions and burden of proof	466
a. In general	466
b. Time of death	469
c. Substitution of presumption of death based on ac- tuarial tables for seven-year presumption	471
3. Hearsay; general report	471
4. Order of substitution	472

TABLE OF CONTENTS.

5. Letters of administration 473
6. Record of death 474
7. Undelivered letter 474

DEFEASANCE.

1. Presumption; burden of proof 475
2. Oral evidence 476
3. Direct question 478
4. Documentary evidence 479
5. Admissions 479
6. Declarations 479
7. General denial 480
8. Cogency of proof 480

DELIVERY.

1. Direct testimony 481
2. Contemporaneous records and entries 482
3. Presumptions 482
 a. Presumption from possession of instrument 482
 b. Presumption from record 483
 c. Presumption of delivery when a voluntary settlement
 is shown 484
 d. Presumption of delivery from mailing of deed 485
4. Constructive delivery 485
5. Parol evidence 485
6. Rebutting delivery by proof of a condition 486
7. Evidence of condition 488
8. Presumption as to date 488
 a. In general 488
 b. Undated instrument 489
 c. Exception in case of private unauthenticated paper .. 489

DEMAND AND REFUSAL.

1. Oral and written 490
2. On servant 490
3. Reasons for refusal 490

DENIAL.

1. Form in pleading 491
2. General denial 491
3. Specific denial 493

DEPOSIT IN BANK.

Tracing	493
---------------	-----

DESERTION.

1. Declarations	494
2. Remonstrance	494
3. Intention to desert	494

DICTAGRAPH, 495.

DOMICIL.

1. Presumptions	496
2. <i>Res gestæ</i>	496
3. Testimony of person as to his intent	497
4. Intent of insane person	498

DUMMY.

1. Bound by evidence	498
2. Effect on rights and liabilities	498

DUTY.

1. Direct testimony	499
a. Scope of duty	499
b. Performance	500
2. Printed rules or instructions	500

DYING DECLARATIONS.

I. IN CIVIL CASES	503
II. IN CRIMINAL CASES	504
1. In general	504
2. In favor of defendant	505
3. Whose declarations admissible	505
4. Subject of declarations	505
5. Mental and physical conditions	507
a. In general	507
b. Belief in after-accountability	510
6. Time elapsing between declaration and death	511
7. Form and completeness of declaration; oral or written ...	511

8. When there is other evidence of the same facts	512
9. Questions for court or jury	513
10. Right to impeach or contradict and to sustain declarant	514
11. Weight to which entitled	515

EFFECT OF INJURY OR OPERATION.

1. Testimony of person injured	516
2. Expert witness	516
3. Nonexpert witness	518

ELECTION OF RIGHT OR REMEDY.

1. Direct testimony	519
2. Decisive act	519

EMBEZZLEMENT.

1. Circumstantial evidence	520
2. Evidence of intent generally	520
3. Evidence of other crimes	520

EMPLOYMENT.

1. Appearance of being in service	521
2. Presumption of employment	521
a. From control of property	521
b. From services rendered	521
c. Of continuance of relation	524

ESTOPPEL.

1. Burden of proof	525
2. Equitable estoppel	525
3. Silence	526
4. Estoppel by admission in action	526
5. By taking position before the court	527
6. By forbearing to sue	527

EXCUSE.

Must be alleged	528
-----------------------	-----

EXPLANATION.

1. Explanation of denial	529
2. Explanation on redirect	529
3. Fact stated not thereby proved	530
4. Explaining nonproduction of evidence	530
5. Explaining impeaching evidence	530
6. Explaining admission	530

FEELINGS.

1. Direct testimony	531
a. By the person affected	531
b. By observer	531
2. Natural manifestations of present feeling	533
3. Declarations describing feeling	533
4. Feigning	535
5. Experiment	536

FICTITIOUS PERSONS.

1. Bank account	536
2. Declarations	536
3. Inquiries	537
a. In general	537
b. Weight of evidence	537
4. Explanation	537
5. Effect of use	538
6. Fictitious grantee	538

FILING.

Mode of proving	539
-----------------------	-----

FINGER PRINTS, PALM PRINTS, AND FOOT PRINTS.

1. Finger prints	540
a. In general	540
b. Photographs	541
c. Experiments in court	541
d. Compulsory taking of finger prints	541
2. Palm prints	541
a. In general	541
b. Photographs	542
3. Foot prints	542

FIXTURES.

Evidence of intent	542
--------------------------	-----

FOREIGN LAW.

1. Judicial notice	543
2. Presumptions	544
3. Oral evidence	546
a. What law is	546
b. As to construction	547
4. Usage in territories acquired by United States	547
5. Statute books and Codes	548
6. Copy of statute; omissions and alterations	548
7. Impeaching	549
8. Judicial decisions	549
9. Foreign law a question of fact	549

FORGOTTEN FACT.

1. Aiding memory by otherwise irrelevant inquiry	550
2. Routine or habit	551
3. Memoranda refreshing memory	551
a. In general	551
b. Writing not an original	554
c. Voluminous writings	555
d. Inspection and cross-examination	555
e. Witness unable to read or write	556
4. Mention to third person	556

GENUINENESS.

1. Proof of genuineness of letter other than by proof of hand-writing or typewriting	557
a. Original letters	557
b. Reply letters	558
2. Of bank notes	558
3. Of stock	559
4. Several signatures	559
5. Of acknowledged instrument	559

GIFT.

1. Direct testimony	559
---------------------------	-----

2. Declarations of donor	560
3. Presumptions and burden of proof	560
a. Validity of gift	560
b. Acceptance of gift	563
4. Sufficiency of proof of	563

GOOD FAITH.

1. Right to prove affirmatively; direct testimony	564
2. Presumption and burden of proof	565
a. In general	565
b. Possession	569
3. Information	569
4. Reason for disregard of notice	569

GRANT.

1. When presumed generally	570
2. Without actual execution	571

HABIT.

1. Direct testimony	572
2. Single instance; and repetition	572
3. Limits of time	573
4. Reputation	574
5. Presumption of continuance	574

HANDWRITING.

I. TESTIFYING AS TO ONE'S OWN HANDWRITING	576
1. Direct testimony; authorizing signature	576
2. Writing in court	576
a. On direct examination	576
b. On cross-examination	577
3. Concealing part of writing	578
II. TESTIMONY OF NONEXPERT FROM KNOWLEDGE OF HANDWRITING ..	579
4. Acquaintance with handwriting; general rule	579
5. Not secondary evidence	579
6. Form of question	580
7. Competency of witness generally	580
8. Means of knowledge	581
a. Having seen write	581
b. Having seen genuine writing	582

c. Only having seen communication received in usual
 course of business 583

 d. Having received letters 584

 e. Having seen ancient documents 584

 f. Having knowledge of handwriting from family cor-
 respondence 585

9. Testimony competent, though not positive 585

10. Witness prepared out of court 586

 a. In general 586

 b. Refreshing memory 586

11. Lost disputed writing 586

12. Privilege of professional relation 587

13. Testimony of interested witness or party to handwriting
 of deceased, etc. 587

14. Ordinary witness cannot make comparison 588

15. Testing knowledge 589

 a. In general 589

 b. Refreshing memory on cross-examination 590

 c. Requiring to pick out genuine writing 590

16. Cross-examination for purposes of contradiction 591

III. TESTIMONY OF EXPERTS, WITH OR WITHOUT THE AID OF STAND-
 ARDS OF COMPARISON 592

17. Expert defined 592

18. Expert's direct opinion founded on comparison 592

19. Qualification of witness 594

20. Expert's testimony to peculiar characteristics 595

21. Expert cross-examination on differences 597

22. Cross-examination for purpose of contradiction 597

IV. STANDARDS OF COMPARISON, WITH OF WITHOUT THE AID OF
 EXPERTS 598

23. Document not already in the case as standard for com-
 parison 598

24. What is considered as in evidence 599

25. Use of papers in the record 599

26. Use of irrelevant documents as standards 600

 a. In general 600

 b. Writing of third person 602

27. What law controls 602

28. Disputed writing and standard to be produced before com-
 parison 603

29. Genuineness of standards, a question for the court 605

30. Requisite authentication of standards of comparison 606

31. Comparison by jury or referee 611

32. Taking to the jury room 612

V. PHOTOGRAPHS, LETTER-PRESS COPIES, MAGNIFYING GLASS, AND	
SUPERIMPOSITION	612
33. Photographic copies	612
34. Letter-press copies	616
35. Use of magnifying glass	616
36. Tracing and superimposition	616
VI. CIRCUMSTANTIAL EVIDENCE AND ADMISSIONS	617
37. Peculiar usages of language	617
38. Aptitude to imitate	617
39. Opportunity	618
40. Condition of writer	618
41. Admission of such an instrument	619

HEALTH AND DISEASE.

1. Direct testimony by person affected	619
2. Matter of observation	619
3. Expert testimony	620
4. Disease of animals	621

HEARING.

1. Direct testimony as to conversation	622
2. As to sounds	622

HORSE POWER.

1. Comparison	623
2. Tables	623

IDENTITY.

1. Inspection in court	624
2. Pointing out person without naming him	624
3. Direct testimony	625
a. In general	625
b. Identifying from voice	626
c. Uncertainty	626
4. Photographs	627
5. Answering to name	628
6. Slight evidence	628
7. Name as evidence of identity	630
8. Oral evidence	631
9. Commingled assets	634

10. Rebuttal 634

 a. Testing witness 634

 b. Inspection and experiment 634

 c. Existence of a "double" 634

 d. Name 635

11. Opinion evidence 635

ILLEGALITY.

Oral evidence 636

INDEBTEDNESS.

1. State of account 637

2. Municipal indebtedness 637

3. Admission 637

INDORSEMENT OF A BILL OR NOTE.

1. Admissibility of parol evidence to explain or vary the
 contract implied from the regular indorsement of
 a bill or note 638

 a. Unqualified indorsement by a bona fide payee or in-
 dorsee 638

 b. Qualified indorsement 639

 c. Evidence to show absence of contract 640

 d. Negotiable instruments law 640

INDUCEMENT.

1. What would you have done? 641

2. Oral evidence 641

3. Cogency of evidence 642

INFANCY.

1. Admission 643

2. Burden of proof 643

3. Physical appearance 643

INSANITY.

I. PRESUMPTIONS AND BURDEN OF PROOF 645

 1. In general 645

 2. With relation to contracts and conveyances 646

3. With relation to wills	648
a. In general	648
b. As to fraud and undue influence	650
c. Burden of proof after probate	651
4. As to capacity of one contracting marriage	652
5. Presumption of insanity from suicide	653
6. Presumption of continuance of insanity	654
a. Habitual insanity	654
b. Temporary insanity	656
c. Alcoholism and alcoholic insanity	657
d. Presumption of continuance of a lucid interval	658
e. Nature of the presumption	658
II. OPINION EVIDENCE	659
7. Expert opinions	659
a. Admissibility generally	659
b. Privilege of witnesses	660
c. From observation or examination	661
d. From the evidence	662
e. On hypothetical questions or statements	663
(1) Admissibility	663
(2) Hypothesis; upon what based	663
(3) Evidence in support of hypothesis	664
(4) Form of question	664
f. Qualifications of experts	665
g. Cross-examination; contradiction	666
h. Weight	667
(1) In general	667
(2) As affected by facts and opportunity to observe	668
(3) As affected by character, bias, and nature of the question	669
(4) As compared with other expert opinions	669
(5) As compared with nonexpert opinions	670
(6) As a question for the jury	671
8. Nonexpert opinions generally	671
a. General rules	671
b. Who may give	673
c. Acquaintance necessary	674
d. Time to which opinion relates	675
e. Cross-examination, rebuttal, and impeachment	676
f. Weight	676
9. Opinion of subscribing witnesses as to sanity or insanity ..	678
a. Admissibility generally	678
b. Necessity of giving	679
c. Contradiction; weight	680

III. MISCELLANEOUS	681
10. Photographs	681
11. Declarations	682
12. General reputation	682
13. Insanity in blood relatives	682
a. Hereditary insanity	682
b. Nonhereditary insanity	682
14. Presence of defendant in lunacy proceedings	683
15. Conduct and circumstances	683
16. Belief in spiritualism, witchcraft, etc.	684

INSOLVENCY, SOLVENCY, AND FINANCIAL CONDITION.

1. Direct testimony	685
2. Accounts	686
3. Relevant facts	686
4. Hearsay and general reputation	687
5. Presumption and burden of proof	688

INTENT.

1. Right of person to testify as to his own intent	690
a. General rule	690
b. Test of admissibility	691
c. Exceptions and limitations	691
d. Application of rule	692
e. Weight and conclusiveness	694
2. Right to testify as to intent of other person	694
a. In general	694
b. Manifested by demeanor	696
3. Declarations; <i>res gestæ</i>	696
4. Intent as to law	696
5. Other acts of same nature	697
6. Concurrence of intent	698
7. Constructive intent	698
8. Presumptions and burden of proof	698
a. Intention as to consequences of act	698
b. Intent of testator	699
c. To evade law	699
d. To create monopoly	700
9. Parol or extrinsic evidence to show	701
a. As to writings generally	701
b. Competency to show writing intended as a sham	703
c. As to wills generally	704

d. To show intent of testator in respect to disinheriting an afterborn child	707
e. To show intent that real property should be charged with payment of legacies where will is silent on that point	707
f. May beneficiary be put to his selection by extrinsic evidence of testator's intention	708
g. To show intent of maker, as to whether an instrument in the form of a deed was intended to operate as a deed or as a will	709
h. To show that instrument on its face a will was not intended as such	710
i. To show that a will did not express true intent of testator because of undue influence	711
10. Rebutting	711

INTEREST.

1. Previous understanding	712
2. Parol evidence	712
3. Relevancy	712
4. Weight, effect, and sufficiency	712

INTOXICATION.

1. Direct testimony	714
2. Customary manner of acting	715
3. Intemperate habits	715
4. Presumption and burden of proof	716
5. Weight	716

JUDGE.

1. Testimony of a judge	717
a. In a trial over which he presides	717
b. In other trials	717

JUDGMENT.

A judgment as evidence in a later proceeding	717
--	-----

TABLE OF CONTENTS.

JUDICIAL NOTICE.

I. BY COURT 718

1. In general 718

2. Laws 724

3. Official and judicial character and acts 729

4. Political, historical, and geographical matters 731

II. BY JURY 734

KNOWLEDGE.

1. Direct testimony 736

2. Probability of knowledge 737

3. Circumstantial evidence 738

4. Possession 739

5. Presumptions and burden of proof 739

 a. Common fact 739

 b. Knowledge of corporation or its officers 739

 c. Of one dealing with corporation 740

 d. Knowledge of principal 740

 e. Knowledge of servant 740

 f. Knowledge of contents presumed from signing or receiving 740

 g. Knowledge of contents presumed from access or from claim 742

 h. Newspaper contents 743

 i. Knowledge of law 744

 (1) In general 744

 (2) Foreign law 744

6. General reputation 745

LEAVE TO SUE.

Receiver 746

LETTERS.

1. Offering part of connected correspondence 746

2. Proof of authenticity or genuineness of letter other than by proof of handwriting or typewriting 748

3. Delivery; mailing 750

4. Letter and inclosure let in each other 752

5. Letters of an agent 752

6. Mere possession 753

7. Omission to answer 753

LOSS OF, OR DAMAGE TO, FREIGHT.

1. Burden of proof	754
a. Common-law liability	754
b. Special contract limiting liability	755
2. Bills of lading	756

LOST RECORD.

Mode of proving; copies	757
-------------------------------	-----

MAILS.

1. Judicial notice	757
2. Deposit	757
3. Presumption	758
4. Weight, effect, and sufficiency	759
5. Best evidence	760

MALICE.

1. Direct testimony	761
2. Indicative conduct and declarations	761
3. Presumptions and burden of proof	763
a. In libel or slander case	763
b. In action for malicious prosecution	766
4. Relevancy of evidence generally	768

MARK.

1. Genuineness	769
2. Burden of proof	771
3. Absence of attesting witness	771
4. Attestation after death	771
5. Intelligence of execution	771

MARRIAGE.

1. Direct testimony	772
2. Eye-witnesses	772
3. Certificates	773
4. Admissions and declarations	773
5. Cohabitation and repute	774

TABLE OF CONTENTS.

6. Presumptions and burden of proof 775
 a. In general 775
 b. Presumptions flowing from marriage ceremony 776
7. Marriage by mail 779

MEASURE.

1. Measurer 780
2. Comparison 780
3. Usage 780
4. Best and secondary evidence 780
5. Documentary evidence 781
6. Parol evidence 782
7. Opinions and conclusions 782
8. Declarations 783
9. Relevancy 783

MEDICAL BOOKS.

Medical books as evidence 784

MEMBERSHIP.

1. Record 784
2. Judicial notice 786
3. Presumptions and burden of proof 786
 a. In general 786
 b. Office holding 788
 c. Attendance at meeting 788
4. Best and secondary evidence 788
5. Parol evidence 789

MERGER.

1. Presumptions and burden of proof 789
2. Extrinsic evidence 790
3. Declarations and acts 790

MESSAGE.

1. Effect of oral message 791
2. Answer competent 791
3. How answer proved 791

MISNOMER.

1. In contract or deed 792
2. In proceedings 792

MISTAKE.

1. Mistake in certified copy 793
2. Mistake as an excuse 794
3. Oral evidence 794
4. Burden of proof 794
5. Cogency of proof 795

MOON.

- Almanac** 795

MORTALITY TABLES.

1. Admissibility generally 796
2. Necessity and conclusiveness 797
3. Secondary evidence of contents 798
4. Authentication 798

MOTIVE AND PURPOSE.

1. Direct testimony 799
2. Declarations 801
3. Motive as affecting cause of action 802
4. Motive in suing 803
5. Relevant facts 803

MOVING PICTURES.

1. Pictures of original events 806
2. Pictures artificially reconstructed 806
3. Exhibition of particular moving pictures 807

NAME AND DESIGNATION.

1. Judicial notice 808
2. Hearsay 808
3. Forgotten name 808
4. Interrogating witness to discover names of informants ... 808

TABLE OF CONTENTS.

5. Omitting from testimony or document 808
6. Trade designation 809
7. Parol evidence 809

NATIONALITY.

1. Of person 810
2. Of vessel 810

NATURALIZATION.

1. Presumptions and burden of proof 811
2. Best and secondary 811
3. Certified copy 812
4. Record conclusive 812

NAVIGABILITY.

1. Judicial notice 812
2. Presumptions and burden of proof 813
3. Government survey 813

NECESSARIES AND NECESSITY.

1. Judicial notice 814
2. Burden of proof 814
3. Presumptions 815
4. Opinion 815
5. Relevancy 817

NEGATIVE.

1. Presumption of innocence 817
2. Lack of entry in account 818
3. Lack of entry in public record 819
4. Official act 819
5. Nonobservation of witness 820

NEW PROMISE.

1. Burden of proof 821
2. Presumption of knowledge 821
3. Documentary evidence 821

NEWSPAPERS.

1. Not evidence	822
2. Judicial notice	822

NOTICE.

1. Anonymous letter; stranger	823
2. Possession as notice	824
a. General rules as to effect of possession	824
b. Effect of statutes requiring actual notice as an equivalent of registration	826
c. Rules as to scope of the inquiry	827
d. Of what possession is notice	828
e. Requisites and sufficiency of possession	829
f. Possession of tenant as notice	831
g. Possession under contract of purchase	832
h. Possession of vendee under unrecorded deed	833
i. Grantor's possession after conveyance	834
j. Mortgagee or lienor in possession	835
k. Possession of <i>cestui que trust</i>	835
l. Possession by cotenants	836
m. Possession by husband and wife	836
n. Other family relations as affecting possession	838
o. Application of rules to easements	839
p. Estoppel of possessor to assert claim	839
3. Notice to charge with fraud	840
4. Notice to agent	841
a. In general	841
b. Knowledge not acquired in principal's business.....	842
c. Where agent is personally interested or is perpetrating a fraud	845
d. Notice to officers of corporation	848
e. Agent with conflicting duties	850
f. Notice to subagent	850
5. Authentication	851
6. Record and index	851
7. <i>Lis pendens</i>	852

OATH.

1. To document or instrument	853
a. Oral evidence	853
b. Presumption of authority	853

2. Oath of office 853
 a. Oral evidence 853
 b. Time when taken 854
 c. How taken 854

OFFICIAL CHARACTER AND ACTS.

1. Judicial notice 855
2. Performance of duty 855
3. Meeting 856
4. Reports of subordinates 857
5. Presumption from act 857
6. Recitals in official instruments 858
7. Declarations 860
8. Official records and registers 861

OPINIONS.

I. OPINIONS OF NONEXPERTS 861
 1. Opinions on nontechnical subject because of impossibility
 of reproducing the data 861
 a. In general 861
 b. Description of objects 862
 c. Human conduct 862
 d. Habits of conduct 863
 e. Animal conduct 863
 f. Estimates 863
 g. Identity 865
 h. Miscellaneous nontechnical matters 865
 2. Opinions in libel and slander cases 866
 3. Proof of future sufferings 866
II. EXPERT OPINIONS 866
 4. Distinction between opinion and observation with judgment 866
 5. Questions preliminary to opinion 867
 6. Qualification of expert 868
 7. Party as expert 869
 8. On what questions competent 869
 9. Direct testimony on the fact 870
 10. Basis of fact for opinion 872
 11. Doubtful facts may be assumed 873
 12. Assuming fact without evidence 873
 13. Preponderance of evidence not necessary 873
 14. Written question 874
 15. Critical opinion of other testimony incompetent 874

16. Reason	875
17. Doubt	875
18. Cross-examination	875
19. Impugning expert's examination	876
20. Weight and conclusiveness of expert's opinion	877

ORDER OF COURT.

1. Copy	879
2. Order in special proceeding	879
3. Jurisdictional facts	880
4. Best and secondary	880
5. Informal order	880
6. What is a court order	881
7. Date and term	881
8. Entry for purpose of proving	881
9. Ground	882
10. Impeaching	882

ORDINANCES.

1. Judicial notice	882
2. Mode of proving generally	882
3. Parol evidence	883

OWNERSHIP.

1. Direct testimony	883
2. Possession	884
a. In general	884
b. Of written instrument	884
3. Hearsay	886
4. Marks, signs, etc.	886
5. Entries in account	887
6. Source of ownership	888
a. In general	888
b. Producing document	888
7. Continuance	889

PATERNITY.

1. Presumption that a married man is the father of a child born to his wife in wedlock, and character of evidence necessary to overcome such presumption	889
--	-----

2. Oath of office 853

 a. Oral evidence 853

 b. Time when taken 854

 c. How taken 854

OFFICIAL CHARACTER AND ACTS.

1. Judicial notice 855

2. Performance of duty 855

3. Meeting 856

4. Reports of subordinates 857

5. Presumption from act 857

6. Recitals in official instruments 858

7. Declarations 860

8. Official records and registers 861

OPINIONS.

I. OPINIONS OF NONEXPERTS 861

 1. Opinions on nontechnical subject because of impossibility
 of reproducing the data 861

 a. In general 861

 b. Description of objects 862

 c. Human conduct 862

 d. Habits of conduct 863

 e. Animal conduct 863

 f. Estimates 863

 g. Identity 865

 h. Miscellaneous nontechnical matters 865

 2. Opinions in libel and slander cases 866

 3. Proof of future sufferings 866

II. EXPERT OPINIONS 866

 4. Distinction between opinion and observation with judgment 866

 5. Questions preliminary to opinion 867

 6. Qualification of expert 868

 7. Party as expert 869

 8. On what questions competent 869

 9. Direct testimony on the fact 870

 10. Basis of fact for opinion 872

 11. Doubtful facts may be assumed 873

 12. Assuming fact without evidence 873

 13. Preponderance of evidence not necessary 873

 14. Written question 874

 15. Critical opinion of other testimony incompetent 874

16. Reason	875
17. Doubt	875
18. Cross-examination	875
19. Impugning expert's examination	876
20. Weight and conclusiveness of expert's opinion	877

ORDER OF COURT.

1. Copy	879
2. Order in special proceeding	879
3. Jurisdictional facts	880
4. Best and secondary	880
5. Informal order	880
6. What is a court order	881
7. Date and term	881
8. Entry for purpose of proving	881
9. Ground	882
10. Impeaching	882

ORDINANCES.

1. Judicial notice	882
2. Mode of proving generally	882
3. Parol evidence	883

OWNERSHIP.

1. Direct testimony	883
2. Possession	884
a. In general	884
b. Of written instrument	884
3. Hearsay	886
4. Marks, signs, etc.	886
5. Entries in account	887
6. Source of ownership	888
a. In general	888
b. Producing document	888
7. Continuance	889

PATERNITY.

1. Presumption that a married man is the father of a child born to his wife in wedlock, and character of evidence necessary to overcome such presumption	889
--	-----

TABLE OF CONTENTS.

2. Inspection	891
3. Testimony of physical resemblance between child and putative parent	893

PAYMENT.

1. Receipts	894
2. Entry in bank books	896
3. Burden of proof	896
4. Presumption	897
a. From possession of instrument	897
b. From lapse of time	898
5. Oral evidence to vary receipt	901

PERFORMANCE.

Direct testimony	902
------------------------	-----

PHONOGRAPHS, 902.

PHOTOGRAPHS, MAPS, PLANS, ETC.

1. Judicial notice	903
2. Admissibility generally	903
3. Copy	904
4. Photographs of persons	904
5. Photographs of documents or instruments	906
6. Proof of correctness	907
7. Effect and conclusiveness of photographs	908
8. Photographs as secondary evidence	908
9. X-ray photographs	909

PLACE.

Inferring from proximity	910
--------------------------------	-----

PLEADINGS.

I. ADMISSIBILITY OF PLEADINGS FOR THE PURPOSE OF ESTABLISHING FACTS SET OUT THEREIN	910
1. Pleadings containing self-serving declarations	910
a. General rule as to admissibility and exceptions thereto	910
b. Parties for whom admissible	912
c. Weight and conclusiveness	912
2. Pleadings containing admissions against interest	913

II. ADMISSIBILITY OF PLEADINGS FOR PURPOSES OTHER THAN ESTABLISHING FACTS SET OUT THEREIN

3. Admissibility for purposes of impeachment	913
4. Admissibility to prove nature of issue and claims of parties in case	914
5. Admissibility for miscellaneous purposes	914

POSITION.

Direct testimony	915
----------------------------	-----

POSSESSION.

1. Direct testimony	916
2. Title	916
3. Paying tax; etc.	917
4. Judgment against third person	917
5. Presumption of continuance	918

POSSIBILITY.

What could have been	919
--------------------------------	-----

PREGNANCY.

1. Judicial notice	920
2. Presumption	921
3. Opinion	921
4. Inspection	921

PREMISES.

Oral evidence	922
-------------------------	-----

PRESENCE.

1. Constructive	923
2. Presumption of presence	923

PRINTING.

1. Comparison	924
2. Several impressions of same issue	924

TABLE OF CONTENTS.

PRIVILEGE.

1. Ordinary witnesses refusing to testify 924
 a. Privilege against self-incrimination 924
 b. Witnesses refusing to testify on grounds other than
 self-incrimination 926
2. Husband and wife 927
3. Physician and patient 928
4. Attorney and client 929
5. Child delinquent and juvenile court judge 929

QUALITY.

1. Direct question 930
2. Comparison; reference to other specimen 931
3. Inspection in court 931

QUANTITY.

1. Direct testimony 932
2. Recount 932
3. Comparison 933

RATIFICATION.

1. Allegation 933
2. How proved 934
3. Executory contract 934
4. Legal effect 935
5. Aid by evidence of agency 935
6. Silence on receipt of letter 935
7. What may be ratified 936

REASON.

Right to prove 936

REASONABLENESS.

1. Reasonable diligence 937
2. Reasonable time 937

REBUTTAL.

1. The right 938

2. Cumulative testimony in rebuttal	939
3. Allegation	939
4. Anticipatory rebuttal	939

REGULARITY.

Bank business	940
---------------------	-----

RESCISSION.

Delay	941
-------------	-----

RESIDENCE.

1. What constitutes residence	941
a. In general	941
b. Voting residence	942
(1) In general	942
(2) Student voting	943
(3) Residences of teachers, ministers, and soldiers	943
(4) Residences of transient workmen	944
2. Direct testimony	944
3. General reputation	944
4. Declarations and conduct	945
5. Place of business	945
6. Absence	946
7. Fugitive from justice	946
8. Instrument executed out of the jurisdiction	946
9. Deposition	947
10. Presumption of continuance	947
11. Burden of proof	947

REVIVAL.

Allegation of succession	948
--------------------------------	-----

SATISFACTION.

1. Burden of proof	948
2. Stipulation to satisfy	949
3. Variance	949

TABLE OF CONTENTS.

SEALS.

- 1. Material 950
- 2. Judicial notice 951
- 3. Direct testimony 951
- 4. Affixing 952
- 5. One for several 952
- 6. Record and omission 953
- 7. Corporate seal 953

SEPARATION.

- Competency of testimony of husband and wife 953

SERVICE.

- Affidavits not competent 954

SIGNATURE.

- 1. Document produced on notice 954
- 2. Authority to sign 955
 - a. Declarations 955
 - b. Previous recognition by principal 955
- 3. Oral evidence 955

SIGNS AND SIGNALS.

- 1. Understanding of witness 956
- 2. Dying declarations 956

SPEED.

- 1. Direct testimony 957
- 2. Comparison by combining witnesses 959
- 3. Declarations as part of the *res gestæ* 959
- 4. Experimental evidence 960

STATUS, 960.

SUNRISE AND SUNSET.

- Almanac 961

SURETYSHIP.

1. Oral evidence	961
2. Direct testimony	962
3. Burden of proof	962

SURPRISE.

Right to object	962
-----------------------	-----

SURRENDER.

1. Verbal	963
2. Payment as raising presumption	963

SURVIVORSHIP.

Presumptions and burden of proof	964
--	-----

TAMPERING.

1. Right to prove	965
2. Contradiction	966

TELEGRAMS.

1. Not privileged	966
2. Best and secondary evidence	967
3. Presumption of delivery	968
4. Connected correspondence	968

TELEPHONE.

1. Judicial notice	969
2. Burden of proof	969
3. Recognition of speaker	969
4. Other evidence of identity	970
5. Necessity of identification of speaker	970
6. Agency of operator	971
7. A third party as a witness	971
8. Conversation by telephone as a false pretense	972

TABLE OF CONTENTS.

TENDER.

1. Burden of proof	972
2. Actual production	972
3. Offer and readiness	972
4. Having in sight	973
5. "Willingness" to pay	973
6. Waiver	973
7. Place of tender	973

TESTIMONY (GIVEN IN FORMER PROCEEDING).

1. Proof of former testimony generally	974
2. Deposition	977
3. Identity of parties and subject-matter	978
4. Opportunity to cross-examine	978
5. Oath	979
6. Proof of death, absence, or disqualification	979
7. Diligence in procuring deposition	980
8. Impeachment of witness	980
9. Refreshing recollection	981
10. Proving by stenographer reading notes	981
11. Proving by official reporter's transcript	982
12. Proving by witness who heard	982
13. Proving by bill of exceptions	983

THREATS.

1. Allegation	984
2. As to state of mind	984

TIDE.

Flow	984
------------	-----

TIME AND DISTANCE.

1. Comparison	985
2. Direct testimony; opinion	985
a. Time spent	985
b. Distance object visible	985
c. Time or distance to stop train	986
d. Time to get off train	987
e. Time necessary for specified distance	988
f. Time necessary for specified work	988

g. Distance within which sparks from engine will set fire	988
h. Miscellaneous matters of distance	989
8. Entries and record	990

TITLE.

1. Direct testimony	990
2. General reputation	991
3. Possession	991
4. Conveyance by one in possession	992
5. Deed founded on judicial proceedings	992
6. Assessment roll	993
7. Oral evidence	994
8. Admissions	994
9. Declarations	994
10. Opinion as to marketableness	995
11. Refusal of others to pass	996

TREATMENT.

Direct testimony	996
------------------------	-----

USAGE.

1. When competent	997
2. To control meaning	998
3. Not competent to create contract	998
4. Direct testimony	999
5. Single witness	1000
6. Single cases	1000
7. Foreign law	1000
8. Presumption of knowledge	1000
9. Testimony as to knowledge	1001
10. Common consent	1001
11. Cogency of evidence	1001

VAIN THINGS.

The law does not require	1002
--------------------------------	------

VALUE.

1. Comparison to lost article	1003
2. Cost	1004
3. Other sales	1005
a. Price paid for adjoining property	1005
b. Other sales of personalty or services	1005
4. Offers and refusals	1006
5. Consideration in deed or bill of sale	1007
6. Opinions	1007
7. Market reports	1009
8. Wages	1009
9. Trade scale and union wages	1010
10. Tax valuation or assessment	1010
11. Crops	1010
12. Profits	1010
13. Choses in action	1011
a. In general	1011
b. Value of stocks and bonds	1011
14. Foreign coin	1012

WAIVER.

1. Oral evidence	1013
a. In general	1013
b. Notwithstanding stipulation requiring writing	1013
2. Direct testimony	1014
3. Acts and declarations	1014
4. Neither consideration nor estoppel needed	1014
5. One objection not waived by another	1015

WEALTH.

Specific property	1015
-------------------------	------

WEATHER.

1. Records	1015
2. Comparison	1016

WEIGHT.

1. Standards	1017
2. Evidence of underweight	1017

BRIEF

—ON—

The Modes of Proving Facts.

ABANDONMENT.

I. CONTRACTS.

1. Burden of proof.
2. Direct testimony.
3. Letters.
4. Parol evidence of abandonment.
5. Opinions.
6. Sufficiency of proof.
7. Stipulated damages.
8. Right of party abandoning contract to recover for partial performance.

II. DOMICIL.

9. Burden of proof.
10. Presumptions.
11. Documentary evidence.
12. Declarations.
13. Mode of proof.

III. EASEMENTS.

14. Effect of nonuser generally.
15. Of abutting owner.
16. Highways.
 - a. Burden of proof.
 - b. Presumptions.
 - c. Weight of facts.
17. Railway right of way.
 - a. Inference of intent.
 - b. Mode of proof.
 - c. Materiality.
 - d. Weight of facts.
18. Ways.
 - a. Nonuser generally.
 - b. Deviation or use of substituted way.
 - c. Obstructing of, or cutting off access to, way.

ABB. FACTS—1.

III. 18—cont'd.

d. Whose acts in attempting to abandon way are binding on dominant owner.

e. Declarations.

19. Water rights.

a. Presumptions and burden of proof generally.

b. Right of flowage.

c. Irrigation rights; ditches; prior appropriation.

20. Mills.

IV. HOMESTEAD.

21. Burden of proof.

22. Presumptions.

23. Opinions.

24. Hearsay.

25. Declarations.

26. Mode of proof.

V. HUSBAND AND WIFE.

27. Declarations.

28. Presumptions.

29. Relevancy, sufficiency, and weight of evidence.

VI. INSURANCE.

30. Presumptions.

31. Declarations.

32. Proof of right to abandon.

VII. PATENTS AND TRADEMARKS.

33. Burden of proof.

34. Presumptions.

35. Declarations.

36. Delay.

VIII. RIGHTS GENERALLY.

37. Burden of proof.

38. Presumptions.

39. Adverse possession.

40. Mining rights.

41. Pleading.

42. Proof of intent.

I. CONTRACTS.

Right to abandon contract, see note to *Lake Shore & M. S. R. Co. v. Richards*, 30 L.R.A. 33.

1. Burden of proof.

In an action on a contract the defendant has the burden of proving that the plaintiff abandoned the contract.¹ In some

jurisdictions the issue of abandonment must be set up by as a special defense of confession and avoidance rather than under a general denial before evidence of such abandonment can be shown.²

¹ *Ross v. Stevens*, 45 N. J. Eq. 231, 13 Atl. 225.

² *Mark v. Stuart-Howland Co.* 226 Mass. 35, 2 A.L.R. 678, 115 N. E. 42.

2. Direct testimony.

Witness may testify that a contract was abandoned, leaving details to be called out on cross-examination.¹

¹ *Wallis v. Randall*, 81 N. Y. 164, Aff'g 16 Hun, 33; *Philadelphia, W. & B. R. Co. v. Trimble*, 10 Wall. 367, 383, 19 L. ed. 948, 953.

3. Letters.

Letters of a party tending to show that he exercised some influence over a third person as to how he should proceed under a contract are admissible as admissions upon the issue whether such third person abandoned the contract.¹

¹ *Hood v. Olin*, 68 Mich. 165, 36 N. W. 177.

4. Parol evidence of abandonment.

A contract under seal may be waived by an executed parol agreement,¹ but evidence of parol assent given without consideration, to a departure from a sealed contract, is inadmissible.² Nevertheless an abandonment of a written contract may be implied from the conduct of both parties;³ so where one party states in the other's presence his understanding that their written contract has been abandoned and then undertakes new obligations with others, the second party may be held by his silence to have abandoned the contract.⁴ It may be proved that after a written agreement was made the parties entered into another oral agreement;⁵ and a written contract altered by parol is admissible as an inducement to the parol agreement and evidence of its terms.⁶

¹ *Munroe v. Perkins*, 9 Pick. 298, 20 Am. Dec. 475.

- ² *Delacroix v. Bulkley*, 13 Wend. 71.
- ³ *Bird v. J. L. Prescott Co.* 89 N. J. L. 591, 99 Atl. 380; *Mark v. Stuart-Howland Co.* 226 Mass. 35, 2 A.L.R. 678, 115 N. E. 42.
- ⁴ *Enderlien v. Kulaas*, 25 N. D. 385, 141 N. W. 511.
- ⁵ *Richardson v. Hooper*, 13 Pick. 446; *Brewster v. Countryman*, 12 Wend. 446; *Hubbell v. Ream*, 31 Iowa, 289; *Woods v. Russell*, 1 Sadler (Pa.) 41, 1 Cent. Rep. 336; *Sharkey v. Miller*, 69 Ill. 560; *Graham v. Houghton*, 153 Mass. 384, 26 N. E. 876; *Ely v. Jones*, 101 Kan. 572, 168 Pac. 1102. Note 31 Harvard L. Rev. 804.
- ⁶ *Chiles v. Jones*, 3 B. Mon. 51; *Delaney v. Linder*, 22 Neb. 274, 34 N. W. 630; *Willey v. Hall*, 8 Iowa, 62; *Raffensberger v. Sullison*, 28 Pa. 426.

5. Opinions.

Whether or not a contract has been abandoned must be proved by evidence of the facts constituting the abandonment, and not by the opinion of witnesses.¹

- ¹ *Jacksonville & A. R. Co. v. Woodworth*, 26 Fla. 368, 8 So. 177.

6. Sufficiency of proof.

Acts and omissions tending to show an abandonment are admissible.¹

- ¹ *Casey v. Dunn*, 29 Mo. App. 14. (The owner's refusal to pay instalments stipulated in a building contract, or a completion of the work under his supervision, on the builder's refusal to proceed, does not evidence an abandonment of a contract which provided that upon certain failures the owner might refuse to pay the instalments.)

Reed v. Hayt, 109 N. Y. 659, 17 N. E. 418. (An abandonment, by mutual consent, of a contract for the sale of corporate stock, is not shown by the fact that the seller, after a breach of the contract by the purchaser, gave him certain options outside the original contract, none of which were carried out.)

Gibson v. Vetter, 162 Pa. 26, 29 Atl. 292. (To establish a parol lease which would change the term the lessee is held to the same strictness of proof that would be required of the lessor to establish a forfeiture for condition broken.)

A subcontractor who suspended work on the contract and consented to the appointment of a receiver was held to have abandoned the contract. *Ætna Indemnity Co. v. George A. Fuller Co.* 111 Md. 321, 73 Atl. 738, 74 Atl. 369.

Letters from a contracting party indicating his intention not to perform the contract, and positively refusing to perform it, are sufficient evidence of abandonment. *Russell v. Excelsior Stove & Mfg. Co.* 120 Ill. App. 23.

Spina v. Arcadia Orchard Co. 73 Wash. 44, 131 Pac. 218. (A contractor for clearing land does not abandon his contract by making a subcontract by which a third party agrees to complete the work.)

Kingman Colony Irrig. Co. v. Payne, 78 Or. 238, 152 Pac. 891. (A contractor to construct an irrigation system accepted a landowner's note and mortgage in payment for his portion of the cost. Afterward the irrigation plan was changed and this particular owner refused to sign a new note and mortgage. Where landowner sued on original note held the change in plan constituted an abandonment of the contract.)

7. Stipulated damages.

Where a contract which contains a provision for stipulated damages for delay is entirely abandoned or repudiated the injured party must *prove* actual damages whether greater or less than the amount stipulated, as the stipulation does not apply.¹

¹ *Shields v. John Shields Constr. Co.* 81 N. J. Eq. 286, 86 Atl. 958; *Ranier v. Masters*, 79 Or. 534, L.R.A.1916E, 1175, 154 Pac. 426, 155 Pac. 1197; *Garey v. Pasco*, 89 Wash. 382, 154 Pac. 433. For other cases see notes in 20 L.R.A.(N.S.) 350, and L.R.A.1916E, 1179.

8. Right of party abandoning contract to recover for partial performance.

Ordinarily one who abandons a contract for work or labor or services without excuse or justification cannot recover either on contract or on the common counts for the work he has actually done.¹ Where however the contract is divisible the employee may prove and recover for whatever units of the contract he has fully performed.²

¹ *Lynn v. Seby*, 29 N. D. 420, L.R.A.1916E, 788, 151 N. W. 31; *Homer v. Shaw*, 177 Mass. 1, 58 N. E. 160. See also for additional cases and full discussion note in L.R.A.1916E, 790.

² *Oliver v. McArthur*, 158 App. Div. 241, 143 N. Y. Supp. 126.

II. DOMICIL.

See also topics ABSENCE; DOMICIL; RESIDENCE.

9. Burden of proof.

The burden of proof is upon the party alleging the change and abandonment of domicil,¹ and to establish both the fact of residence in the new locality and the intention of remaining there.²

¹ Price v. Price, 156 Pa. 617, 27 Atl. 291; Kilburn v. Bennett, 4 Met. 199; Lowry's Estate, 5 Pa. Dist. R. 729; 18 Pa. Co. Ct. 591; People ex rel. Winston v. Winston, 25 Misc. 676, 56 N. Y. Supp. 323. (A party who relies upon nonresidence, but is shown to have lately been domiciled within the state, has the burden of proving a change of residence with an intention to permanently abandon his domicil.)

Hightower v. Ogletree, 114 Ala. 94, 21 So. 934. (Removal of one with his family to another state raises a presumption that his domicil is in such state, and the burden is upon one denying his nonresidence to prove that he has not in fact abandoned his residence in the state.)

² Agassiz v. Trefry, 260 Fed. 226; Dunn v. Trefry, 171 C. C. A. 183, 260 Fed. 147.

10. Presumptions.

Domicil once acquired is presumed to continue until it is clearly shown to have been abandoned.¹

¹ Keith v. Stetter, 25 Kan. 100; Hatch v. Smith, 6 Kan. App. 645, 49 Pac. 698; Kilburn v. Bennett, 3 Met. 199; Price v. Price, 156 Pa. 617, 27 Atl. 291; Botna Valley State Bank v. Silver City Bank, 87 Iowa, 479, 54 N. W. 472. (Proof of absence for nine days is insufficient to overcome the presumption of continuance, without proof of presence elsewhere, or of any motive or intent to change domicil.)

Ludlow v. Szold, 90 Iowa, 175, 57 N. W. 676. (Failure to acquire a new residence does not make the presumption of the continuance of the old one conclusive, but such presumption may be rebutted by any competent facts showing abandonment.)

Belmont v. Vinalhaven, 82 Me. 524, 20 Atl. 89. (There is no presumption of law that one who leaves the place of his residence for the purpose of working in another intends to return when his labor has ended, but there may be some presumption of fact to that effect.)

Reynolds v. Lloyd Cotton Mills, 177 N. C. 412, 5 A.L.R. 284, 99 S. E. 240, holding that before the old domicile can be held to have been abandoned, a new one must have been acquired.

11. Documentary evidence.

A letter written to the assessors of the town which he left, by one who claims to have changed his domicile, which contains declarations as to his residence, is inadmissible in his favor in an action to recover the amount of a tax assessed. Nor are deeds in which he is grantor, nor the wills of himself or his father, describing him as of another place, nor the fact that he was accustomed to discuss its affairs, admissible in his favor; but a deed running to him as grantee is admissible against him.¹

¹ **Weld v. Boston**, 126 Mass. 166; **Wright v. Boston**, 126 Mass. 161.

12. Declarations.

Declarations of intention to abandon a residence are not conclusive, but may be disproved by acts and conduct.¹

The declarations of a party, made in his own favor, are as a general rule inadmissible on the question of domicile, but when made contemporaneously with and accompanying some act which is in itself admissible and expressive of its character and motive, they may be received as part of the *res gestæ*.²

¹ **Keith v. Stetter**, 25 Kan. 100; **Kreitz v. Behrensmeyer**, 125 Ill. 141, 8 Am. St. Rep. 349, 17 N. E. 232.

² **Fulham v. Howe**, 62 Vt. 386, 20 Atl. 101; **Wright v. Boston**, 126 Mass. 161; **Brookfield v. Warren**, 128 Mass. 287; **Pickering v. Cambridge**, 144 Mass. 244, 10 N. E. 827; **Richmond v. Thomaston**, 38 Me. 232; **Church v. Rowell**, 49 Me. 367.

Belmont v. Vinalhaven, 82 Me. 524, 20 Atl. 529 (declarations admissible when made at or near the time of the alleged residence, but not when made twenty years after).

Viles v. Waltham, 157 Mass. 542, 34 Am. St. Rep. 311, 32 N. E. 901. (The declarations must be made within a reasonable time before or after removal.)

Kilburn v. Bennett, 3 Met. 199. (A declaration of an intention to change domicile, made about three weeks before removal, is admissible.)

13. Mode of proof.

Social and domestic relations and minor particulars of private life, habits, character, and business may be inquired into, to an extent resting largely in the discretion of the court, in determining questions of domicil.¹

Long-continued change of residence is strong evidence of intent to change the domicil,² but does not necessarily establish such fact.³

To establish an abandonment of a domicil, there must be not only a removal, but also an intention to acquire a new domicil.⁴

¹ Hallett v. Bassett, 100 Mass. 170; Thayer v. Boston, 124 Mass. 132, 26 Am. Rep. 650; Fulham v. Howe, 62 Vt. 386, 20 Atl. 101.

² Depuy v. Wurtz, 53 N. Y. 556.

³ Steinman v. Erisman, 8 Lanc. L. Rev. 177.

⁴ Beekman v. Beekman, 53 Fla. 858, 43 So. 923.

The removal of an insane person to an asylum in another county was held not an abandonment of her legal residence. Cecil v. Robertson, 32 Ky. L. Rep. 357, 105 S. W. 926.

Moffett v. Hill, 131 Ill. 239, 22 N. E. 821. (Voting in one place is almost conclusive evidence of the abandonment of residence in another, where a permanent abode is a statutory requisite to the right of suffrage.) For other voting cases involving abandonment of domicil, see topic RESIDENCE.

Pickering v. Cambridge, 144 Mass. 244, 10 N. E. 827. (Evidence that a person declined to accept a nomination for municipal office, on the ground that he had no connection with or interest in the affairs of the city, is too remote to be admitted to show that he afterwards actually abandoned his domicil therein.)

Buchanan v. Cook, 70 Vt. 168, 40 Atl. 102. (That a person after an alleged change of residence assumed to act as treasurer of a school district situated in the village from which he claims to have removed is competent.)

III. EASEMENTS.

14. Effect of nonuser generally.

The general rule in relation to the loss of an easement by abandonment is that mere nonuser will not of itself extinguish it, but is simply evidence tending to show an intention to abandon the right.¹ In some cases it has been held that there must

also be an adverse use of the servient estate for the prescriptive period.² Some expressions may be found in the cases to the effect that a cesser of the use, coupled with any act clearly indicating an intention to abandon the right, would have the same effect as an express release of the easement without reference to time,³ and that a cesser to use for a less period than twenty years, accompanied by acts clearly indicating an intent to abandon the right, is sufficient.⁴

The controlling element is not so much the duration of the cesser to use the easement as the nature of the act done by the owner thereof, or of the adverse act acquiesced in by him. It is the intention so indicated that is material.⁵ The effect of the nonuser will depend upon the circumstances of the case, and it is a question of intention.⁶

In some cases a distinction has been made between easements acquired by deed and those acquired by prescription, these cases holding that mere nonuser of a prescriptive easement for the period of the statute of limitations will work a termination of the easement,⁷ but that no period of nonuser of an easement resting in grant, no matter how long continued, will, in the absence of a statute to that effect, destroy the easement, but that there must be clear and convincing proof of an intention to abandon the right,⁸ which may be shown by acts done by the owner of the dominant tenement, or by his acquiescence in acts done by the owner of the servient tenement.⁹ This distinction has also been adopted in some states by statute. But in many cases the distinction is ignored, and it has been declared to be unsound on the ground that prescription is based on the presumption of a grant.¹⁰ And it has been held that, while nonuser for the prescriptive period of an easement acquired by prescription is evidence of an intention to abandon the easement,¹¹ yet it is open to explanation, and may be controlled by proof that the owner had no such intention while omitting to use it.¹²

¹ *Curran v. Louisville*, 83 Ky. 628; *Willey v. Norfolk Southern R. Co.* 96 N. C. 408, 1 S. E. 446; *Kuecken v. Voltz*, 110 Ill. 264; *Wiggins v. McCleary*, 49 N. Y. 348; *Williams v. Nelson*, 23 Pick. 141, 34 Am. Dec. 45.

² *Dill v. Board of Education*, 47 N. J. Eq. 421, 10 L.R.A. 276, 20 Atl. 739;

- Eddy v. Chace, 140 Mass. 471, 5 N. E. 308; Smith v. Worn, 93 Cal. 206, 28 Pac. 944; Lathrop v. Elsner, 93 Mich. 599, 53 N. W. 791; Arnold v. Stevens, 24 Pick. 106, 35 Am. Dec. 305, 1 Mor. Min. Rep. 176.
- ³ Glenn v. Davis, 35 Md. 208, 6 Am. Rep. 389; Volger v. Geiss, 51 Md. 410; Liggins v. Inge, 7 Bing. 682, 131 Eng. Reprint, 263, 5 Moore & P. 712, 9 L. J. C. P. 202; Reg. v. Chorley, 12 Q. B. 515, 116 Eng. Reprint, 960, 3 Cox, C. C. 262.
- ⁴ Moore v. Rawson, 3 Barn. & C. 332, 107 Eng. Reprint, 756, 5 Dowl. & R. 234, 3 L. J. K. B. 32, 27 Revised Rep. 375; Liggins v. Inge, 7 Bing. 682, 131 Eng. Reprint, 263, 5 Moore & P. 712, 9 L. J. C. P. 202; Dyer v. Sanford, 9 Met. 395, 43 Am. Dec. 399; Snell v. Levitt, 110 N. Y. 595, 1 L.R.A. 414, 18 N. E. 370.
- ⁵ Reg. v. Chorley, 12 Q. B. 515, 116 Eng. Reprint, 960, 3 Cox, C. C. 262; Pope v. Devereux, 5 Gray, 409.
- ⁶ Ward v. Ward, 14 Eng. L. & Eq. Rep. 413; Wiggins v. McCleary, 49 N. Y. 348.
- ⁷ Potts v. Clark, 23 Ky. L. Rep. 332, 62 S. W. 884; Cox v. Forrest, 60 Md. 74; Arnold v. Stevens, 24 Pick. 106, 35 Am. Dec. 305; 1 Mor. Min. Rep. 176; Smyles v. Hastings, 22 N. Y. 217, affirming 24 Barb. 44; Pope v. O'Hara, 48 N. Y. 446; Miller v. Garlock, 8 Barb. 153; Cuthbert v. Lawton, 14 S. C. L. (3 M'Cord.) 194.
- ⁸ Hennessy v. Murdock, 137 N. Y. 317, 33 N. E. 330; Snell v. Levitt, 110 N. Y. 595, 1 L.R.A. 414, 18 N. E. 370; Welsh v. Taylor, 134 N. Y. 450, 18 L.R.A. 535, 31 N. E. 896; Jewett v. Jewett, 16 Barb. 150; Andrus v. National Sugar Ref. Co. 93 App. Div. 377, 87 N. Y. Supp. 671; Smith v. Worn, 93 Cal. 206, 28 Pac. 944; Petitpierre v. Maguire, 155 Cal. 242, 100 Pac. 690; Smyles v. Hastings, 22 N. Y. 224; Dill v. Board of Education, 47 N. J. Eq. 421, 10 L.R.A. 276, 20 Atl. 739; Bannon v. Angier, 2 Allen, 128.
- ⁹ Dyer v. Sanford, 9 Met. 395, 43 Am. Dec. 399; Chandler v. Jamaica Pond Aqueduct Corp. 125 Mass. 544; Bell v. Golding, 23 Ont. App. Rep. 485; Jennison v. Walker, 11 Gray, 423.
- ¹⁰ Veghte v. Raritan Water Power Co. 19 N. J. Eq. 156; 3 Kent, Com. 449, note by Holmes.
- ¹¹ Corning v. Gould, 16 Wend. 531.
- ¹² Pratt v. Sweetser, 68 Me. 344.
- For a review of the other cases on the effect of nonuser of an easement, see note in 18 L.R.A. 535; and on the question whether the failure to maintain an easement will raise a presumption of its abandonment, see note in 2 L.R.A. (N.S.) 832.

15. Of abutting owner.

A property owner's unconditional consent to the construction and operation of an elevated railway in front of his premises is an abandonment *pro tanto* of the easements of light, air, and

access, when he has no other rights in the street.¹ This rule has also been held to apply to right of access to piers over public waters.²

¹ *White v. Manhattan R. Co.* 139 N. Y. 19, 34 N. E. 887; *Ward v. Metropolitan Elev. R. Co.* 152 N. Y. 39, 46 N. E. 319.

² *New York Dock Co. v. Flinn-O'Rourke Co.* 107 Misc. 190, 176 N. Y. Supp. 123.

16. Highways.

a. Burden of proof.—The burden of proof is upon the party who alleges the abandonment of a highway.¹

¹ *Horey v. Haverstraw*, 124 N. Y. 273, 26 N. E. 532; *Reilly v. Racine*, 51 Wis. 526, 8 N. W. 417.

b. Presumptions.—The abandonment of a highway may be presumed from nonuser¹ or the creation and use of a new road in its place.²

Abandonment will be presumed where, for twenty years or more, adjoining owners have been permitted to occupy a part of the road; and when to disturb long-established lines would involve criminal consequences or work serious injustice to valuable improvements made in good faith, such presumption will be conclusive.³

But abandonment of land acquired for or dedicated to public purposes will not be presumed from mere nonuser, or because temporarily left open to the public,⁴ or used for other purposes.⁵

¹ *Devaux v. Detroit*, Harr. Ch. (Mich.) 98; *Beardslee v. French*, 7 Conn. 125, 18 Am. Dec. 86 (from its desertion for nearly a century); *Fox v. Hart*, 11 Ohio, 414 (from abandonment for a long period); *Jeffersonville, M. & I. R. Co. v. O'Connor*, 37 Ind. 95 (from nonuser and unfit condition for use for thirty-six years).

Nonuser for twenty years is some evidence of an intent to abandon a highway; and, when accompanied by affirmative evidence showing an intention to abandon, the public interest is extinguished. *Woodruff v. Paddock*, 56 Hun, 288, 9 N. Y. Supp. 381.

Nonuser for the statutory period, accompanied by an occupation of the land by an individual under a claim of right, will be deemed an abandonment. *Burroughs v. Cherokee*, 134 Iowa, 429, 109 N. W. 876.

Nonuser of a highway for thirty-three years, during which time the highway had become impassable for vehicles, other highways being provided in the vicinity, was deemed sufficient to raise a presumption of aban-

donment. *Phillips v. Lawrence*, 23 Ky. L. Rep. 824, 64 S. W. 411.

Nonuser of a highway for many years is prima facie evidence of abandonment if voluntary and intentional. *Hartford v. New York & N. E. R. Co.* 59 Conn. 250, 22 Atl. 37.

Contra:

Lawrenceburgh v. Wesler, 10 Ind. App. 153, 37 N. E. 956.

Abandonment does not depend upon nonuser, but is to be established like any other question of fact. *Brockhausen v. Boehland*, 36 Ill. App. 224.

And the proof to establish it must be strong enough to establish another line as 'the road. *Champlin v. Morgan*, 20 Ill. 181.

² *Shelby v. State*, 10 Humph. 165; *Grube v. Nichols*, 36 Ill. 92; *Flick's Estate*, 6 Kulp, 329.

But the fact that land has been given for a new highway is not sufficient to show an abandonment of the old one. *Galbraith v. Littlech*, 73 Ill. 210.

That travel has been substantially diverted to a new road, and that the old one is not worked, and that portions have been fenced in, do not show an abandonment. *Kelly Nail & Iron Co. v. Lawrence Furnace Co.* 46 Ohio St. 544, 5 L.R.A. 652, 22 N. E. 639.

³ *Hamilton v. State*, 106 Ind. 361, 7 N. E. 9; *Brooks v. Riding*, 46 Ind. 15.

⁴ *New York v. Carleton*, 113 N. Y. 284, 21 N. E. 55; *Parker v. St. Paul*, 47 Minn. 317, 50 N. W. 247; *Knowles v. Knowles*, 25 R. I. 325, 55 Atl. 755.

Failure to repair or work a road for seven years was held not to constitute an abandonment of it. *Brumley v. State*, 83 Ark. 236, 103 S. W. 615.

A temporary suspension of the use of a bridge on account of its weakness, or its destruction, does not amount to an abandonment of it as a public way. *Re Rutland*, 70 Misc. 82, 128 N. Y. Supp. 94.

⁵ *Baltimore v. Frick*, 82 Md. 77, 33 Atl. 435; *Curran v. Louisville*, 83 Ky. 628.

The construction of a retaining wall upon land acquired by a city for a slope for a street grade, although evidence of an intent to abandon the easement, does not establish such fact. *Kuschke v. St. Paul*, 45 Minn. 225, 47 N. W. 786.

The grant to a railroad company of a franchise (not exclusive) to occupy a highway with its tracks was held not an abandonment of the highway by the public. *Turney v. Southern P. Co.* 44 Or. 280, 75 Pac. 144, 76 Pac. 1080.

c. Weight of facts.—Encroachments upon a highway, which do not obstruct travel, do not show a nonuser¹ or abandonment;² nor does the obstruction of a highway for a time by fences,³ or failure to repair,⁴ work,⁵ or improve⁶ the way, constitute an abandonment.

¹ *Grandville v. Jenison*, 84 Mich. 54, 47 N. W. 600.

² *Driggs v. Phillips*, 103 N. Y. 77, 8 N. E. 514; *Horey v. Haverstraw*, 47 Hun, 356; *Hentzler v. Bradbury*, 5 Kan. App. 1, 47 Pac. 330.

³ *Brown v. Hiatt*, 16 Ind. App. 340, 45 N. E. 481.

⁴ *Lawrenceburgh v. Wesler*, 10 Ind. App. 153, 37 N. E. 956.

⁵ *Storm v. Barger*, 43 Ill. App. 173.

⁶ *Louisiana Ice Mfg. Co. v. New Orleans*, 43 La. Ann. 217, 9 So. 21.

For a more extensive discussion of the question of abandonment of a highway, see note in 26 L.R.A. 449.

17. Railway right of way.

a. Inference of intent.—The intention of a corporation to abandon an easement may be inferred from circumstances.¹

¹ *Hatch v. Cincinnati & I. R. Co.* 18 Ohio St. 92; *Central I. R. Co. v. Moulton & A. R. Co.* 57 Iowa, 249, 10 N. W. 639.

b. Mode of proof.—An abandonment of a railroad right of way is properly shown by acts which do not appear of record.¹

¹ *Wescott v. New York & N. E. R. Co.* 152 Mass. 465, 25 N. E. 840.

c. Materiality.—Evidence as to the intent of a railroad to permanently abandon a right of way is immaterial and incompetent, where it does not claim temporary abandonment, but that the public was better served by running trains over its other tracks.¹

¹ *Hickox v. Chicago & C. S. R. Co.* 94 Mich. 237, 53 N. W. 1105.

d. Weight of facts.—Mere nonuser will not work an extinguishment of a railroad right of way, however acquired, in the absence of adverse possession by the servient owner, or unequivocal acts on the part of the railroad evincing a clear intention to abandon it.¹ Nor will use of the property for a purpose foreign to that for which the land was taken constitute an abandonment.²

¹ *Roanoke Investment Co. v. Kansas City & S. E. R. Co.* 108 Mo. 50, 17 S. W. 1000; *Pittsburgh, Ft. W. & C. R. Co. v. Peet*, 152 Pa. 488, 19 L.R.A. 467, 25 Atl. 612 (nonuser by a railway of land acquired with a view to future use not an abandonment); *Lorick & Lowrance v. Southern R. Co.* 87 S. C. 71, 68 S. E. 931.

Nonuser and intention to abandon must coexist. *Stannard v. Aurora, E. & C. R. Co.* 220 Ill. 469, 77 N. E. 254; *Enfield Mfg. Co. v. Ward*, 190 Mass. 314, 76 N. E. 1053; *Denison & S. R. Co. v. St. Louis Southwestern R. Co.* 96 Tex. 233, 72 S. W. 161.

An abandonment of a street railroad franchise is not established by proof that the company ran only one car a day over its track, and suspended operations for several days, at a time when there was snow on the ground,—especially when the company had applied for leave to change its motive power, and have been prevented by municipal ordinance, and ran the one car a day for the purpose of preserving its franchise. *Forty-second Street, M. & St. N. Ave. R. Co. v. Cantor*, 104 App. Div. 476, 93 N. Y. Supp. 943.

But a right of way is abandoned by removal of the track, fences and a bridge with intention to abandon the easement. *Jones v. Van Bochove*, 103 Mich. 98, 61 N. W. 342.

In Iowa, by statute, nonuser for eight years is deemed an abandonment. *Gil v. Chicago & N. W. R. Co.* 117 Iowa, 278, 90 N. W. 606; Iowa Comp. Code 1919, § 5000, title xv. chap. 5.

² *Locks & Canals v. Nashua & L. R. Co.* 104 Mass. 1, 6 Am. Rep. 181; *Prospect Park & C. I. R. Co. v. Williamson*, 91 N. Y. 552 (construction of conveniences for passengers and decorations at seaside resort); *Roby v. New York C. & H. R. R. Co.* 142 N. Y. 176, 36 N. E. 1053 (lease of land for a coal yard).

That a railroad permitted its grantor to use a portion of the land pending the company's need of it was held not an abandonment. *Graham v. St. Louis, I. M. & S. R. Co.* 69 Ark. 562, 65 S. W. 1048. 66 S. W. 344.

18. Ways.

a. Nonuser generally.—Mere nonuser of a way arising either by prescription or grant, for a period short of that prescribed by the statute of limitations, will not extinguish the easement unless accompanied by an intention on the part of the dominant owner to abandon it.¹ And a way resting in grant is not lost by mere nonuser, no matter how long continued.² It is not necessary that the dominant owner of a way arising by grant should use it frequently, or at all, in order to retain the easement.³ And it has been said that, where there has been no change in the title of a servient estate, and no one has been led to change his position or condition in consequence of the act of the owner of an easement resting in grant, temporary cesser of use, or acts of the latter inconsistent with the existence of the right, do not extinguish the easement.⁴ However, if, during the period prescribed by the statute of limitations, a way

is in the open, visible, notorious, and hostile adverse possession of another, the easement will be extinguished, even when resting in grant.⁵ And nonuser of a way which has become obliterated so as not to be notice to a purchaser of its existence will extinguish the easement.⁶ And if nonuser of a way, even though resting in grant, and no matter for how short a time, is accompanied by an intent on the part of the dominant owner to abandon the easement, it will work an extinguishment thereof.⁷ It is not the duration of a cesser of use, but the nature of the act done by the dominant owner, or of the adverse act acquiesced in by him, and the intention which the one or the other indicates, that is material.⁸ But there must be some act on the part of the dominant owner clearly indicating an intention to give up and abandon the easement.⁹

¹ *Edgerton v. McMullan*, 55 Kan. 90, 39 Pac. 1021; *Crigler v. Newman*, 29 Ky. L. Rep. 27, 91 S. W. 706; *Tabbutt v. Grant*, 94 Me. 371, 47 Atl. 899; *Cox v. Forrest*, 60 Md. 74; *Emerson v. Wiley*, 10 Pick. 310; *Manning v. Port Reading R. Co.* 54 N. J. Eq. 46, 33 Atl. 802; *Miller v. Garlock*, 8 Barb. 153; *Weaver v. Getz*, 16 Pa. Super. Ct. 418; *Cuthbert v. Lawton*, 3 M'Cord, L. 194.

A passway was deemed not abandoned because the person entitled to the right could not and did not use it by reason of an encroachment existing at the time of the grant. *Dewire v. Hanley*, 79 Conn. 454, 65 Atl. 573.

² *Smith v. Worn*, 93 Cal. 206, 28 Pac. 944; *Reed v. Gasser*, 130 Iowa, 87, 106 N. W. 383; *Edgerton v. McMullan*, 55 Kan. 90, 39 Pac. 1021; *White v. Crawford*, 10 Mass. 183; *Lathrop v. Elsner*, 93 Mich. 599, 53 N. W. 791; *Riehle v. Heulings*, 38 N. J. Eq. 20; *Smyles v. Hastings*, 22 N. Y. 217, affirming 22 Barb. 44; *Pope v. O'Hara*, 48 N. Y. 446; *Valentine v. Schreiber*, 3 App. Div. 235, 38 N. Y. Supp. 417; *Andrus v. National Sugar Ref. Co.* 93 App. Div. 377, 87 N. Y. 671, affirmed without opinion in 183 N. Y. 580, 76 N. E. 1088; *Richmond v. Bennett*, 205 Pa. 470, 55 Atl. 17; *Bombaugh v. Miller*, 82 Pa. 203; *Johnson v. Stitt*, 21 R. I. 429, 44 Atl. 513; *Brown v. Oregon Short Line R. Co.* 36 Utah, 257, 24 L.R.A. (N.S.) 86, 102 Pac. 740; *Watts v. C. I. Johnson & B. Real Estate Corp.* 105 Va. 519, 54 S. E. 317.

³ *Hofherr v. Mede*, 226 Ill. 320, 80 N. E. 893; *Heughes v. Galusha Stove Co.* 133 App. Div. 814, 118 N. Y. Supp. 109; *James v. Stevenson* [1893] A. C. 162, 62 L. J. P. C. N. S. 51, 1 Reports, 324, 68 L. T. N. S. 539.

⁴ *Tyler v. Cooper*, 47 Hun, 94.

⁵ *Reed v. Gasser*, 130 Iowa, 87, 106 N. W. 383; *Edgerton v. McMullan*, 55 Kan. 90, 39 Pac. 1021; *Bannon v. Angier*, 2 Allen, 128; *Perth Amboy*

Terra Cotta Co. v. Ryan, 68 N. J. L. 474, 53 Atl. 699; *Smyles v. Hastings*, 22 N. Y. 217, affirming 24 Barb. 44; *McCullough v. Board Exchange Co.* 101 App. Div. 566, 92 N. Y. Supp. 533, affirmed without opinion in 184 N. Y. 592, 77 N. E. 1191; *Brady v. Brady*, 31 Misc. 411, 65 N. Y. Supp. 621, s. c. on second appeal, sub. nom. reversed on other points in *Brady v. Smith*, 38 App. Div. 427, 84 N. Y. Supp. 1119, 181 N. Y. 178, 106 Am. St. Rep. 531, 73 N. E. 963, 2 A. & E. Ann. Cas. 636; *Boyd v. Hunt*, 102 Tenn. 495, 52 S. W. 131; *Weaver v. Getz*, 16 Pa. Super. Ct. 418; *Greenmount Cemetery Co.'s Appeal*, 1 Sadler (Pa.) 371, 4 Atl. 528.

⁶ *Kammerling v. Grover*, 9 Ind. App. 628, 36 N. E. 922.

⁷ *Hayford v. Spokesfield*, 100 Mass. 491; *Mason v. Ross*, 75 N. J. Eq. 136, 71 Atl. 141; *Crain v. Fox*, 16 Barb. 184; *Welsh v. Taylor*, 134 N. Y. 450, 18 L.R.A. 535, 31 N. E. 896, reversing 54 Hun, 636, and 50 Hun, 137, 2 N. Y. Supp. 515; *Norris v. Hoffman*, 118 N. Y. Supp. 156, affirming 62 Misc. 385, 115 N. Y. Supp. 890; *Lathrop v. Elsner*, 93 Mich. 599, 53 N. W. 791; *Boyd v. Hunt*, 102 Tenn. 495, 52 S. W. 131; *Brown v. Oregon Short Line R. Co.* 36 Utah, 257, 24 L.R.A.(N.S.) 86, 102 Pac. 740; *Scott v. Moore*, 98 Va. 668, 81 Am. St. Rep. 749, 37 S. E. 342.

⁸ *Pope v. Devereux*, 5 Gray. 409; *Fitzpatrick v. Boston & M. R. Co.* 84 Me. 33, 24 Atl. 432; *Vogler v. Geiss*, 51 Md. 407; *Mason v. Ross*, 75 N. J. Eq. 136, 71 Atl. 141.

Nonuser of a right of way, coupled with user for farm purposes of portions of the servient land by its owner at times when the easement is not required, cannot constitute an abandonment of the entire right, and is inconclusive to prove an abandonment of portions thereof. *James v. Stevenson* [1893] A. C. 162, 62 L. J. P. C. N. S. 51, 1 Reports, 324, 68 L. T. N. S. 529.

⁹ *King v. Murphy*, 140 Mass. 254, 4 N. E. 566; *Marshall v. Weeninger*, 20 Misc. 527, 46 N. Y. Supp. 679; *Raymond v. St. Mary's Roman Catholic Church Soc.* 131 App. Div. 364, 115 N. Y. Supp. 928.

For a full review of the authorities on the question of abandonment or loss of private way by nonuser, or improvements inconsistent with its use, see notes to 22 L.R.A. N.S. 892.

3. *Deviation in use of a private way.*—A temporary deviation from the original way, or use of the substituted way for the convenience of either the dominant or servient owner, is not sufficient to show an abandonment.¹ While user of another way equally convenient may be strong evidence of abandonment, if accompanied with evidence of intention to abandon the old way, it does not constitute abandonment of the old way without proof of an intention to abandon.²

But the use of a substituted way may be evidence of abandonment, if necessitated by a denial of the use of or an obstruction of the original way.³ So, abandonment may occur by using a substituted way without objection for many years.⁴

¹ *Johnson v. Clark*, 22 Ky. L. Rep. 418, 57 S. W. 474; *Crigler v. Newman*, 29 Ky. L. Rep. 27, 91 S. W. 706; *Weaver v. Getz*, 16 Pa. Super. Ct. 418; *Crounse v. Wemple*, 29 N. Y. 540; *Cuthbert v. Lawton*, 3 M'Cord, L. 194; *Ward v. Ward*, 7 Exch. 838, 21 L. J. Exch. N. S. 334.

² *Jamaica Pond Aqueduct Corp. v. Chandler*, 121 Mass. 3.

Nor is an abandonment of a way leading to a well shown by the fact that for six years the dominant owner had used, without the permission of or objection from the servient owner, another way over his land, during which time the original way was used by a tenant of the dominant owner, where, when the servient owner placed a fence across the latter way, the dominant owner made a prompt protest. *Tabbutt v. Grant*, 94 Me. 371, 47 Atl. 899.

So, where access to a prescriptive way was destroyed by lowering the grade of the highway, and the owner of the servient estate closed the way and opened another entrance 70 feet distant, which the dominant owner used for eleven years, when it was closed by the former, the right to the original way was not lost by its nonuse. *Nichols v. Peck*, 70 Conn. 439, 40 L.R.A. 81, 39 Atl. 803.

Nor does the closing of a gate by one entitled to a passway, and his making an opening in the fence for another passway, work an abandonment of his right to use the original passway. *Faulkner v. Duff*, 14 Ky. L. Rep. 227, 20 S. W. 227.

³ *Weaver v. Getz*, 16 Pa. Super Ct. 418.

⁴ *Starkie v. Richmond*, 155 Mass. 188, 29 N. E. 770.

c. Obstruction of, or cutting off access to, way.—Facts which clearly show the intention of one entitled to the use of a private way to abandon it are sufficient, though the obstruction manifesting such intention is not of a more permanent character than a board or rail fence.¹ But the fact that the dominant owner cuts off his access to a way acquired by grant does not, of itself, disclose an intention to abandon the easement.²

Thus, an easement is not destroyed by the act of the dominant owner in obstructing a portion thereof with buildings and fences, unless an intention to abandon the easement appears.³ And the fact that the dominant owner permits a stranger to obstruct a way with a building and place a fence across the way.

around which the former deviates in using the way, does not disclose an intention to abandon the easement.⁴ But the erection of fences across a way by the dominant owner, and its non-user for five or six years, in connection with the fact that he has no longer any use for the way, and plows up and cultivates the land covered by it, discloses an intention to abandon the easement.⁵ And an easement will be considered abandoned where the servient owner, with the knowledge of the dominant owner, erects and maintains a building upon a way for fifteen years.⁶ So, the fact that the dominant owner knows that the servient owner is erecting a wall across a way and building a structure thereon, and makes no complaint, is evidence of an estoppel *in pais*.⁷

¹ Crain v. Fox, 16 Barb. 184.

² Welsh v. Taylor, 134 N. Y. 450, 18 L.R.A. 535, 31 N. E. 896, reversing 54 Hun, 636, and 50 Hun, 137, 2 N. Y. Supp. 815; Watts v. C. I. Johnson & B. Real Estate Corp. 105 Va. 519, 54 S. E. 317; Cook v. Bath, L. R. 6 Eq. 177.

Where the dominant owner erects a brick wall on the line of a way, an intention to abandon the easement is not shown, where he leaves a door therein to give access to the way. Boyd v. Hunt, 102 Tenn. 495, 52 S. W. 131.

The maintenance for seven years of a board fence over a right of way obtained by grant does not prove an abandonment. Hayford v. Spokesfield, 100 Mass. 491.

But an abandonment is shown where the dominant owner cuts off his access to a way by erecting a building across it, and does not use the easement for twenty years. Tudor Boiler Mfg. Co. v. I. E. Greenwald Co. 26 Ohio C. C. 556, 5 Ohio C. C. N. S. 37.

³ Gulick v. Hamilton, 287 Ill. 373, 122 N. E. 537; Wood v. Carter, 70 Ill. App. 217; Schaidt v. Blaul, 66 Md. 141, 6 Atl. 669; New England Structural Co. v. Everett Distilling Co. 189 Mass. 145, 75 N. E. 85; Bentley v. Root, 19 R. I. 205, 32 Atl. 918.

⁴ Peck v. Lloyd, 38 Conn. 566.

⁵ Crain v. Fox, 16 Barb. 184.

⁶ Bell v. Golding, 23 Ont. App. Rep. 485.

⁷ Arnold v. Cornman, 50 Pa. 361. But see Collins v. St. Peters, 65 Vt. 618, 27 Atl. 425; Rogers v. Stewart, 5 Vt. 215, 26 Am. Dec. 298.

d. Whose acts in attempting to abandon way are binding on dominant owner.—No act of a tenant of the dominant owner, done without the latter's knowledge or acquiescence, will work

an extinguishment.¹ So, the acts of a life tenant in possession cannot affect the rights of the remainderman, who was the dominant owner.² So, a mortgagor cannot, by opening a new way over lands owned by him, abandon the passway acquired by grant, so as to bind the mortgagee.³

¹ Teachout v. Capital Lodge, I. O. O. F. 128 Iowa, 380, 104 N. W. 440; Vogler v. Geiss, 51 Md. 407; Scott v. Moore, 98 Va. 668, 81 Am. St. Rep. 749, 37 S. E. 342.

² Browne v. Methodist Episcopal Church, 37 Md. 108; Welsh v. Taylor, 134 N. Y. 450, 18 L.R.A. 535, 31 N. E. 896, reversing 54 Hun. 636 and 50 Hun. 137, 2 N. Y. Supp. 815; Boyd v. Hunt, 102 Tenn. 495, 52 S. W. 131.

³ Duval v. Becker, 81 Md. 537, 32 Atl. 308.

c. Declarations.—Declarations and acts of a grantor showing the relinquishment of a right of way by him while owner of the dominant estate are admissible.¹

¹ Warshauer v. Randall, 109 Mass. 586; King v. Murphy, 140 Mass. 254, 4 N. E. 566.

Evidence of an executed oral agreement between the owners of the dominant and servient tenements to discontinue the old way, acquired by prescription, and to substitute a new one, is competent evidence of a surrender of the old right of way. Pope v. Devereux, 5 Gray, 409.

19. Water rights.

a. Presumptions and burden of proof generally.—Abandonment of property in a dam and ditch for mining purposes will not be presumed from lapse of time;¹ nor will abandonment of the servitude of drainage, imposed by statute on a lower estate for the benefit of the estate above, be presumed in the absence of clear proof.² Failure to use water is evidence of an intention to abandon the right, and, if continued for an unreasonable period, creates a presumption of such intention; but this presumption is not conclusive, and may be overcome by other sufficient proof.³

The burden is upon one asserting the abandonment of a water right, to prove such fact by a preponderance of evidence.⁴

¹ Partridge v. McKinney, 10 Cal. 181.

² *Foley v. Codchaux*, 48 La. Ann. 466, 19 So. 247.

³ *Seaboard Air Line R. Co. v. Sikes*, 4 Ga. App. 7, 60 S. E. 868; *Sieber v. Frink*, 7 Colo. 148, 2 Pac. 901.

⁴ *Hall v. Lincoln*, 10 Colo. App. 260, 50 Pac. 1047.

b. Right of flowage.—A right of flowage is not lost by mere nonuser, short of the time necessary to have it destroyed by prescription.¹ But a granted right to flow land may be lost by nonuser for the prescriptive period, during which the grantor is making adverse use of the property.² The intent of a party in doing or omitting to do certain acts is admissible in evidence upon the question of his abandonment of the right of flowage.³

¹ *Vickery v. Providence*, 17 R. I. 651, 24 Atl. 148; 2 Farnham, Waters, p. 1798.

² *Ruttans v. Winans*, 5 U. C. C. P. 379.

³ *Butterfield v. Reed*, 160 Mass. 361, 35 N. E. 1128.

c. Irrigation rights; ditches; prior appropriation.—The right to use water from a stream for the purpose of irrigation being a natural right of a riparian owner, it is not lost by mere nonuser. He may make use of his right or not, as he chooses, and he loses none of his rights thereby.¹ The use of a ditch being necessary in most cases to make water available for irrigation, the question as to abandonment has arisen more often with respect to the ditch than to the water right. The right to maintain the ditch may be lost by abandonment or nonuser. In most of the cases affecting ditches for irrigation purposes, they were constructed over public lands when there was no right upon the part of anyone to interfere with them, and they were not maintained long enough to perfect the right by prescription, so that the title of the ditch owner rested merely on the statute giving governmental permission to use government land for a right of way. When, therefore, the land went into possession of a grantee from the government, very little was necessary to show that the statutory right had been abandoned.² So long, however, as the title to the property remains in the government, a mere nonuser of the ditch does not amount to a forfeiture of the right to maintain it.³ The facts that a quartz mill and mining claim have not been operated for years, and that the mill

has gone to decay, so that it cannot be operated, may be received to show an abandonment of the easement in the land for a flume, or such nonuser as would preclude the inference that prescriptive title ever ripened into existence, where it appears that such flume was appurtenant to such mill and claim.⁴ But if the use of the ditch is stopped under an agreement, the nonuser will not result in an abandonment so long as the agreement continues in force.⁵ So, nonuser of a ditch, brought about by circumstances over which the ditch owner has no control, is not evidence of abandonment of, or intent to abandon, such ditch.⁶

The facts that but little water was used from a ditch, and that it became so obstructed that but little water would flow in it, do not establish an abandonment, where it appears that the ditch was used continuously to convey water for domestic purposes, and to some extent for irrigation, and that the intention of the owner to retain the right was made manifest to the one claiming the abandonment.⁷ The same rights which attach to water flowing in a stream apply to that flowing in a ditch after it has been constructed; and therefore a perpetual right to the use of water from an irrigation ditch, acquired or reserved under a contract, constitutes an easement in the ditch, which cannot be lost by nonuser alone, short of the period of limitations for actions to recover real property.⁸ So, a right to the use of water from an irrigation ditch is not abandonment by a failure of the grantee of the land upon which the same was used to obtain a tenant for two or three years, or a failure of his grantor for two or three years to contribute towards the maintenance of the ditch.⁹

In case of the prior appropriation of water, in order to evidence an abandonment, there must be an intent to abandon, either express or implied from the conduct of the appropriator. Whether an act will constitute an abandonment will depend upon the intention with which it is done.¹⁰ To work an abandonment there must be a relinquishment of water, as well as the intention of abandonment.¹¹ The fact is to be determined by consideration of both act and intent.¹² Mere nonuser of the water is not, of itself, sufficient to work an abandonment.¹³ But it has been held that a failure to use water is evidence of an

intention to abandon, and, if continued for an unreasonable period, it creates a presumption of an intention to abandon. This presumption, however, is not conclusive, but may be overcome by other sufficient proof.¹⁴ Nor will an attempted change in the ditch or in the manner of use effect an abandonment.¹⁵ But the right will be abandoned by asserting inconsistent rights.¹⁶ The fact that after the purpose for which the water is appropriated has been accomplished, the appropriators have dispersed, and the water has been allowed to go to waste for a long time, after which it is sold for a nominal price, may be deemed evidence of abandonment.¹⁷ But the obstruction and disuse for fifteen years of a part of a ditch do not show an abandonment by a prior appropriator of his rights therein.¹⁸

¹³ Farnham, Waters, p. 1911, § 607.

²³ Farnham, Waters, p. 1912; Reeves v. Backus-Brooks Co. 83 Minn. 339, 86 N. W. 337.

Thus a ditch constructed by running a furrow and cleaning it out with a shovel is held to be abandoned if it is not used for many years, and if it becomes so obliterated as not to be perceptible by persons driving over or plowing the land across which it runs, while the owners permit another person to construct a ditch and take water from the stream without notifying him of the prior appropriation. Dorr v. Hammond, 7 Colo. 79, 1 Pac. 693.

So, if the end of a ditch is filled up by a landslide, and not opened or used again for nine or ten years, there will be an abandonment of the right under the Oregon statute, providing that, if a ditch is abandoned, and thereafter for one year the claimant shall cease to exercise acts of ownership over the same, he shall be deemed to have lost all claim thereto. Ison v. Nelson Min. Co. 47 Fed. 199; Re Umatilla River, 88 Or. 382, 168 Pac. 922, 172 Pac. 97; Or. Laws 1920, Olson vol. 2, § 5785.

³ Welch v. Garrett, 5 Idaho, 639, 51 Pac. 405, 19 Mor. Min. Rep. 193; Ada County Farmers' Irrig. Co. v. Farmers' Canal Co. 5 Idaho, 793, 40 L.R.A. 485, 51 Pac. 990.

⁴ Richard v. Hupp, 4 Cal. Unrep. 824, 37 Pac. 920.

⁵ Stufflebeem v. Adelsbach, 135 Cal. 221, 67 Pac. 140.

⁶ Welch v. Garrett, 5 Idaho, 639, 51 Pac. 405, 19 Mor. Min. Rep. 193.

⁷ Utt v. Frey, 106 Cal. 392, 39 Pac. 807.

⁸ People ex rel. Standart v. Farmers High Line Canal & Reservoir Co. 25 Colo. 202, 54 Pac. 626, reversing 8 Colo. App. 246, 45 Pac. 543.

⁹ Putnam v. Curtis, 7 Colo. App. 437, 43 Pac. 1056.

¹⁰ Putnam v. Curtis, 7 Colo. App. 437, 43 Pac. 1056.

No abandonment of a water right appurtenant to land, by a former owner thereof, is shown where there was no attempt made by him to relinquish any appropriation so appurtenant while in possession, nor any intention on his part to abandon the same, without which there can be no abandonment, although he subsequently declared that he did not buy or claim any water right and did not sell any; such intention cannot be inferred from the fact that the land was not cropped or irrigated by him, where he never had occasion to do so. *Turner v. Cole*, 31 Or. 154, 49 Pac. 971.

But abandonment of the right to divert the waters of a stream may be inferred from acts, or failures to act, so inconsistent with an intention to retain it that the unprejudiced mind is convinced of the renunciation. *North America Exploration Co. v. Adams*, 45 C. C. A. 185, 104 Fed. 404, 21 Mor. Min. Rep. 65.

¹¹ *Nichols v. Lantz*, 9 Colo. App. 1, 47 Pac. 70.

¹² *Gassert v. Noyes*, 18 Mont. 216, 44 Pac. 959; *Integral Quicksilver Min. Co. v. Altoona Quicksilver Min. Co.* 21 C. C. A. 409, 44 U. S. App. 566, 75 Fed. 379; *Smith v. Green*, 109 Cal. 228, 41 Pac. 1022.

¹³ *Cache La Poudre Irrig. Co. v. Larimer & W. Reservoir Co.* 25 Colo. 144, 71 Am. St. Rep. 123, 53 Pac. 318; *Turner v. Cole*, 31 Or. 154, 49 Pac. 971; *Dodge v. Marden*, 7 Or. 456, 1 Mor. Min. Rep. 63; *Haugh v. Porter*, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728; *Partridge v. McKinney*, 10 Cal. 181, 1 Mor. Min. Rep. 185.

Mere nonuser of water for the operation of a mill, even for a period longer than the statute of limitations, does not constitute an abandonment thereof, where the reason of the nonuser was the closing of the mill during that period, and the evidence clearly shows that there was no intention to abandon the mill. *Smith v. Hope Min. Co.* 18 Mont. 432, 45 Pac. 632.

Failure to use the water for the purpose for which it was appropriated will not constitute an abandonment if, during the years in which it was not used, there was not a sufficient quantity to supply the requisite amount for that purpose. *McCauley v. McKeig*, 8 Mont. 389, 21 Pac. 22, 16 Mor. Min. Rep. 1.

¹⁴ *Sieber v. Frink*, 7 Colo. 148, 2 Pac. 901.

¹⁵ *Kleinschmidt v. Greiser*, 14 Mont. 484, 43 Am. St. Rep. 652, 37 Pac. 5.

An appropriation of water which is carried from one stream to another to make up the amount which has been attempted to be appropriated from the latter is not abandoned by the mere nonuser of the ditch through which it was taken, where there was no intention to abandon, and the further use of the ditch had become unnecessary because of the transfer of the water from one stream to another by a junior appropriator further up the stream. *Hector Min. Co. v. Valley View Min. Co.* 28 Colo. 315, 64 Pac. 205.

¹⁶ *Hewitt v. Story*, 30 L.R.A. 265, 12 C. C. A. 250, 29 U. S. App. 155, 64

Fed. 510; *Oppenlander v. Left Hand Ditch Co.* 18 Colo. 142, 31 Pac. 834.

¹⁷ *Davis v. Gale*, 32 Cal. 26, 91 Am. Dec. 554, 4 Mor. Min. Rep. 604.

¹⁸ *Wimer v. Simmons*, 27 Or. 1, 50 Am. St. Rep. 685, 39 Pac. 6.

For a further treatment of the question of abandonment or loss of rights of prior appropriators of water, see note in 30 L.R.A. 265, and also 3 Farnham, Waters, § 691, p. 2126.

As to abandonment of the privilege or easement incidental to the construction of a mill dam, see *Gross v. Jones*, 85 Neb. 77, 32 L.R.A.(N.S.) 47, 122 N. W. 681 and note in 32 L.R.A.(N.S.) 47.

20. Mills.

Nonuser of a mill for less than twenty years is not alone sufficient evidence of the abandonment of a right to flow the land of another,¹ but entire and continued disuse of a mill privilege for twenty years is strong prima facie evidence of ceasing to use the privilege for an unreasonable time, by which it is lost, and, unless rebutted by explanatory circumstances, must be deemed conclusive.²

¹ *Williams v. Nelson*, 23 Pick. 141, 34 Am. Dec. 45.

² *French v. Braintree Mfg. Co.* 23 Pick. 216.

The right to maintain a dam and flow the land of another is not abandoned by nonuser for less than twenty years. *Carlisle v. Cooper*, 19 N. J. Eq. 256.

Nonuser for twenty years of the right to maintain a dam acquired by use is presumptive evidence of abandonment, but such presumption may be rebutted by proof. *Farrar v. Cooper*, 34 Me. 394.

The sale of a mill privilege for its value, or an offer to sell, will not be regarded as an abandonment. *Pillsbury v. Moore*, 44 Me. 154, 69 Am. Dec. 91.

Nonuser of water by a milling company for nine years is not an abandonment, where its intention not to abandon the mill is manifested by leaving the premises in care of a watchman. *Smith v. Hope Min. Co.* 18 Mont. 432, 45 Pac. 632.

IV. HOMESTEAD.

21. Burden of proof.

The burden is on him who seeks to subject homestead property to the payment of his claim, to show that it has been abandoned,¹ but one who claims a homestead in land which he has ceased to occupy has the burden, as against intervening claimants, to prove an intention on his part to return and reoccupy it.²

¹ *Robinson v. Charleton*, 104 Iowa, 296, 73 N. W. 616; *Bradshaw v. Hurst*,

57 Iowa, 745, 11 N. W. 672; Harle v. Richards, 78 Tex. 80, 14 S. W. 257; Hayes v. Cavi, — Tex. Civ. App. —, 31 S. W. 313; Union Stock Yards Nat. Bank v. Smout, 62 Neb. 227, 87 N. W. 14.

² Newman v. Franklin, 69 Iowa, 244, 28 N. W. 579; Bell v. Greathouse, 20 Tex. Civ. App. 478, 49 S. W. 258.

22. Presumptions.

A homestead will be presumed to continue until its use is discontinued with an intention not to use it again as a home.¹ The removal of a family from the homestead and their prolonged absence will raise a presumption of abandonment.²

The presumption of abandonment of a homestead conveyed by the husband, without the wife's knowledge, after they left it, is not overcome by her evidence that she never intended to abandon it, when such intention was not known to the grantee, and no attempt to retain the homestead was made for many years after the husband's death.³

¹ H. P. Drought & Co. v. Stallworth, 45 Tex. Civ. App. 159, 100 S. W. 188. Imprisonment will not overcome this presumption since the absence is involuntary. Millett v. Pearson, 143 Minn. 187, 5 A.L.R. 256, 173 N. W. 411.

² Conway v. Nichols, 106 Iowa, 358, 68 Am. St. Rep. 311, 76 N. W. 681; Kaes v. Gross, 92 Mo. 647, 1 Am. St. Rep. 767, 3 S. W. 840.

³ Portwood v. Newberry, 79 Tex. 337, 15 S. W. 270.

23. Opinions.

Evidence of witnesses that it was the intention of the homestead claimant and his family to return and again occupy the homestead is the expression of an opinion, and inadmissible.¹

¹ Graves v. Campbell, 74 Tex. 576, 12 S. W. 238.

24. Hearsay.

Evidence that it was generally understood in the community that a person resided there is inadmissible to show his abandonment of a homestead in another place.¹

¹ Scottish-American Mortg. Co. v. Scripture, — Tex. Civ. App. —, 40 S. W. 210.

25. Declarations.

An intention to abandon a homestead may be shown by the declarations and acts of the homesteader.¹

¹ Moses v. White, 6 Kan. App. 558, 51 Pac. 622; Mills v. Mills, 141 Mo.

195, 42 S. W. 709; *McMillan v. Warner*, 38 Tex. 410; *Cincinnati Leaf Tobacco Warehouse Co. v. Thompson*, 105 Ky. 627, 49 S. W. 446; *Robinson v. Charleton*, 104 Iowa, 296, 73 N. W. 616 (talk of exchanging the homestead property, or a statement of its value, does not show an intent to abandon); *Painter v. Steffen*, 87 Iowa, 171, 54 N. W. 229 (that a homesteader, before removal, took legal advice concerning the effect of his absence, is admissible as *res gestæ*).

Declarations of intent to return to the homestead cannot outweigh evidence of abandonment afforded by acts. *Reece v. Renfro*, 68 Tex. 192, 4 S. W. 545.

A statement by the owner of a homestead that he would have to abandon it unless he could procure pecuniary assistance to erect a new building in place of that destroyed by fire does not show an abandonment. *Stewart v. Rhoades*, 39 Minn. 193, 39 N. W. 141.

26. Mode of proof.

To establish the abandonment of a homestead the evidence must show a removal with the intention of not returning, or the formation of such an intention after the removal.¹ Intention to abandon may be shown by circumstances and the existing facts,² or by the party to whom it is attributed.³

¹ *Corey v. Schuster*, 44 Neb. 269, 62 N. W. 470; *Edwards v. Reid*, 39 Neb. 645, 42 Am. St. Rep. 607, 58 N. W. 202; *Mallard v. First Nat. Bank*, 40 Neb. 784, 59 N. W. 511.

Nonoccupancy:

² Nonoccupancy not conclusive. *Sanders v. Sheran*, 66 Tex. 655, 2 S. W. 804; *McMillan v. Warner*, 38 Tex. 410; *Loveless v. Thomas*, 152 Ill. 479, 38 N. E. 907; *Hitchcock v. Misner*, 111 Mich. 180, 69 N. W. 226.

Removal to engage in business without definite intent to return shows an abandonment. *Wolf v. Hawkins*, 60 Ark. 262, 29 S. W. 892.

Acquisition of a new homestead, and a direction to the sheriff to levy upon the old, establish an abandonment, although the homesteader testifies he did not intend to abandon. *Wilson v. Daniels*, 79 Iowa, 132, 44 N. W. 246.

A widow abandons her homestead right by removal and division of the land between her children (*Crabb v. Potter*, 12 Ky. L. Rep. 430, 14 S. W. 501); but not by temporary removal upon remarriage (*Loveless v. Thomas*, 152 Ill. 479, 38 N. E. 907).

Removal by a married woman constitutes an abandonment, although she refuses to join in a conveyance of the homestead, when she does not intend to return without her husband, who has determined not to return. *Nash v. Herring*, 5 Tex. Civ. App. 95, 23 S. W. 739.

Whether the cessation of the homestead use is temporary or not may be

shown by the acts of the husband alone. *Wynne v. Hudson*, 66 Tex. 1, 17 S. W. 110.

One who voluntarily absents himself from his homestead for fifteen years, receiving no benefit therefrom during that time, is deemed to have abandoned it and to have lost his rights therein. *Martin v. Smith*, 31 Ky. L. Rep. 882, 104 S. W. 310.

Lease:

Lease does not constitute abandonment in the absence of such intention. *Zwick v. Johns*, 89 Iowa, 550, 56 N. W. 665; *Shirack v. Shirack*, 44 Kan. 653, 24 Pac. 1107.

Lease of homestead for life is not conclusive evidence of abandonment where the lessor reserves the right to return, and intends to do so. *Gates v. Steele*, 48 Ark. 539, 4 S. W. 53.

Abandonment will not be conclusively inferred from the removal of the family to a store house and the temporary renting of the residence. *Harle v. Richards*, 78 Tex. 80, 14 S. W. 257.

Length of time a homestead is rented and the character of the improvements upon it may be considered in determining the intention as to abandonment. *Charles v. Chaney*, — Tex. Civ. App. —, 26 S. W. 169.

Sale:

Offer to sell homestead does not show intent to abandon. *Dunn v. Tozer*, 10 Cal. 167; *Aultman v. Allen*, 12 Tex. Civ. App. 227, 33 S. W. 679.

But a contract to sell, with the purpose of investing the proceeds in other land not to be held as a homestead, tends to show an intention to abandon. *Sanders v. Sherman*, 66 Tex. 655, 2 S. W. 804.

Conveyance:

Conveyance of homestead by warranty deed after removal is conclusive evidence of abandonment. *Portwood v. Newberry*, 79 Tex. 337, 15 S. W. 270.

Voting:

Voting in another place after removal is not conclusive evidence of abandonment of homestead. *Corey v. Schuster*, 44 Neb. 269, 62 N. W. 470; *Robinson v. Charleton*, 104 Iowa, 296, 73 N. W. 616; *Imhoff v. Lipe*, 162 Ill. 282, 44 N. E. 493; *Campbell v. Potter*, 16 Ky. L. Rep. 535, 20 S. W. 139; *Cobb v. Smith*, 88 Ill. 199; *Cincinnati Leaf Tobacco Warehouse Co. v. Thompson*, 105 Ky. 627, 49 S. W. 446; *Moline v. Plow Co. v. Vanderhoof*, 36 Ill. App. 26.

Nor is registration for the purpose of voting in another state conclusive, —especially when not personally made. *Mallard v. First Nat. Bank*, 40 Neb. 784, 59 N. W. 511.

Removal to more valuable property, at which place the husband voted, and subsequent removal still farther away, show abandonment. *Kutch v. Holley*, 77 Tex. 220, 14 S. W. 32.

Generally:

The acquisition of a new homestead is not absolutely essential to the

abandonment of the old one. *Moore v. Johnson*, 12 Tex. Civ. App. 694, 34 S. W. 771.

Abandonment of a portion of a homestead is not shown by recitals in a mortgage upon it, which limit its extent, or by an unrecorded plat dividing the property. *Giersa v. Gray*, — Tex. Civ. App. —, 31 S. W. 231.

Evidence of bad health at a time subsequent to the removal from the homestead is inadmissible on the question of abandonment, when there is nothing to show that the removal was due to ill health. *Scottish-American Mortg. Co. v. Scripture*, — Tex. Civ. App. —, 40 S. W. 210.

For other cases on question of what constitutes an abandonment of a homestead, see note in 56 L.R.A. 882.

See also note in 3 L.R.A.(N.S.) 515 (*Withers v. Love*, 72 Kan. 140, 83 Pac. 204), on the effect of confinement in an insane asylum or a prison, in determining the question of abandonment of the homestead.

Another note on this subject, in 13 L.R.A.(N.S.) 430 (*Washington v. Smith*, 77 Neb. 363, 109 N. W. 381), considers the abandonment, conveyance, or encumbrance of homestead during the insanity of one of the spouses.

³ *Glasscock v. Stringer*, — Tex. Civ. App. —, 32 S. W. 920.

V. HUSBAND AND WIFE.

27. Declarations.

The declarations of a wife, made immediately before her flight, manifesting her feelings, such as satisfaction,¹ or distress,² or made immediately afterward to the persons with whom she took refuge,³ or to a third person,⁴ are admissible as part of the *res gestæ*,⁵ on the question of abandonment. So is evidence of her physical condition. The same principle applies to all persons.

Declarations by the wife after abandonment are inadmissible to prove her nonconsent to her husband's absence,⁶ and to disprove wilful desertion by the husband.⁷

The husband's declarations are inadmissible, in an action by the wife for the alienation of his affections, to show that his abandonment of her was due to the interference of the defendant.⁸

¹ *Jacobs v. Whitcomb*, 10 Cush. 255 (opinion by Bigelow, Ch. J., in assumpsit against a husband for alleged necessities).

² *McGowen v. McGowen*, 52 Tex. 657 (divorce for abandonment).

³ *Cattison v. Cattison*, 22 Pa. 275 (divorce for desertion); *S. P., McGowen v. McGowen*, 52 Tex. 657.

⁴ *Hoare v. Allen*, 3 Esp. 276 (Ld. Kenyon, crim. con., declarations as to cause of leaving).

⁵ *Park v. Hopkins*, 18 S. C. L. (2 Bail.) 408.

Conversation between the husband and wife in his house, three days after she first left him, is admissible as part of the *res gestæ*. *Remsen v. Hay*, 14 N. Y. Week. Dig. 443.

See also ABSENCE; DESERTION; INTENT; SEPARATION.

⁶ *Bealor v. Hahn* (Pa.) 9 Cent. Rep. 599, 11 Atl. 776.

⁷ *Hart v. McGrew*, 8 Sadler (Pa.) 505, 11 Atl. 617.

⁸ *Buchanan v. Foster*, 23 App. Div. 542, 48 N. Y. Supp. 732.

28. Presumptions.

The law presumes that a man did not intend to abandon his family, in the absence of cogent proof to the contrary.¹

¹ *Jennison v. Hapgood*, 10 Pick. 99; *Green v. Greene*, 11 Pick. 410.

29. Relevancy, sufficiency, and weight of evidence.

Upon the trial of a man for abandoning his minor children, evidence that he separated from his wife for her misconduct is inadmissible.¹ And in a prosecution against a husband for abandoning his wife, evidence that before the alleged abandonment he had made a trip, taking another woman, is incompetent.²

To show circumstances authorizing a wife to sue alone for damages to the common property, she may testify that her husband has abandoned her, although by statute a wife is precluded from testifying to facts relied upon as grounds for divorce.³ But evidence that a married woman and her brother-in-law stated that her husband had abandoned her is inadmissible to prove a state of facts empowering her to convey land as if unmarried.⁴

A wife claiming that her abandonment of her home was caused by the conduct of her husband must, upon his denial, in an action for divorce for desertion, sustain her claim by the corroborative evidence of circumstances, or other witnesses.⁵

Failure to support the wife will not justify the husband's conviction of abandonment, when she left his house and stripped

it of furniture, with no excuse except that he failed to pay his bills.⁶

But prosecution for abandonment of a wife by her husband is sustained by evidence that he turned her out of his house and wholly neglected to support her.⁷

Mere declarations of a willingness to resume marital relations, without effort to put an end to a separation, are of slight weight.⁸

A husband's cruel and inhuman treatment of his wife by compelling her to abandon her infant children by a former marriage has been held to constitute an abandonment of her by him.⁹

¹ Bennefield v. State, 80 Ga. 107, 4 S. E. 869.

² Jones v. People, 119 Ill. App. 49.

³ Houston & T. C. R. Co. v. Lackey, 12 Tex. Civ. App. 229, 33 S. W. 768.

⁴ Blum v. Goff, — Tex. Civ. App. —, 29 S. W. 1110.

⁵ Herold v. Herold, 47 N. J. Eq. 210, 9 L.R.A. 696, 20 Atl. 375.

⁶ State v. Brinkman, 40 Mo. App. 284.

⁷ People ex rel. Shrady v. Shrady, 47 Misc. 333, 95 N. Y. Supp. 991.

⁸ Broom v. Broom, 47 N. J. Eq. 215, 20 Atl. 377; Elliott v. Elliott, 48 N. J. Eq. 231, 21 Atl. 381.

⁹ Williamson v. Williamson, 183 Ky. 435, 3 A.L.R. 799, 209 S. W. 502.

VI. INSURANCE.

30. Presumptions.

The presumption is against an intent by the insured to abandon a live policy.¹ But the agent who insures for the owner is presumed to have authority to abandon.²

¹ Manhattan L. Ins. Co. v. Wright, 61 C. C. A. 138, 126 Fed. 82.

² Chesapeake Ins. Co. v. Stark, 6 Cranch, 268, 3 L. ed. 220; Merchants' Marine Ins. Co. v. Barss, 15 Can. S. C. 185.

31. Declarations.

Evidence of a deceased member's declaration of his disconnection from a benefit society is admissible on the question of an abandonment of the certificate.¹

¹ Stewart v. Supreme Council, A. L. H. 36 Mo. App. 319.

32. Proof of right to abandon.

The right to abandon a vessel is to be determined from the facts as they existed on the day of abandonment.¹

¹ *Orient Mut. Ins. Co. v. Adams*, 123 U. S. 67, 31 L. ed. 63, 8 Sup. Ct. Rep. 68; *Bradlie v. Maryland Ins. Co.* 12 Pet. 378, 9 L. ed. 1123; *Dickey v. New York Ins. Co.* 4 Cow. 222; *Snow v. Union Mut. Marine Ins. Co.* 119 Mass. 592, 20 Am. Rep. 349.

One who refused to pay an increased assessment, but without alleging its illegality, and who notified the company of his withdrawal, is deemed to have abandoned the contract. *Roth v. Mutual Reserve Ins. Co.* 89 C. C. A. 262, 162 Fed. 282.

A default in the payment of premiums, and refusal to continue premiums or assessments, with knowledge of the circumstances, are deemed conclusive on the question of abandonment by the insured. *Mutual L. Ins. Co. v. Hill*, 178 U. S. 347, 44 L. ed. 1097, 20 Sup. Ct. Rep. 914; *Price v. Mutual Reserve L. Ins. Co.* 102 Md. 683, 4 L.R.A.(N.S.) 870, 62 Atl. 1040.

VII. PATENTS AND TRADEMARKS.**33. Burden of proof.**

The issue of letters patent is prima facie evidence that there has been no voluntary abandonment of an invention,¹ and the burden of proof is on one who claims abandonment.²

¹ *Johnsen v. Fassman*, 5 Fish. Pat. Cas. 471, Fed. Cas. No. 7,365.

² *American Hide & Leather Splitting & Dressing Mach. Co. v. American Tool & Mach. Co.* 4 Fish. Pat. Cas. 284, Fed. Cas. No. 302; *Kellogg Switchboard & Supply Co. v. International Teleph. Mfg. Co.* 158 Fed. 104; *Victor Talking Mach. Co. v. American Graphophone Co.* 140 Fed. 860, affirmed in 76 C. C. A. 180, 145 Fed. 350.

34. Presumptions.

Abandonment cannot be presumed from the use and sale of an invention within two years before application for a patent, unless accompanied by acts or declarations which clearly evidence an intention to dedicate the improvement to the public.¹ Nor will abandonment be presumed from sale or use between the application for, and grant of, a patent.² Nor can the acquiescence of an inventor in the public use of his invention be

presumed where he has no knowledge of it; but such knowledge may be presumed from circumstances.³

But an inventor who describes and claims only a part of his invention in his application for a patent is presumed to have abandoned the residue to the public.⁴

A trademark is not deemed abandoned because the owner consents to the joint use thereof by his father and himself.⁵

¹ *Mast, F. & Co. v. Dempster Mill Mfg. Co.* 27 C. C. A. 191, 49 U. S. App. 508, 82 Fed. 327; *McCormick v. Seymour*, 2 Blatchf. 240, Fed. Cas. No. 8,726.

² *Ryan v. Goodwin*, 3 Sumn. 514, Fed. Cas. No. 12,186.

³ *Woodbury Patent Planing-Mach. Co. v. Keith*, 101 U. S. 479, 25 L. ed. 939; *Wyeth v. Stone*, 1 Story, 273, Fed. Cas. No. 18,107; *Shaw v. Cooper*, 7 Pet. 292, 8 L. ed. 689; *American Hide v. Leather Splitting & Dressing Mach. Co. v. American Tool & Mach. Co.* 4 Fish. Pat. Cas. 284, Fed. Cas. No. 302 (abandonment is never presumed, but must be proved).

⁴ *Deering v. Winona Harvester Works*, 155 U. S. 286, 39 L. ed. 153, 15 Sup. Ct. Rep. 118.

An omission of grounds due to a misapprehension of the objections of the commissioner, does not show an abandonment when application for a reissue was made within a reasonable time. *Hutchinson v. Everett*, 33 Fed. 502.

An invention cannot be presumed abandoned within the two years allowed for putting it into public use; an alleged abandonment must be proved. *Rolfe v. Hoffman*, 26 App. D. C. 336.

A patentee is presumed to have abandoned specifications not distinctly claimed as an invention. *Ide v. Torlicht, D. & R. Carpet Co.* 53 C. C. A. 341, 115 Fed. 137.

⁵ *Giles Remedy Co. v. Giles*, 26 App. D. C. 375.

35. Declarations.

Abandonment of an invention may be proved, either by express declarations of an intention to abandon, or by conduct inconsistent with any other conclusion.¹

¹ *United States Rifle & Cartridge Co. v. Whitney Arms Co.* 118 U. S. 22, 30 L. ed. 53, 6 Sup. Ct. Rep. 950.

Declarations of an intention to dedicate an invention to the public will not be regarded as equivalent to an actual dedication. *Pitts v. Hall*, 2 Blatchf. 229, Fed. Cas. No. 11,192.

36. Delay.

An abandonment may be shown by negligent postponement of the inventor's claims.¹

But delay in presenting an invention for patent does not necessarily show an abandonment.²

¹ Woodbury Patent Planing Mach. Co. v. Keith, 101 U. S. 479, 25 L. ed. 939.

Delay in applying for a patent for a year or two during the perfection and patenting of a device regarded as a better one is insufficient to show an abandonment. *Esty v. Newton*, 14 App. D. C. 50. But a delay of nine years will be regarded as an abandonment where the only excuse given is that the time did not seem propitious for making profit out of the invention. *Marvel v. Decker*, 13 App. D. C. 562.

Testimony of an inventor that he did not intend to abandon his invention is of little weight as against delay and his undisputed acts. *Bevin v. East Hampton Bell Co.* 5 Fish. Pat. Cas. 23, Fed. Cas. No. 1,379.

² *Eck v. Kutz*, 132 Fed. 758; *Kellogg Switchboard & Supply Co. v. International Teleph. Mfg. Co.* 158 Fed. 104, affirmed in 96 C. C. A. 395, 171 Fed. 651; *Appert v. Brownsville Plate Glass Co.* 144 Fed. 115.

VIII. RIGHTS GENERALLY.

37. Burden of proof.

A party who relies upon an abandonment to establish a right in himself must prove it.¹

¹ *Oreamuno v. Uncle Sam Gold & Silver Min. Co.* 1 Nev. 215; *White v. Holliday*, 11 Tex. 606.

38. Presumptions.

The gratuitous abandonment of an acquired right,¹ or any fact that works a forfeiture of an estate, will not be presumed.² Thus, abandonment of title is not presumed from failure to pay taxes.³

But intent to abandon personal property may be inferred from the conduct of the owners and the situation of the property.⁴

Abandonment of realty will be presumed where the possessor leaves upon the property no indication of his intention to return and resume occupancy.⁵ But it is sufficient to rebut the presumption of abandonment arising from cessation of occupancy, that the occupant left an agent in charge of the premises.⁶

¹ *Green v. Fonbene*, 2 La. Ann. 957.

² *State v. Atkinson*, 24 Vt. 448.

ABB. FACTS—3.

³ *Kreamer v. Voneida*, 24 Pa. Super. Ct. 347.

But see *Timber v. Desparois*, 18 S. D. 587, 101 N. W. 879, where neglect for more than twenty years to pay taxes was held sufficient, with other circumstances, to show an intention to abandon.

⁴ *Log-Owner's Boom. Co. v. Hubbell*, 135 Mich. 65, 4 L.R.A.(N.S.) 573, 97 N. W. 157, in which it is held that to prove abandonment both intention and actual relinquishment must be shown. This holding is in harmony with the other authorities (which are few), as shown by a review thereof in a note accompanying the report of the case in 4 L.R.A.(N.S.) 573.

⁵ *Burke v. Hammond*, 76 Pa. 172.

⁶ *Keane v. Cannovan*, 21 Cal. 291, 82 Am. Dec. 738.

It will be presumed that the pledgeor has abandoned collateral security given to indemnify sureties, and allowed to remain with them for thirty years. *Louchbaum's Estate*, 7 Pa. Dist. R. 100.

39. Adverse possession.

It will be presumed that one who abandons land which he has been holding adversely held in subordination to the title of the true owner,¹ but the burden of proving abandonment or interruption of adverse possession is upon the adverse party.²

¹ *Russell v. Slaton*, 25 Ga. 193.

But where his adverse possession has ripened into title his abandonment will not destroy such title. *Tarver v. Dappen*, 132 Ga. 798, 804, 24 L.R.A.(N.S.) 1161, 65 S. E. 177.

² *Wilson v. Spring*, 38 Ark. 181.

40. Mining rights.

A lessee of land for mining purposes, who fails for twenty-four years after the leases are made to take any steps for the operation and development of the property, must be deemed to have abandoned his rights.¹

¹ *Wilmore Coal Co. v. Brown*, 147 Fed. 931, affirmed in 82 C. C. A. 295, 153 Fed. 143.

See also *McIntosh v. Robb*, 4 Cal. App. 484, 88 Pac. 517, where a mining lease was deemed abandoned after a delay of a year and a half to begin operations or to pay instalments of rent required by the lease.

41. Pleading.

Proof of abandonment is admissible without special plea under denial of title,¹ or where the strict legal title is not involved and the plaintiff relies upon a right founded on possession,² or where, in ejectment to recover a mining claim, the

defendant pleads and relies on a location prior to that of the plaintiff.³

¹ Bell v. Red Rock Tunnel & Min. Co. 36 Cal. 214.

² Willson v. Cleaveland, 30 Cal. 192.

³ Trevaskis v. Peard, 111 Cal. 599, 44 Pac. 246, 18 Mor. Min. Rep. 353.

42. Proof of intent.

An intention to abandon is necessary to effect an abandonment of real property.¹

Acts explanatory of the leaving, which tend to show that it was not accompanied with the intention not to return, may be shown in rebuttal.²

¹ Smith v. Cushing, 41 Cal. 97; Log-Owners' Boom. Co. v. Hubbell, 135 Mich. 65, 4 L.R.A.(N.S.) 573, 97 N. W. 157, and cases in note in 4 L.R.A.(N.S.) 573.

Such intention is not shown by neglect to sue to recover possession. Cleveland v. Cleveland, C. C. & St. L. R. Co. 93 Fed. 113.

Or by payment of taxes on the property by another. Keane v. Cannovan, 21 Cal. 291, 82 Am. Dec. 738; Davis v. Perley, 30 Cal. 630; Philadelphia v. Riddle, 25 Pa. 259.

Or by leaving the premises vacant and unimproved. Judson v. Malloy, 40 Cal. 299.

Or by removal of a fence with intent to erect a better one. Sweetland v. Hill, 9 Cal. 556.

Or by removal from premises improved under promise of a gift of them. Allbright v. Hannah, 103 Iowa, 98, 72 N. W. 421.

Failure to use and occupy a school building is competent, but not conclusive, evidence of a design to abandon. Rowe v. Minneapolis, 49 Minn. 148, 51 N. W. 907.

That a person graded the street in front of property upon notification as owner is pertinent and material in rebuttal of a claim of abandonment. Bliss v. Ellsworth, 36 Cal. 310.

An intention to abandon is not conclusively disproved by the statement of the owner (Myers v. Spooner, 55 Cal. 260); nor is the general belief as to whether mining property has been abandoned admissible (Phenix Mill. & Min. Co. v. Lawrence, 55 Cal. 143); nor the belief of the person taking possession after the supposed abandonment. Stone v. Geyser Quicksilver Min. Co. 52 Cal. 315.

² Bell v. Bed Rock Tunnel & Min. Co. 36 Cal. 214.

ABBREVIATIONS.

1. Judicial notice.
2. Parol evidence.
 - a. In general; general usage.
 - b. Usage of writer.
3. Pleading—variance.
4. Question to witness.

1. Judicial notice.

The court may,¹ but is not bound to,² take judicial notice of the meaning, according to general usage, of abbreviations in common use.

¹ *Power v. Bowdle*, 3 N. D. 107, 21 L.R.A. 328, 44 Am. St. Rep. 511, 54 N. W. 404; *State v. Senn*, 32 S. C. 392, 11 S. E. 292; *Fenton v. Perkins*, 3 Mo. 106; *Birmingham & A. R. Co. v. Maddox & Adams*, 155 Ala. 292, 46 So. 780.

Christian names:

Brown v. Piper, 91 U. S. 37, 42, 23 L. ed. 200, 201 (*dictum* that the court will notice the customary abbreviations of Christian names); *Goodell v. Hall*, 112 Ga. 435, 37 S. E. 725.

Stephen v. State, 11 Ga. 225 (as to meaning of "Jas.").

Buell v. State, 72 Ind. 523 (that "Jerry" means "Jeremiah").

Sparks v. Sparks, 51 Kan. 195, 32 Pac. 892 (that "Dan" means "Daniel").

Alsop v. State, 36 Tex. Crim. Rep. 535, 38 S. W. 174 (that "Bob" means "Robert").

Contra:

Owens v. State, — Tex. Crim. Rep. —, 20 S. W. 558 (courts cannot take judicial notice of contractions in names, as, that "Lettie" is a contraction for "Letitia").

Dates and figures:

May take judicial notice of the meaning of "Dec. 22, '88." *Perdue v. Fraley*, 92 Ga. 780, 19 S. E. 40.

Also of the letters "A. D." *State v. Hodgeden*, 3 Vt. 481; *Com. v. Clark*, 4 Cush. 596.

Also of "Sec. 23, 28, 14." *McChesney v. Chicago*, 173 Ill. 75, 50 N. E. 191.

But not of the meaning of printer's marks: "Oct 3, 4t." *Johnson v. Robertson*, 31 Md. 476.

Initials:

The abbreviation "M. C. R. R." is the recognized name of the Michigan Central Railroad. *Ripley v. Case*, 78 Mich. 126, 18 Am. St. Rep. 428, 43 N. W. 1097. But judicial notice cannot be taken of the meaning of

the letters "C. B. & Q. R. R. Co." *Accola v. Chicago, B. & Q. R. Co.* 70 Iowa, 185, 30 N. W. 503.

Judicial notice will be taken of the meaning of the letters "C. O. D." *State v. Intoxicating Liquors*, 73 Me. 278; *United States Exp. Co. v. Keefer*, 59 Ind. 263, Approved in *Wasson v. First Nat. Bank*, 107 Ind. 206, 8 N. E. 97.

Contra:

McNichol v. Pacific Exp. Co. 12 Mo. App. 401.

Compare also *Collender v. Dinsmore*, 55 N. Y. 200, 205, 14 Am. Rep. 124, where it is intimated that evidence as to "C. O. D." would be necessary; but undoubtedly all courts would not take notice of that term.

The court judicially knows that the abbreviation "f. o. b." means "free on board" (*Capehart v. Furman Farm Improv. Co.* 103 Ala. 671, 49 Am. St. Rep. 60, 16 So. 627); but not that "D. C." means "Dimmit Co." *Vivian v. State*, 16 Tex. App. 262.

The letters "N. P." after a signature clearly indicate the office of notary public. *Rowley v. Berrian*, 12 Ill. 198. In Alabama the letters "N. P." are not self-proving unless attested by a notarial seal as required by statute. *Bayonne Knife Co. v. Umbenhauer*, 107 Ala. 496, 54 Am. St. Rep. 114, 18 So. 175.

The letters "J. P." following a signature, will be taken to mean "justice of the peace." *Shattuck v. People*, 5 Ill. 477; *Russ v. Wingate*, 30 Miss. 440; *State v. Manley*, 1 Overt. 428.

But the letters "J. P. C. Co. Ga." must be explained. *Miller v. Miller*, 43 S. C. 306, 21 S. E. 254.

The sign "&" is synonymous with the word "and." *Brown v. State*, 16 Tex. App. 245; *Com. v. Clark*, 4 Cush. 596; *Malton v. State*, 29 Tex. App. 527, 16 S. W. 423.

The letters "Se.," following the word "acres," and preceding figures, will be held to mean "section" where they appear in a devise. *Chambers v. Watson*, 60 Iowa, 339, 46 Am. Rep. 70, 14 N. W. 336.

The letters "L. S.," following the name of a notary in an acknowledgment in an abstract of records, sufficiently indicate that an official seal was attached. *Bucklen v. Hasterlik*, 155 Ill. 423, 40 N. E. 561.

In conveyances, etc.:

Courts will take notice of well-understood abbreviations used in describing land in conveyances, judicial sales, surveys, and assessments. *Kile v. Yellowhead*, 80 Ill. 208; *Blakeley v. Bestor*, 13 Ill. 708; *Jordan Ditching & Draining Asso v. Wagoner*, 33 Ind. 50.

As to when judicial notice will be taken of abbreviations in tax proceeding, see *People v. Thompson*, 295 Ill. 187, 129 N. E. 155; *Brinkley v. Halliburton*, 129 Ark. 334, 1 A.L.R. 1225, 196 S. W. 118, and note in 1 A.L.R. 1228.

The abbreviation "Miss." in a trust deed, necessarily means "Mississippi." *Wilkinson v. Webb*, 75 Miss. 403, 23 So. 180.

Abbreviations used in court proceedings:

The Illinois Supreme Court refused to take judicial notice of a judgment composed of abbreviations on the ground that it was not entered in the English language as required by the State Constitution. *Stein v. Meyers*, 253 Ill. 199, 97 N. E. 295.

But see dissenting opinion and cases cited, and Article on Judicial notice in Illinois by Homer H. Cooper, 12 Ill. L. Rev. 260, 268.

Places:

It cannot be judicially known that "Mo." stands for "Missouri" (*Ellis v. Park*, 8 Tex. 205); or that "La." stands for "Louisiana." *Russell v. Martin*, 15 Tex. 238. *Contra*, as to "Ind." *Burroughs v. Wilson*, 59 Ind. 436. See also title JUDICIAL NOTICE, § 1, note 8.

Abbreviations generally:

The court will take notice that "acct." stands for "account" (*Heaton v. Ainley*, 108 Iowa, 112, 78 N. W. 789); and that "Supt." stands for "superintendent." *South Missouri Land Co. v. Jeffries*, 40 Mo. App. 360.

² On the danger of relying on the court's taking notice in a doubtful case beyond the knowledge of the judge, though the power exist, see note to *Porter v. Waring*, 2 Abb. N. C. 230.

So, in *Hulbert v. Carver*, 37 Barb. 62, Ingraham, P. J., said: "We can easily guess what was intended by the letters 'Ills. cy.,' but that is not the mode which the law adopts to ascertain the meaning of doubtful terms. It was the duty of the party relying on these terms, as affecting the contract of deposit, to show by parol what was intended."

That the court may take judicial notice of slang or colloquial phrases, see note 11 A.L.R. 661.

2. Parol evidence.

a. In general; general usage.—The meaning of abbreviations may be explained by parol evidence,¹ and oral evidence of general usage is admissible for this purpose.²

¹ *Hattiesburg Plumbing Co. v. Carmichael*, 80 Miss. 66, 31 So. 536; *Elam v. Western U. Teleg. Co.* 113 Mo. App. 538, 88 S. W. 115; *Grasmier v. Wolf*, — Iowa, —, 90 N. W. 813.

² Abb. Tr. Ev. (3d ed.) pp. 402 et seq., 801 et seq., 1475.

United States v. Hardyman, 13 Pet. 176, 10 L. ed. 113 (meaning of letter "M." in Treasury note "bearing interest at M. per centum").

Mercantile abbreviations:

The settled rule is that where characters, marks, or technical terms are used in a particular business, unintelligible to persons unacquainted with such business, and occur in a written instrument, their meaning may be explained by parol evidence, if the explanation is consistent with the terms of the contract. *Allen, J.*, in *Collender v. Dinsmore*, 55 N. Y. 200, 206, 14 Am. Rep. 224; Citing *Dana v. Fiedler*, 12 N.

Y. 40, 62 Am. Dec. 130, the leading case; *Salmon Falls Mfg. Co. v. Goddard*, 14 How. 446, 14 L. ed. 493; *Maurin v. Lyon*, 69 Minn. 257, 65 Am. St. Rep. 568, 72 N. W. 72; *Heideman v. Wolfstein*, 12 Mo. App. 366.

The principle extends to extended forms of expression, as well as to single words or characters. *Dana v. Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130.

The meaning of the letters "C. O. D." may be proved by parol (*American Exp. Co. v. Lesem*, 39 Ill. 312); also the letters "f. o. b." *Sheffield Furnace Co. v. Hull Coal & Coke Co.* 101 Ala. 446, 14 So. 672; *Earl Fruit Co. v. McKinney*, 65 Mo. App. 220.

So with the letters "F. C." used in the wool trade. *New England Dressed Meat & Wool Co. v. Standard Worsted Co.* 165 Mass. 328, 52 Am. St. Rep. 516, 43 N. E. 112.

Also the meaning of "C. L. R. P. oats," under Ga. Code, § 5789, 5 Park's Anno. Code Ga. 1914, p. 3908 (formerly known as § 3801 and later as § 5202), permitting parol evidence to explain ambiguities. *Wilson v. Coleman*, 81 Ga. 297, 6 S. E. 693.

Parol evidence is admissible to show that "Boyo" meant "Bayous," a kind of bean, and that "per 100" meant "per one hundred pounds." *Gardiner v. McDonogh*, 147 Cal. 313, 81 Pac. 964.

Parol evidence is admissible to show that in the dressed lumber trade "brac." means "brackets," that "X" means "by," that "mem." stands for "member," that "ply" signifies "thickness" (*Jaqua v. Witham & A. Co.* 106 Ind. 545, 7 N. E. 314); also to explain the meaning of "Class B. No. 1 good" (*Jones v. Anderson*, 82 Ala. 302, 2 So. 911).

Barton v. Anderson, 104 Ind. 578, 4 N. E. 420 (abbreviations in a description in a tax deed).

Converse v. Wead, 142 Ill. 132, 31 N. E. 314 (abbreviations in abstract of title).

Jones v. State, 35 Tex. Crim. Rep. 565, 34 S. W. 631 (that "Uph.," in a chattel mortgage, means "upholstered").

Davis v. Harnbell, — Tex. Civ. App. —, 24 S. W. 972. (It may be shown that the letters "J. P." and "C." stand for "justice of the peace" and "constable," where an execution sale is collaterally attacked.)

The meaning of "R. L. D.," in the copy introduced in evidence of a record in the office of the collector of internal revenue, may be shown. *State v. White*, 70 Vt. 225, 39 Atl. 1085.

But it cannot be shown that the letters "P. & D." in the docket entry of a justice of the peace mean "plaintiff" and "defendant." *Rood v. School Dist. No. 7*, 1 Dougl. (Mich.) 502.

Parol evidence was held admissible to show that the letters "Pt." after the name of the payee in a draft were intended to identify him as president of a bank. *Griffin v. Erskine*, 131 Iowa, 444, 109 N. W. 13, 9 Ann. Cas. 1193.

b. Usage of writer.—A usage peculiar to the parties may be proved to explain an abbreviation; ¹ but in case of transaction

inter partes (as distinguished from a will,² etc.), the usage of the writer alone is not competent in his favor, without evidence that the other party or person addressed was aware of the usage, or understood the term in the same sense.

¹ See, for instance, *Barry v. Coombe*, 1 Pet. 640, 7 L. ed. 295 (the words "your half E. B. wharf and premises" in a memorandum of a sale of land).

² *Abb. Tr. Ev.* (3d ed.) pp. 402 et seq.

Jagua v. Witham & A. Co. 106 Ind. 545, 7 N. E. 314. (The intention of a party in making use of abbreviations cannot be shown.)

3. Pleading—variance.

The meaning of an abbreviation or other character, in a contract on which the action is directly founded, must be alleged in pleading, in order to let in oral evidence of its meaning.¹

¹ *United States v. Hardyman*, 13 Pet. 176, 179, 10 L. ed. 113 (criminal case); *American Exp. Co. v. Lesem*, 39 Ill. 312, 333 (civil case).

Variance:

Evidence that the abbreviation "Nos." was used in an instrument, instead of "numbers," as alleged, is not a fatal variance. *Shope v. State*, 106 Ga. 226, 32 S. E. 140. Nor is it necessary variance that a note declared on as payable at the Farmer's & Mechanics' Bank is payable at the F. & Mechanics' Bank. *Comstock v. Savage*, 27 Conn. 184. And to establish the identity of a note it may be shown that "Mech's" therein means "Mechanics." *Hite v. State*, 9 Yerg. 357.

4. Question to witness.

A witness of experience in the trade may be asked what is the meaning in that trade of technical phrases and abbreviations used in a document in evidence relating to a transaction in that trade.¹

¹ *Storey v. Salomon*, 6 Daly, 531, 540 ("settled at the market 72½," indorsed on stock, straddle. The judgment was affirmed without questioning this point, in 71 N. Y. 420).

Sheldon v. Benham, 4 Hill, 129, 40 Am. Dec. 271 (meaning of memorandum made by a bank teller since deceased).

Lane v. Union Nat. Bank, 3 Ind. App. 299, 29 N. E. 613 (meaning of "Nat." in a note).

State v. O'Connell, 82 Me. 30, 19 Atl. 86 (meaning of "R. L. D." in a record of special internal revenue taxes).

Kotz v. Belz, 178 Ill. 434, 53 N. E. 367 (abbreviations in abstract books of original entry).

Sufficiency of abbreviation to show official character of individual signing or attesting a document, see note to *Summer v. Mitchell*, 14 L.R.A. 815.

ABILITY.

1. Judicial notice.
2. Presumptions.
3. Direct testimony.
4. Expert testimony.
5. Experiments in court.
6. Experiments out of court.
7. Witness's ability.
8. Conclusions.
9. Relevancy and materiality.

See also CAPACITY; DISEASE; FEELINGS; HEALTH; INTOXICATION.
As to financial ability, see INSOLVENCY.

1. Judicial notice.

It is a matter of common knowledge that persons who have lost a hand are active and successful in many vocations, even where manual labor is required.¹

¹ Peoria, D. & E. R. Co. v. Hardwick, 53 Ill App. 161.

2. Presumptions.

Every citizen is presumed to enjoy a normal condition of mind and body, until the contrary is shown.¹

¹ State ex rel. Board of Health v. Lederer, 52 N. J. Eq. 675, 29 Atl. 444; Seligman v. Victor Talking Mach. Co. 71 N. J. Eq. 697, 701, 63 Atl. 1093.

3. Direct testimony.

A witness who has had continuous opportunity of observation may, although not an expert, testify directly what ordinary acts a person was able or unable to do.

This is matter of fact, the result of observation, although involving in some measure opinion or judgment.¹

¹ Parker v. Boston, & H. S. B. Co. 109 Mass. 449, Approved in Com. v. Sturtivant, 117 Mass. 134, 19 Am. Rep. 401; Sloan v. New York C. R. Co. 45 N. Y. 125; Chicago City R. Co. v. Van Vleck, 143 Ill. 480, 32 N. E. 262; Re Goldthrop, 94 Iowa, 336, 58 Am. St. Rep. 400, 62 N. W. 845; Stone v. Moore, 83 Iowa, 186, 49 N. W. 76.

See also note L.R.A.1918A, 681, for discussion and citation of other cases admitting in evidence the opinion of witnesses as to the ability of a person to do a specified thing.

French v. Ware, 65 Vt. 338, 26 Atl. 1096 (a man's divorced wife is competent to testify to his inability to labor).

Ashley Wire Co. v. McFadden, 66 Ill. App. 26. (The daughter of a decedent may testify as to his ability to perform hard labor.)

Lawson v. Conaway, 37 W. Va. 159, 18 L.R.A. 627, 38 Am. St. Rep. 17, 16 S. E. 564; Harris v. Detroit City R. Co. 76 Mich. 227, 42 N. W. 1111. (A witness may testify as to the physical ability of another whose arm was broken.)

Adams v. People, 63 N. Y. 621, Aff'g 3 Hun, 654 (testimony that one's eyesight was good).

Missouri, K. & T. R. Co. v. Wright, 19 Tex. Civ. App. 47, 47 S. W. 56 (testimony by a physician that one injured was confined to his bed, and could not walk without a crutch or help of some kind).

Ashland v. Marlborough, 99 Mass. 47. (A nonexpert witness may testify to acts and appearances which indicate disability or the contrary, but may not give opinions on the subject.)

Chattanooga, R. & C. R. Co. v. Huggins, 89 Ga. 494, 15 S. E. 848. (A witness, after stating facts within his knowledge tending to show that plaintiff in a suit for personal injuries was seriously disabled, may express his opinion that he is only able to do work of a very light nature.)

A person injured at a railroad crossing may testify as to the first point at which the train could be seen on account of certain specified obstructions. The question does not call for a conclusion. Kansas City M. & B. R. Co. v. Weeks, 135 Ala. 614, 34 So. 16. See also Wallace v. North Alabama Traction Co. 145 Ala. 682, 40 So. 89.

4. Expert testimony.

An expert may testify to the degree of physical and mental ability.¹

¹ Beckwith v. New York C. R. Co. 64 Barb. 299. Also whether one having a wooden leg was capable of committing a crime in the matter alleged. State v. Perry, 41 W. Va. 641, 24 S. E. 634.

As to how far a person is able to walk after being shot through the heart. State v. McLaughlin, 149 Mo. 19, 50 S. W. 315.

Whether an injured condition of one's arm might coexist with the ability to use it in the manner witnessed by the jury. Graves v. Battle Creek, 95 Mich. 266, 19 L.R.A. 641, 35 Am. St. Rep. 561, 54 N. W. 757.

But in order to admit testimony that A, having lost an eye, would not under given circumstances see an object as well as B, who had not, it should appear that the expert had examined their eyes. People v. Marseiler, 70 Cal. 98, 11 Pac. 503.

Nor can expert evidence be given by one who does not show himself possessed of special knowledge on the subject, as to the capacity of a maimed person to do various kinds of work by the use of an artificial leg. New Jersey Traction Co. v. Brabban, 57 N. J. L. 691, 32 Atl. 217,

Persons who have noticed the agility and power displayed by fish in ascending rivers may express an opinion as to their ability to ascend a certain stream. *Cottrill v. Myrick*, 12 Me. 222.

5. Experiments in court.

A party or a witness may be permitted to demonstrate his physical ability or inability in court when the adverse party is afforded an opportunity to cross-examine him.¹

On the cross-examination it is in the discretion of the court whether or not to require a party who has testified to a physical inability involved in the issue, to perform an act in the presence of the jury which may manifest its nature and extent.²

¹ *Prichard v. Moore*, 75 Ill. App. 553. (In an action for malpractice in the treatment of a fractured arm the plaintiff, while on the witness stand, may show the jury to what extent he can use his arm.)

Citizens' Street R. Co. v. Willooby, 134 Ind. 563, 33 N. E. 627. (In an action for personal injuries a physician may exhibit the plaintiff to the jury, and place him in different attitudes, in order to enable them to determine the extent of his disability.)

Osborne v. Detroit, 32 Fed. 36. (The plaintiff's medical attendant, not sworn, may demonstrate her loss of feeling by thrusting a pin into her alleged paralyzed side.)

Tompkins v. Scranton Traction Co. 3 Pa. Super Ct. 576 (test of the eyesight of a witness to an accident).

² *Heath v. State*, 93 Ga. 446, 21 S. E. 77 (not error to refuse to allow a witness to go to the window and look at a person upon the street who was not visible to the judge or jury from their position, to test the witness's power of vision).

Ort v. Fowler, 31 Kan. 478, 47 Am. Rep. 501, 2 Pac. 580 (not error to require a defendant to read, whose defense to a note was that he signed in reliance on the false representations of its contents by the payee, because he was unable to read it).

Hatfield v. St. Paul & D. R. Co. 33 Minn. 130, 53 Am. Rep. 14, 22 N. W. 176, (not error to refuse to require plaintiff to walk after she testified she could not walk without limping).

But compare *CONDITION AND CRIMINAL TRIAL BRIEF*.

6. Experiments out of court.

Testimony concerning *ex parte* tests as to how far objects could be seen upon the railroad track, and within what distance a train could be stopped at the scene of the accident, is admissible when made under essentially identical conditions.¹

¹ *Burg v. Chicago, R. I. & P. R. Co.* 90 Iowa, 106, 48 Am. St. Rep. 419,

57 N. W. 680; *Byers v. Nashville, C. & St. L. R. Co.* 94 Tenn. 345, 29 S. W. 128; *Chicago & A. R. Co. v. Logue*, 47 Ill. App. 292; *Chicago & A. R. Co. v. Legg*, 32 Ill. App. 218. (Witnesses may testify as to experiments made to determine whether stock, before going upon the track, could have been seen by railroad employees, in view of the disputed character of the surroundings.)

See extensive note in 8 A.L.R. 18 on experimental evidence as affected by similarity or dissimilarity of conditions. See p. 52 thereof as to possibility of seeing persons on or near track.

7. Witness's ability.

It is competent to ask a witness whether he was able to do a specified act,¹ or used the best ability and skill that he possessed,² for his ability is a fact within his own knowledge.

¹ *People v. Tubbs*, 37 N. Y. 586.

² *Doyle v. New York Eye & Ear Infirmary*, 80 N. Y. 631, 633 (question to physician sued for malpractice; but whether the question was leading was not determined).

Brink v. Hanover F. Ins. Co. 80 N. Y. 108, 116 (diligence in serving notice).

Choate v. Southern R. Co. 119 Ala. 611, 24 So. 373. (A conductor and engineer may testify, as expert witnesses, that they did everything in their power to stop the train and avert an injury.)

Winter v. Central Iowa R. Co. 80 Iowa, 443, 45 N. W. 737. (In an action for personal injuries the plaintiff may testify that after the accident he tried to work, but was unable to do so.)

8. Conclusions.

Testimony by one injured, that he has not done any work since the accident because not able to do any, is not a conclusion, but a statement that his physical ability has prevented him from working.¹

¹ *Cass v. Third Ave. R. Co.* 20 App. Div. 591, 47 N. Y. Supp. 356.

9. Relevancy and materiality.

Evidence that one injured in driving across a ditch was short-sighted and wore spectacles is admissible on the issue of contributory negligence.¹

Testimony as to the health and strength of a man several years before is inadmissible on the question of his capacity to earn wages.²

The testatrix's ability to labor may be shown in rebuttal of

the contestant's evidence that the testatrix was weak in body and mind.³

¹ *Austin v. Ritz*, 72 Tex. 391, 9 S. W. 884.

² *Evans v. Horton*, 93 Ala. 379, 9 So. 534.

³ *Denny v. Pinney*, 60 Vt. 524, 12 Atl. 108.

ABSENCE.

1. Reputation.
2. Fact of letters received.
3. Contents.
4. Telegrams.
5. Entries by deceased person.
6. Answers to inquiries.
7. Presumption of continuance.
8. Public officer's absence.
9. Reason or motive for absence.
10. Opinions.
11. Relevancy and sufficiency.

See also ABANDONMENT; DESERTION; DOMICIL; RESIDENCE.

Presumption of death from absence, see DEATH.

1. Reputation.

Absence of a person from the state cannot be proved by general reputation.¹

But general reputation is competent in corroboration of circumstantial evidence of absence.²

¹ *State Bank v. Seawell*, 18 Ala. 616; *Mitchell v. State*, 114 Ala. 1, 22 So. 71. In *Wheeler v. Webster*, 1 E. D. Smith, 1, the court refused to take judicial notice that Daniel Webster was not a resident of New York.

² Testimony that witness knew the person, and that he had recently broken up his establishment and was sold out, and thereafter either departed or kept concealed; that previous thereto witness saw him frequently, but since then not at all; and that it is generally understood and believed, etc.,—Held, sufficient to give the magistrate jurisdiction under the statute as to absent and absconding debtors. *Re Faulkner*, 4 Hill, 598; *Van Alstyne v. Erwin*, 11 N. Y. 331.

2. Fact of letters received.

Testimony of a witness that he received letters from a deponent apparently from places without the state, shortly before the trial, is competent proof of absence.¹

¹ *Carman v. Kelly*, 5 Hun, 283 (so held for the purpose of excusing his nonproduction, and to let in his deposition *de bene esse*).

Gaines v. Relf, 12 How. 472, 534, 13 L. ed. 1071, 1097 (Catron, J., delivering the opinion of the court, says: "The date of a letter is evidence to prove where the writer was, and the time when he wrote").

The like evidence was received in *Prince v. Blackburn*, 2 East, 250, to show absence of subscribing witness.

For the presumption that letters received in answer are from the person addressed, see **LETTERS**.

3. Contents.

Letters written during absence from home are admissible in evidence as explanatory of the nature of the departure and absence, the departure and absence being regarded as one continuous act.¹

¹ *Rawson v. Haig*, 2 Bing. 99, 9 J. B. Moore, 217, 1 Car. & P. 77, Cited in *Cattison v. Cattison*, 22 Pa. 277.

4. Telegrams.

A telegram received in reply, purporting to be from a person apparently at a distant place, is not competent to show his absence.¹

¹ *Howley v. Whipple*, 48 N. H. 487. (The reason is that it is not an original. See note to *Oregon S. S. Co. v. Otis*, 14 Abb. N. C. 394.)

Contra: *Conner v. State*, 23 Tex. App. 378, 5 S. W. 189 (absence of witness so as to let in deposition).

5. Entries by deceased person.

To prove absence of a person since deceased, from a specified place, entries made by him in the course of professional duty, of official acts, the making of which would have required his presence at another place, are competent evidence that he was present at the latter place at the time stated in such entries.¹

¹ *Clark v. Society of Saint James' Church*, 21 Hun, 95.

6. Answers to inquiries.

Answers given to inquiries duly made in search of a person are not hearsay, but competent as part of the *res gestæ*, to show his absence;¹ otherwise of hearsay statements, or answers not induced by due inquiry for the purpose.²

¹ *People v. Rowland*, 5 Barb. 449 (answers given at residence and information derived from neighbors on inquiry for a subscribing witness). *Bronner v. Frauenthal*, 37 N. Y. 166, 169, 172 (inquiries at the usual stopping place within the state of a nonresident whose deposition had been taken *de bene esse*).

Buswell v. Lincks, 8 Daly, 518, 523, and cases cited (answers given at residences to a person calling to serve process).

To similar effect, *Chase v. Lawson*, 36 Hun, 221; *Phelps v. Foot*, 1 Conn. 387.

Van Dyne v. Thayre, 19 Wend. 162, 165 (holding that the absence of a subscribing witness should be shown by diligent inquiry at his former residence, and by information derived from his neighbors).

To similar effect see *Jackson ex dem. Lansing v. Chamberlain*, 8 Wend. 620; *Jackson ex dem. Woodruff v. Cody*, 9 Cow, 140.

Contra: *Fry v. Bennett*, 1 Abb. Pr. 289 (holding answers given at the residence, to a person inquiring for a witness whose deposition had been taken *de bene esse*, were not competent as a ground for reading his deposition). See also 1 Taylor, Ev. 523*n*.

Compare discussion in *Howard v. Holbrook*, 9 Bosw. 237, 23 How. Pr. 64 (holding that after being told that the principal was absent, calling again and finding one who answered to the name and admitted identity, was sufficient evidence of identity to go to the jury).

Whether the rule is applicable in a criminal case to prove an element of the offense,—query. See FICTITIOUS PERSONS; Criminal Trial Brief.

² *Com. v. Ricker*, 131 Mass. 581 (holding, on the trial of an indictment, that on the question whether defendant was in the commonwealth at a particular time the testimony of a sergeant of police that on a certain day a police officer reported to him that he had seen the defendant in the street that night is incompetent).

7. Presumption of continuance.

The fact of continued nonresidence at a previous time having been shown, absence from the state at the present time may be inferred.¹

¹ *Nixon v. Palmer*, 10 Barb. 175, Reversed on other ground in 8 N. Y. 398; *Rixford v. Miller*, 49 Vt. 319; *State Bank v. Seawell*, 18 Ala. 616.

8. Public officer's absence.

Absence of one of several officers or other persons clothed with authority of a public nature cannot be presumed from the mere fact that an official act or report was signed by the others only.¹

¹ *Yates v. Russell*, 17 Johns. 461, 468 (referee's report sustained by contrary presumption).

McCoy v. Curtice, 9 Wend. 17, 24 Am. Dec. 113 (warrant for collection of taxes sustained as justification to collector, by contrary presumption). To the same effect, *Doolittle v. Doolittle*, 31 Barb. 312.

Downing v. Rugar, 21 Wend. 178, 184, 34 Am. Dec. 223 (same of proceedings of overseers of poor on which warrant was issued).

Woolsey v. Thompkins, 23 Wend. 324 (same in case of laying out a high way).

Doughty v. Hope, 3 Denio, 249, 594, Affirmed in 1 N. Y. 79 (report of commissioners of estimate and assessment).

To same effect, *Miller v. Garlock*, 8 Barb. 153; *Colman v. Shattuck*, 2 Hun, 497; *Tucker v. Rankin*, 15 Barb. 471.

People ex rel. Kingsland v. Bradley, 64 Barb. 228 (official certificate signed by two, aided by the same presumption as to the presence of the third, the fourth being dead and the fifth having vacated the office by removal).

Smith v. Helmer, 7 Barb. 416 (proceedings by commissioners to alter highway).

Horton v. Garrison, 23 Barb. 176 (note given by school trustees).

Stewart v. Wallis, 30 Barb. 347; *People ex rel. Kingsland v. Palmer*, 52 N. Y. 87 (presumed that all met); *Delaware County Bd. of Excise Comrs. v. Sackrider*, 35 N. Y. 154 (presumed that the consent of all was obtained); *John Shillito Co. v. McClung*, 2 C. C. A. 526, 6 U. S. App. 128, 51 Fed. 868 (absence of the Secretary of the Treasury will be presumed in support of the decision of the assistant secretary).

9. Reason or motive for absence.

On the question whether the absence of a person was with fraudulent intent, his declarations, made about the time of his departure or during his absence, and letters written by him during the absence, are competent against him.¹

The intent of an absentee in departing may be shown by letters written, acts done, and declarations made about the time of departure.²

¹ *Brady v. Parker*, 67 Ga. 636 (declarations just before departure).

Smith v. Cramer, 1 **Scott**, 541, 1 **Bing. N. C.** 1, 1 **Hodges**, 124 (letters written a month prior to departure).

Rouch v. Great Western R. Co. 1 **Q. B.** 51, 61, 4 **Perry & D.** 686, 2 **Eng. Ry. & C. Cas.** 505, 5 **Jur.** 826 (letters written during absence).

² **Thorndike v. Boston**, 1 **Met.** 242. (A letter expressing an intent to reside abroad permanently is admissible in the writer's favor as a declaration, when written without knowledge of the assessment of the tax sought to be enforced.)

Declarations made three weeks before removal, or about the time of it, and expressive of intent, are admissible. **Kilburn v. Bennett**, 3 **Met.** 199; **Salem v. Lynn**, 13 **Met.** 544.

Declarations of a person, made in connection with his departure from a place and concerning his intent, are admissible. **Burgess v. Clark**, 3 **Ind.** 250; **Church v. Rowell**, 49 **Me.** 367.

Ross v. Clark, 32 **Mo.** 296. (Testimony of the sale of goods in an unusual or clandestine manner at under prices is admissible to show the intent of a debtor's absence.)

Such declarations and letters may be competent in his own favor.¹

¹ **United States v. Penn**, 13 **Nat. Bankr. Reg.** 464, **Fed. Cas. No.** 16,025 (holding that where the question in issue was whether the defendant has absconded, his declarations made while on his way from his place of residence, as to his intention of returning, were competent in his favor).

Declarations made on return may be received. **Bateman v. Bailey**, 5 **T. R.** 512. (A conversation with a bankrupt, which passed on his return after nearly two days' absence, was received.)

But they must have been made soon after his return. **Lees v. Marton**, 1 **Moody & R.** 210.

Marsh v. Meager, 1 **Starkie**, 353 (holding a conversation with the bankrupt not competent if it did not appear to be contemporary with the act, or immediately subsequent).

10. Opinions.

Testimony by a witness that he knows a party is not about to remove out of the state on a specified date is merely an opinion, and inadmissible.¹

¹ **Baldwin v. Walker**, 94 **Ala.** 514, 10 **So.** 391.

11. Relevancy and sufficiency.

Proof of absence out of the jurisdiction of an alleged ac-

complice of the defendant is inadmissible where it can have no legitimate bearing upon the issue.¹

Evidence that a party "went east" with his family, and remained several years, is insufficient to show that he was at any time out of the state.²

¹ People v. Sharp, 107 N. Y. 427, 1 Am. St. Rep. 851, 14 N. E. 319.

² Tremaine v. Weatherby, 58 Iowa, 615, 12 N. W. 609; Hallet v. Bassett, 100 Mass. 167. (Absence from the state, of a seafaring man, is insufficient to bar the running of the statute of limitations, when he maintained a furnished room in the state, which he occupied at intervals, and regarded as his home.)

Clarke v. Cummings, 5 Barb. 339. (Reasonable search and inquiry for an absent life tenant is a mixed question of law and fact to be determined by the particular circumstances of the case; and inquiry of a tenant only may be reasonable inquiry.)

ABSTRACTS.

1. Voluminous documents.
2. Lost or destroyed documents.
3. Abstracts of title.
 - a. In general.
 - b. Admissibility under Illinois burnt records act.
4. Extracts from reports.
5. Extracts from books and records.

See also ACCOUNTS; INDEBTEDNESS; NEGATIVE.

As to liability of officer for defects in abstracts of title, see note to Mallory v. Ferguson, 22 L.R.A. 99.

For right of abstractors to inspect records, see note to Re Caswell, 27 L.R.A. 82.

1. Voluminous documents.

If the original documents are inconveniently voluminous or numerous, and the result to be gathered from them is the material fact, a qualified witness who has examined them may testify to the result, subject to cross-examination on details;

and an abstract or summary made by him out of court, with the originals before him, and which he testifies is correct, may be received in evidence instead of requiring the originals.¹

But this is discretionary with the court.²

¹ *Burton v. Driggs*, 20 Wall. 125, 22 L. ed. 299; *National Ulster County Bank v. Madden*, 41 Hun, 113 (Landon, J., says: "A true copy differs from a true abstract only in degree").

Hollingsworth v. State, 111 Ind. 289, 12 N. E. 490 (holding the rule equally applicable in criminal cases).

In *Boston & W. R. Corp. v. Dana*, 1 Gray, 83, 104, Bigelow, J., says: "It should only be done where books and documents are multifarious and voluminous and of a character to render it difficult for the jury to comprehend material facts without the aid of such statements, and even in such cases they should not be admitted unless verified by persons who have prepared them from the originals in proof, and who testify to their accuracy, and after ample time has been given to the adverse party to examine them and test their correctness."

Accountants may testify to the result of their examination of voluminous books, records, papers, or entries of such a character as to render it difficult for the jury to arrive at a correct conclusion. *Chicago, St. L. & P. R. Co. v. Wolcott*, 141 Ind. 267, 50 Am. St. Rep. 320, 39 N. E. 451; *Culver v. Marks*, 122 Ind. 554, 7 L.R.A. 489, 17 Am. St. Rep. 377, 23 N. E. 1086; *Equitable Acci. Ins. Co. v. Stout*, 135 Ind. 444, 33 N. E. 623; *Crawford v. Roney*, 126 Ga. 763, 55 S. E. 499.

Harrison v. Middleton, 11 Gratt. 527. (A witness may use an extract from surveyor's field notes to refresh his recollection, but, since it is not evidence, he must then speak from his recollection.)

Johnson v. Kershaw, 1 De G. & S. 264, 11 Jur. 553, 795. (The result of an expert's examination of partnership books is inadmissible where the books are not in evidence.)

State v. Powell, 40 La. Ann. 234, 8 Am. St. Rep. 522, 4 So. 46. (Certified extracts from the books of the auditor of public accounts, showing the condition of the account of a defaulting tax collector, are competent evidence in a suit against him and his sureties.)

² *Lynn v. Cumberland*, 77 Md. 449, 26 Atl. 1001.

Von Sachs v. Kretz, 72 N. Y. 548, Affirming 10 Hun, 95 (holding it not error to refuse to allow a witness with the books before him to give a summary where it did not appear that expert testimony was necessary).

2. Lost or destroyed documents.

An abstract made from lost or destroyed documents is ad-

missible as secondary evidence when its correctness is testified to by the person making it, and the loss of the original is shown.¹

¹ *Ætna Ins. Co. v. Weide*, 9 Wall. 677, 19 L. ed. 810; *Florida C. & P. R. Co. v. Bucki*, 16 C. C. A. 42, 30 U. S. App. 454, 68 Fed. 864; *Mayson v. Beazley*, 27 Miss. 106; *Ritchie v. Kinney*, 46 Mo. 298. (A statement made up from bank books is inadmissible when their loss is not shown.)

Sizer v. Burt, 4 Denio, 426. (Statement by a witness of the parts extracted by him from a document since lost or destroyed is competent secondary evidence, where he has read the whole document, and can give a general account of its contents.)

Robbins v. Ginnochio, — Tex. Civ. App. —, 45 S. W. 34. (A purported abstract of the destroyed record of a deed is admissible as common-law evidence.)

3. Abstracts of title.

a. In general.—An abstract of title is admissible to show that a certain conveyance appeared upon it, and as a reason for obtaining a quitclaim deed;¹ to show the original ownership of land sold for taxes;² and, when furnished by a vendor, is admissible against him to show defective title.³ But an abstract is not admissible to show title at a certain time, although the records of title have been destroyed, without proof of its correctness by the person who made or compared it.⁴

¹ *Seaman v. Bisbee*, 163 Ill. 91, 45 N. E. 208.

² *People ex rel. Hamilton Park Co. v. Wemple*, 67 Hun, 495, 22 N. Y. Supp. 497.

³ *Hartley v. James*, 50 N. Y. 38; *Kane v. Rippey*, 22 Or. 296, 23 Pac. 180.

⁴ *Irwin v. Scheuerer*, 10 Ohio C. C. 568, 6 Ohio C. D. 815.

An abstract of the registries upon a lot showing the granting by the Crown of a patent is not evidence of title or of any of the conveyances mentioned in it. *Reed v. Ranks*, 10 U. C. C. P. 202.

A certified abstract of title made by a county clerk is admissible in evidence. *Frugia v. Trueheart*, 48 Tex. Civ. App. 513, 106 S. W. 736.

Loss of deed and the destruction of county records having been shown, an abstract of title made by a former recorder was admitted to show a tax deed to plaintiff's remote grantor. *Kries v. Holladay-Klotz Land & Lumber Co.* 121 Mo. App. 184, 98 S. W. 1086.

b. Admissibility under Illinois burnt records act.—An abstract of title is admissible when made in the ordinary course

of business prior to the destruction of a deed and its record,¹ or when found in the hands of the owner with deeds from preceding grantees, and presumably handed down as an accompaniment of the muniments of title,² or when found in the possession of abstracters engaged as such at the time of the fire,³ although it fails to show that some of the lost deeds were properly acknowledged; and it may be introduced in evidence in part,⁴ but is incompetent to prove that a deed was recorded prior to the destruction of the records, unless the deed itself is lost or destroyed.⁵

An abstract of title dated prior to the time the original documents were destroyed is admissible in ejectment without proof that the originals were duly executed by persons in actual possession of the premises at the time of the destruction of the records.⁶ That abstract of title was prepared by one clerk from memoranda made by others from the record does not render it inadmissible as the copy of a copy;⁷ nor are extracts made from the destroyed records, and in the possession of abstracters, secondary evidence of the abstract of title compiled from them.⁸

¹ Russell v. Mandell, 73 Ill. 136; Miller v. Shaw, 103 Ill. 277.

Such an abstract is competent after preliminary proof showing that original conveyances or records included therein have been lost or destroyed or cannot be produced. Glos v. Wheeler, 229 Ill. 272, 82 N. E. 234.

² Richley v. Farrell, 69 Ill. 264.

³ Converse v. Wead, 142 Ill. 132, 31 N. E. 314.

⁴ Heinsen v. Lamb, 117 Ill. 549, 7 N. E. 75.

⁵ Walton v. Follansbee, 165 Ill. 480, 46 N. E. 459.

⁶ Chicago & A. R. Co. v. Keegan, 152 Ill. 413, 39 N. E. 33.

⁷ Heinsen v. Lamb, 117 Ill. 549, 7 N. E. 75.

⁸ Converse v. Wead, 142 Ill. 132, 31 N. E. 314.

4. Extracts from reports.

The putting in evidence of statements from a report produced by the other party under order of the court does not make the whole report admissible on the part of the party who produced it, but as much of it as relates to the statements introduced may be proved.¹

Part of the returns made by officers of a turnpike company

to the state authorities as to the value of capital stock may be introduced against the company to show the value of the road.²

¹ Laufer v. Bridgeport Traction Co. 68 Conn. 475, 37 L.R.A. 533, 37 Atl. 379.

² West Chester & W. Pl. Road Co. v. Chester County, 182 Pa. 40, 37 Atl. 905.

5. Extracts from books and records.

Records when used to prove the facts therein contained should, as a general rule, be produced entire.¹

An unsworn transcript from the records of the registrar of vital statistics is inadmissible to prove cause of death;² nor is a certificate of the executive department, which gives substantially the contents or a part of the contents of a record, admissible;³ nor is the mere certificate of the custodian of record sufficient to prove that a certain fact appears by them.⁴ Neither will an authenticated abstract of a judgment, which states an impossible date as that when the judgment was rendered, be received in evidence, although the error is manifestly clerical.⁵

¹ Crone v. Dawson, 19 Mo. App. 214.

Little v. Barlow, 37 Fla. 232, 53 Am. St. Rep. 249, 20 So. 240. (To sustain the defense of *res judicata* the complete record in the former suit, including the judgment, should be produced, and not incomplete and detached portions.)

O'Hara v. Mobile & O. R. Co. 22 C. C. A. 512, 40 U. S. App. 471, 76 Fed. 718. (A party desiring to use as evidence part of the record of a judicial proceeding may introduce such portion as is material, without producing a transcript of the whole record.)

² Metropolitan L. Ins. Co. v. Anderson, 79 Md. 375, 29 Atl. 606.

³ Doe ex dem. Henderson v. Roe, 16 Ga. 521.

⁴ Wayland v. Ware, 109 Mass. 248.

⁵ Rushing v. Willis, — Tex. Civ. App. —, 28 S. W. 921.

ACCEPTANCE.

1. Judicial notice.
2. Burden of proof.
3. Presumptions.
 - a. Acceptance of beneficial instrument or grant.
 - (1) In general.
 - (2) By corporation or officer thereof.
 - b. Acceptance of bill of exchange.
 - c. By carrier, of goods for transportation.
 - d. Acceptance of highways.
4. Documentary evidence.
5. Parol evidence concerning written acceptance.
6. Direct question.
7. Admissions.
8. *Res gestæ* of receiving.
9. Relevancy and materiality; acceptance of deed or lease; of order.
10. Acceptance of goods or work.
11. Acceptance of land patent.
12. Weight, effect, and sufficiency.
 - a. Acceptance of land dedicated to public use.
 - b. To satisfy statute of frauds.
 - c. Of bill of exchange.

See also DEDICATION; DELIVERY.

Sufficiency and effect of acceptance of bill or draft, see notes to *Hopps v. Savage*, 1 L.R.A. 648, and *Fiske v. First Nat. Bank*, 7 L.R.A. 209.

Of forged paper, see note to *Goshen Nat. Bank v. Bingham*, 7 L.R.A. 595.

Promise to accept, see note to *Lindley v. First Nat. Bank*, 2 L.R.A. 709.

Validity of oral promise to accept an order or bill of exchange, see note to *Allen v. Leavens*, 26 L.R.A. 620.

1. Judicial notice.

The court cannot take judicial notice that a railroad company has accepted the provisions of a statute requiring it to fence its right of way.¹

¹ *Gorman v. Pacific R. Co.* 26 Mo. 441, 72 Am. Dec. 220.

2. Burden of proof.

The burden of proof is on the party alleging that promissory notes were accepted as payment.¹

One seeking to foreclose a mortgage against the grantee in a

deed by which the mortgage is assumed has the burden of proving a delivery to, and acceptance by, the grantee of the deed.²

The burden of proving delivery and acceptance of goods sold, so as to take the case out of the statute of frauds, rests upon the person setting up the contract.³

One who receives and uses machinery,⁴ or opens packages of goods and fails to object that they do not correspond with the sample,⁵ has the burden of rebutting his apparent acceptance of the merchandise.

If the holder of a bill of exchange relies upon a conditional acceptance he must show affirmatively that the condition has been complied with.⁶

¹ Bradley v. Harwi, 43 Kan. 314, 23 Pac. 566.

The rule as stated in the text is the general rule. Note 35 L.R.A. (N.S.) 98. In Indiana, Maine, Massachusetts and Vermont it is held that a rebuttable presumption of payment arises on giving a negotiable note for an antecedent debt. Scott v. Edgar, — Ind. App. —, 60 N. E. 468; Shumway v. Reed, 34 Me. 560, 56 Am. Dec. 679; Bunker v. Barron, 79 Me. 62, 1 Am. St. Rep. 282, 8 Atl. 253; Goodnow v. Hill, 125 Mass. 587; Arnold v. Sprague, 34 Vt. 402. Note 35 L.R.A. (N.S.) 99.

In Indiana, however, the giving of a note not governed by the law merchant does not operate as payment unless stipulated between the parties. Alford v. Baker, 53 Ind. 279; Olvey v. Jackson, 106 Ind. 286, 4 N. E. 149.

² Shattuck v. Rogers, 54 Kan. 266, 38 Pac. 280.

³ Harris Photographic Supply Co. v. Fisher, 81 Mich. 136, 45 N. W. 661.

⁴ Whitney Iron Works Co. v. Reuss, 40 La. Ann. 112, 3 So. 500.

⁵ Wineland v. Jones, 77 Iowa, 401, 42 N. W. 333.

⁶ Ford v. Angelrodt, 37 Mo. 50, 88 Am. Dec. 174.

3. Presumptions.

a. Acceptance of beneficial instrument or grant.—(1) *In general.*—An infant's acceptance of a grant is presumed from the beneficial nature of the grant, if it is wholly beneficial and imposes no burden.¹

Acceptance of a bond, deed, gift, or other beneficial instrument is presumed² or inferred from delivery to, and retention by, a grantee,³ and until the contrary appears;⁴ but no such

presumption will arise as long as the grantee is ignorant of the conveyance.⁵

¹ Francis v. New York & B. Elev. R. Co. 17 Abb. N. C. 1, 6; Fellows v. Wood, 59 L. T. N. S. 513, 52 J. P. 822; Standiford v. Standiford, 97 Mo. 231, 3 L.R.A. 299, 10 S. W. 836; Tobin v. Bass, 85 Mo. 654, 55 Am. Rep. 392; Sneathen v. Sneathen, 104 Mo. 201, 24 Am. St. Rep. 326, 16 S. W. 497; Davis v. Garrett, 91 Tenn. 147, 18 S. W. 113.

² Peavey v. Tilton, 18 N. H. 151, 45 Am. Dec. 365; Mallory v. Stodder, 6 Ala. 801; Church v. Gilman, 15 Wend. 656, 30 Am. Dec. 82; Lady Superior of Cong. Nunnery v. McNamara, 3 Barb. Ch. 375, 49 Am. Dec. 184; Jackson ex dem. Smith v. Bode, 20 Johns. 187; Guard v. Bradley, 7 Ind. 600; Merrills v. Swift, 18 Conn. 257, 46 Am. Dec. 315; Brownlow v. Wollard, 61 Mo. App. 124; Tuttle v. Turner, 28 Tex. 759; Huelick v. Scovil, 9 Ill. 159. (The presumption that a party will accept a deed because it is beneficial to him will never be carried so far as to consider him as having accepted it.)

Boyd v. Bethel, 10 Ky. L. Rep. 470, 9 S. W. 417. (Where a deed forty years old has been accompanied by possession the presumption arises that it has been accepted.)

Hurst v. McMullen, — Tex. Civ. App. —, 47 S. W. 666. (Acceptance of a recorded deed, wherein the grantee assumes the payment of notes, will be presumed where he permits it to go in evidence without objection.)

Renfro v. Harrison, 10 Mo. 411. (The acceptance of a deed by a grantee will not be presumed unless the grant be certainly to his benefit.)

A wife's acceptance is presumed where it appears that a mortgage intended for her benefit was delivered to her husband. Rhea v. Planters' Mut. Ins. Co. 77 Ark. 57, 90 S. W. 850.

Assignment or deed of trust for creditors:

The law presumes the assent of creditors to a deed of trust or an assignment beneficial to them. The Governor v. Campbell, 17 Ala. 566; Benning v. Nelson, 23 Ala. 801; Wiswall v. Ross, 4 Port. (Ala.) 321; Hempstead v. Johnston, 18 Ark. 123, 65 Am. Dec. 458; Forbes v. Scannell, 13 Cal. 242; De Forest v. Bacon, 2 Conn. 633; Gibson v. Reese, 50 Ill. 383; Paul v. Logansport Nat. Bank, 60 Ind. 199; Nicoll v. Mumford, 4 Johns. Ch. 522, 529; Martin v. Funk, 75 N. Y. 134, 31 Am. Rep. 446; North v. Turner, 9 Serg. & R. 244; Brashear v. West, 7 Pet. 608, 8 L. ed. 801; Tompkins v. Wheeler, 16 Pet. 106, 10 L. ed. 903.

A creditor is presumed to accept an assignment for the benefit of all creditors by which property is to be equally distributed *pro rata*, where no release or other condition is stipulated for on behalf of the debtor. Halsey v. Fairbanks, 4 Mason, 206, Fed. Cas. No. 5,964.

But the assent of creditors to an assignment made for their benefit cannot be presumed where the indenture was between the debtor and trustees,

and not intended to be signed by the creditors, and the trustees were to make distribution without preference among all the creditors, who were not required to release their demands. *Russell v. Woodward*, 10 Pick. 408.

For other authorities on presumption of acceptance by creditors of deed of trust or assignment, see cases in note in 24 L.R.A. 369.

Gifts:

The acceptance of a gift is presumed. *Matson v. Abbey*, 70 Hun, 475, 24 N. Y. Supp. 284; *Dunlap v. Dunlap*, 94 Mich. 11, 53 N. W. 788; *Frazier v. Perkins*, 62 N. H. 69; *Taylor v. Sanford*, 108 Tex. 340, 5 A.L.R. 1660, 193 S. W. 661.

Where the grant is an unqualified gift the presumption of acceptance can be rebutted only by proof of dissent. *Mitchell v. Ryan*, 3 Ohio St. 377.

Public grant:

It will be presumed that a grant of public land was accepted. *Caledonia County Grammar School v. Kent*, 84 Vt. 1, 77 Atl. 877.

Wills:

A widow will be presumed to accept a provision made for her in the will when not expressly waived, if it is more beneficial than her dower. *Merrill v. Emery*, 10 Pick. 507.

Lease:

The acceptance of a lease will not be presumed because, on the face of it, it appears to be beneficial to the lessee, but the question is whether, under all the circumstances, the lessee derives a benefit from the transaction. *Camp v. Camp*, 5 Conn. 291, 13 Am. Dec. 60.

3 Of official bond by bank:

Bank of United States v. Dandridge, 12 Wheat. 64, 6 L. ed 552; *Graves v. Lebanon Nat. Bank*, 10 Bush, 23, 19 Am. Rep. 50.

Of deed:

Smith v. Cole, 109 N. Y. 436, 17 N. E. 356.

4 Of deed:

Allen v. DeGroodt, 105 Mo. 442, 16 S. W. 494, 1049; *Gemel v. McDaniels*, 269 Ill. 362, 368, 109 N. E. 996; *Tibbals v. Jacobs*, 31 Conn. 428.

5 Moore v. Flynn, 135 Ill. 74, 25 N. E. 844; *First Nat. Bank v. Ridenour*, 46 Kan. 707, 718, 27 Pac. 150. (Acceptance by the beneficiary of a chattel mortgage executed in good faith without his knowledge will be presumed, and his subsequent actual acceptance will relate back to the day of filing.)

(2) *By corporation or officer thereof.*—It will be presumed that a corporation has accepted a beneficial grant or right conferred upon it.¹ The acceptance of a charter by a corporation may be inferred from any corporate acts,² of which the books of the corporation are the best evidence.³

One notified of his appointment as director of a corporation will be presumed to have accepted, unless he expressly declines.⁴

¹ *Charles River Bridge v. Warren Bridge*, 7 Pick. 344; *Bangor, O. & M. R. Co. v. Smith*, 47 Me. 34; *Astor v. New York Arcade R. Co.* 48 Hun, 562, 1 N. Y. Supp. 174; *City R. Co. v. Citizens' Street R. Co.* 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653.

Acceptance by a city of a redemption of property made for its benefit will be presumed. *People ex rel. Thorne v. Hays*, 4 Cal. 127.

But there is no presumption, without evidence, that a railroad company accepted any rights under a joint resolution of Congress. *United States v. Northern P. R. Co.* 41 Fed. 842.

² *Gleaves v. Brick Church Turnp. Co.* 1 Sneed, 491; *Middlesex Husbandmen & Mfrs. Soc. v. Davis*, 3 Met. 133; *St. Joseph & I. R. Co. v. Shambaugh*, 106 Mo. 557, 17 S. W. 581; *Hudson v. Carman*, 41 Me. 84; *Palfrey v. Paulding*, 7 La. Ann. 363.

Assent to a new or additional charter by an existing corporation may be inferred from acts or omissions inconsistent with any other hypothesis; and when the new grant is beneficial very little is required to find a presumption of acceptance. *Com. ex rel. Claghorn v. Cullen*, 13 Pa. 133, 53 Am. Dec. 450.

A charter granted to certain persons is prima facie presumed to have been granted at their instance, and to have been accepted by them; but such presumption is rebutted by evidence that no proceedings were ever had under the charter, and that seven years have elapsed since its date. *Newton v. Carberry*, 5 Cranch, C. C. 632, Fed. Cas. No. 10,190.

Acceptance of a special charter is shown where the act was passed at the incorporators' request, and accepted as amended at a meeting of the incorporators, who voted to build the contemplated railroad under it. *State, Carlton, v. Dawson*, 22 Ind. 272.

³ *Coffin v. Collins*, 17 Me. 440.

⁴ *Danville & W. R. Co. v. Brown*, 90 Va. 340, 18 S. E. 278.

b. Acceptance of bill of exchange.—Acceptance of a bill of exchange may be inferred from the drawee's keeping the bill a great length of time, or by any other act which gives credit to it and induces the holder to consider it as accepted.¹

¹ *Hough v. Loring*, 24 Pick. 254; *Dunavan v. Flynn*, 118 Mass. 539. For cases discussing bank clearing house transactions as acceptance or payment of checks, see note 12 A.L.R. 998.

c. By carrier, of goods for transportation.—A carrier is pre-

sumed to accept property for transportation under the responsibility created by common law, unless modified by statute or by special acceptance equivalent to a contract.¹

¹ *London & L. F. Ins. Co. v. Rome, W. & O. R. Co.* 68 Hun, 598, 23 N. Y. Supp. 231.

See also cases cited under title LOSS OF, OR DAMAGE TO, FREIGHT.

d. Acceptance of highways.—Acceptance of a street or highway will be presumed from slight circumstances if it appears beneficial and necessary to the public.¹

Acceptance may be presumed from public use,² working, and repairs.³ But acceptance cannot be presumed merely because the records have been lost or destroyed,⁴ or from proof of the execution of a plat, where the plat, if accepted as a conveyance, imposes upon the city the burden to open, improve, and repair the streets.⁵

¹ *Mann v. Elgin*, 24 Ill. App. 419.

² *Morse v. Zeize*, 34 Minn. 35, 24 N. W. 287; *Kennedy v. Le Van*, 23 Minn. 513; *Requa v. Rochester*, 45 N. Y. 129, 6 Am. Rep. 52.

³ *Brakken v. Minneapolis & St. L. R. Co.* 29 Minn. 41, 11 N. W. 124; *Pomfrey v. Saratoga Springs*, 104 N. Y. 459, 11 N. E. 43; *Grube v. Nichols*, 36 Ill. 92. But repair of streets in the vicinity will not constitute implied acceptance. *Kennedy v. Cumberland*, 65 Md. 514, 57 Am. Rep. 346, 9 Atl. 234.

⁴ *Gaines v. Merryman*, 95 Va. 660, 29 S. E. 738.

⁵ *Littler v. Lincoln*, 106 Ill. 368; *State v. Trask*, 6 Vt. 355, 27 Am. Dec. 554.

4. Documentary evidence.

Letters relating directly to the refusal of defendants to accept or pay for machinery for the price of which the action is brought, and to the statement of the specific reasons upon which such refusal was based, are admissible in evidence.¹

But the blotter and check-book stubs of the treasurer of a corporation are inadmissible to show payment by the defendant of calls on shares of stock in proof of the assignment and acceptance of the stock, in an action by an administrator to recover

assessments paid after the alleged transfer, where the defendant is a stranger to the corporation.²

Notes and renewals given for the purchase price of a water wheel, and letters in relation to them, are admissible in evidence, as bearing upon the question of its acceptance, although in a letter in which one of the notes was inclosed the purchaser reserves the question of acceptance for further consideration.³

¹ *Hummel v. Stern*, 21 App. Div. 544, 48 N. Y. Supp. 528.

² *Tripp v. Appleman*, 35 Fed. 19.

³ *Valley Iron-Works Mfg. Co. v. Grand Rapids Flouring-Mill Co.* 85 Wis. 274, 55 N. W. 693.

5. Parol evidence concerning written acceptance.

A written acceptance cannot be varied by proof of a contemporary parol agreement,¹ nor can an acceptance absolute on its face be shown by parol evidence to have been conditional.²

Parol evidence is admissible to show that a writing on a draft, which constitutes a valid acceptance, was intended for that purpose;³ that acceptance of a draft was refused, although words were written on it and a partial payment made;⁴ that acceptance of a bill of exchange was stipulated not to waive counterclaims,⁵ or that particular parties always drew and accepted bills in the same form.⁶

¹ *C. Aultman & Co. v. Brown*, 39 Minn. 323, 40 N. W. 159.

² *Haines v. Nance*, 52 Ill. App. 406.

One who accepts a writing directing him to pay a certain amount to the payee may show in an action upon the acceptance that there was a collateral agreement with the payee that he should not be required to pay except upon certain conditions. *Penniman v. Alexander*, 111 N. C. 427, 16 S. E. 408.

A drawer who showed the payee an absolute agreement on the part of the drawee to accept the bill may testify that at such time he communicated to the payee conditions and restrictions to which the order was subject. *Storer v. Logan*, 9 Mass. 55.

The admissibility of parol evidence to show that a bill or note was conditional is the subject of an extensive annotation in connection with the case of *Vincent v. Russell*, — A.L.R. —.

³ *Cortelyou v. Maben*, 22 Neb. 697, 3 Am. St. Rep. 284, 36 N. W. 159.

⁴ *Cook v. Baldwin*, 120 Mass. 317, 21 Am. Rep. 517

⁵ Bohn Mfg. Co. v. Harrison, 13 Mont. 293, 34 Pac. 313.

⁶ Spencer v. Billing, 3 Campb. 310, 1 Rose, 362.

An order by an agent on his principal for the shipment of goods of a certain amount at specified prices, to a firm which writes its signature after the word "Accepted" upon the order, but leaves blank the place for the name of the purchaser, where there is no explicit statement of sale or purchase therein, is open to extrinsic evidence to show that the acceptance did not constitute a purchase of the quantity of goods specified, but that they were shipped for some other purpose not expressed in the instrument. Colgate v. Latta, 115 N. C. 127, 26 L.R.A. 321, 20 S. E. 388.

6. Direct question.

On the question whether goods delivered were accepted by the agent of a party, the agent cannot be asked whether he ever accepted them, for this calls for a conclusion or opinion; but the question should call for what was done or said or left undone or unsaid.¹

¹ Brewer v. Housatonic R. Co. 107 Mass. 277.

7. Admissions.

In an action on an order, the acceptance of which by the defendant firm is at issue, it is competent to show admissions and actions of the firm with reference to the acceptance of the order and its genuineness.¹

But a promise or declaration of a buyer that he will at a certain day take goods then left for him at another place cannot be held an acceptance or an admission of acceptance.²

¹ Bruner v. Nisbett, 31 Ill. App. 517.

² Shepherd v. Pressey, 32 N. H. 49.

8. Res gestæ of receiving.

On the question whether one mentioned in an instrument as a party, and to whom it was delivered, accepted it, it is competent to ask what he did with it, and what he said about accepting or signing.¹

¹ Stevens v. Miles, 142 Mass. 571, 8 N. E. 426.

9. Relevancy and materiality; acceptance of deed or lease; of order.

Delivery and acceptance of a deed may be established by circumstances as well as direct proof.¹ But evidence of previous talks, acts, and negotiations of the parties is inadmissible to show the grantee's acceptance of a deed on a particular day, in the absence of proof that the grantee intended to accept the deed on that date.²

Use by an assignee for the benefit of creditors, of leased premises for the benefit of the assigned estate beyond the time reasonably necessary to remove therefrom, is material upon the issue whether he accepted the lease.³

Evidence tending to show that the alleged acceptor was not indebted to the drawer in the amount of the order is competent when an oral acceptance of the order is in dispute.⁴

¹ Hubbard v. Cox, 76 Tex. 239, 13 S. W. 170.

See also title DELIVERY.

² Dikeman v. Arnold, 78 Mich. 455, 44 N. W. 407.

³ Draper v. Salisbury, 11 Misc. 573, 66 N. Y. S. R. 83, 32 N. Y. Supp. 757.

⁴ Lavell v. Frost, 16 Mont. 93, 40 Pac. 146.

10. Acceptance of goods or work.

Acts indicative of ownership by the purchaser may be given in evidence to show the acceptance of goods, and to take the case out of the statute of frauds.¹ And an attempt by a purchaser, upon examination of goods, to communicate to the vendor a message declining to accept them, is material as qualifying the act of receiving and retaining the goods, and rebutting the presumption of acceptance, although the vendor did not receive the message.²

In an action for the contract price of a well, evidence that defendant caused another well to be sunk near the one in question is admissible on the question whether he accepted plaintiff's work, where the latter witnessed the work on the new well while endeavoring to remedy defects in the performance of his contract.³

The mere occupancy and use of a building by the owner are

not conclusive evidence of an acceptance of the work of construction or repair as complying with the contract covering such work nor do they amount to a waiver of defects therein.⁴ Nevertheless such facts may be considered in connection with other evidence on the issue of acceptance.⁵

¹ *Garfield v. Paris*, 96 U. S. 557, 24 L. ed. 821.

Proof of acceptance is complete if the buyer has an opportunity to inspect the property, and pays for it, even if he complains of its quality. *Casselli v. Mossò*, 90 N. Y. Supp. 371.

A buyer who retains goods manufactured under an executory contract after notice of a difference in price and an offer by the seller to receive them back must be deemed to have accepted the goods at the advanced price, and is liable therefor. *Stuart v. Manhattan Bath-Tub Co.* 34 Misc. 165, 68 N. Y. Supp. 816.

It is sufficient evidence of acceptance that a purchaser under a contract of warranty of the quality of a machine received and used it for a few days and then returned it, refusing to point out any defects or permit them to be remedied, although the contract required the purchaser to give notice of defects. *Geiser Mfg. Co. v. Taylor*, 55 App. Div. 638, 67 N. Y. Supp. 30.

As to acceptance of goods or order therefor, see also *supra*, §§ 4-7; *infra*, § 12, b.

Possession of the goods by the purchaser at the time of the oral agreement to purchase will not change the rule requiring proof of acts indicating ownership by the purchaser to satisfy the statute. *Wilson v. Hotchkiss*, 171 Cal. 617, L.R.A.1916F, 389, 154 Pac. 1, Ann. Cas. 1917B, 570. Notes 11 L.R.A.(N.S.) 1186; 20 L.R.A.(N.S.) 498; 49 L.R.A.(N.S.) 700; L.R.A.1916F, 393.

² *Caulkins v. Hellman*, 47 N. Y. 449, 7 Am. Rep. 461.

³ *Lynch v. Kampff*, 69 Minn. 448, 72 N. W. 455.

⁴ *Leonard v. Home Builders*, 174 Cal. 65, L.R.A.1917C, 322, 161 Pac. 1151; *Japes v. Harmon*, 176 Mich. 1, 141 N. W. 595; notes 16 L.R.A. (N.S.) 489; 20 L.R.A.(N.S.) 872; L.R.A.1917C, 324.

⁵ *Buttrick Lumber Co. v. Collins*, 202 Mass. 413, 89 N. E. 138; *Wiebener v. Peoples*, 44 Okla. 32, 142 Pac. 1036, Ann. Cas. 1916E, 748.

11. Acceptance of land patent.

A land patent is deemed accepted without actual delivery, upon its being issued by the proper officer and recorded in the record of patents.¹

¹ *United States v. Laam*, 149 Fed. 581.

12. Weight, effect, and sufficiency.

a. Acceptance of land dedicated to public use.—Acceptance of a street or highway may be proved by long public use,¹ by grading, working, and repairs,² or by the acts and conduct³ of the public authorities recognizing and adopting the highway.

And use by a comparatively small number of persons on foot, during a part only of the year, is sufficient, if such was the user to be anticipated by the dedicator.⁴

Acceptance of land dedicated for park purposes is manifested by public use of the property, where there is no municipal body with authority to make formal acceptance.⁵

¹ *Holdane v. Cold Spring*, 21 N. Y. 474; *McMannis v. Butler*, 51 Barb. 436; *Mayberry v. Standish*, 56 Me. 342.

While under the Iowa Code evidence of public use of certain land used for a highway is not competent to show title in the public by prescription, yet, where there is evidence tending to show a dedication, proof of use by the public is competent as tending to show an acceptance of the dedication. *State v. Birmingham*, 74 Iowa, 407, 38 N. W. 121; Iowa Comp. Code 1919, § 6445 (formerly § 2031).

Acceptance of a dedication of a public highway may be effected by user alone, and slight evidence is sufficient. *Iowa Loan & T. Co. v. Polk County*, 187 Iowa, 160, 5 A.L.R. 1532, 174 N. W. 97. Fourteen years has been held a sufficient length of time. *Hull v. Cedar Rapids*, 111 Iowa, 466, 83 N. W. 28.

Evidence of use by the public has some tendency to prove an acceptance on the part of the town. *Com. v. Coupe*, 128 Mass. 63; *Hayden v. Stone*, 112 Mass. 346.

Use of streets by the public for two or three weeks is not sufficient evidence of an acceptance. *Laughlin v. Washington*, 63 Iowa, 652, 19 N. W. 819.

The question of whether the use by the public is of such a nature to constitute an acceptance depends on the particular facts in each case. *H. A. Hillmer Co. v. Behr*, 264 Ill. 568, 106 N. E. 481 and note in L.R.A.1916B, 1175.

Acceptance of a dedication of a foot path was shown by public use for 15 years. *Bloomfield v. Allen*, 146 Ky. 34, 7 A.L.R. 122, 141 S. W. 400.

² *Eckerson v. Haverstraw*, 6 App. Div. 102, 39 N. Y. Supp. 635; *Lake View v. LeBahn*, 120 Ill. 92, 9 N. E. 269; *State v. Eisele*, 37 Minn. 256, 33 N. W. 785; *Ross v. Thompson*, 78 Ind. 90.

Mere travel is not evidence of an acceptance of dedication of a highway, but it may be shown by the fact that public authorities took charge

of and repaired it, and by public use. *Forbes v. Balenseifer*, 74 Ill. 183.

Repairs made upon a dedicated highway by an officer not authorized by statute to bind the town do not show an acceptance of the way. *State v. Bradbury*, 40 Me. 154.

³ *People v. Loehfelm*, 102 N. Y. 1, 5 N. E. 783; *Cook v. Harris*, 61 N. Y. 448; *Rees v. Chicago*, 38 Ill. 322; *Landis v. Hamilton*, 77 Mo. 554; *Gentleman v. Soule*, 32 Ill. 271, 83 Am. Dec. 264; *Fisk v. Havana*, 88 Ill. 208.

Acceptance of a street is evidenced, either by the action of some civil authority representing the public, or by the purchase of lots by private persons based upon its dedication, or by public use which implies an acceptance. *Sanford v. Meridian*, 52 Miss. 383.

⁴ *Phillips v. Stamford*, 81 Conn. 408, 22 L.R.A.(N.S.) 1114, 71 Atl. 361. For other cases on effect of limited use of way by the public as an acceptance of dedication, see note appended to the report of this case in 22 L.R.A.(N.S.) 1114.

⁵ *Maywood Co. v. Maywood*, 118 Ill. 61, 6 N. E. 866.

b. To satisfy statute of frauds.—The receipt and acceptance of goods to satisfy the terms of the statute of frauds must be proved by clear and unequivocal acts on the part of the buyer.¹ The act of a buyer in offering to resell the goods he has contracted to purchase is sufficient evidence of acceptance to take the contract out of the statute of frauds.²

¹ *Johnson v. Cuttle*, 105 Mass. 447, 7 Am. Rep. 545; *Knight v. Mann*, 118 Mass. 143; *Prescott v. Locke*, 51 N. H. 94, 12 Am. Rep. 55; *Snow v. Warner*, 10 Met. 132, 43 Am. Dec. 417; *Denny v. Williams*, 5 Allen, 1. There must be unequivocal acts. Words alone are insufficient. *Shindler v. Houston*, 1 N. Y. 261, 49 Am. Dec. 316; *Bailey v. Ogden*, 3 Johns. 421, 3 Am. Dec. 509; *Ely v. Ormsby*, 12 Barb. 570.

Acts indicative of ownership, such as taking the keys of a building and making inventory, are sufficient evidence of acceptance to take the case out of the statute. *Gray v. Davis*, 10 N. Y. 285.

Acceptance of a certificate, indorsed in blank by the seller, for unissued shares of stock, is sufficient to satisfy the statute of frauds if the transaction is within it. *Meehan v. Sharp*, 151 Mass. 564, 24 N. E. 907.

But acceptance of a less amount of goods corresponding with the sample is insufficient to satisfy the statute in the absence of some unequivocal act expressive of an intent to accept. *Remick v. Sandford*, 120 Mass. 309; *Davis v. Eastman*, 1 Allen, 422.

Or where the purchaser expressly states that he will be responsible only for the part received. *Atherton v. Newhall*, 123 Mass. 141, 25 Am. Rep. 47.

That a bill of lading was, without the purchaser's knowledge, left with his clerk not authorized to receive it, does not show an acceptance, where the purchaser promptly returned it, and had previously notified the seller he would not receive the cargo. *Quintard v. Bacon*, 99 Mass. 185.

Nor is acceptance of goods subsequently destroyed by fire shown by piling them apart and marking them with the purchaser's initials, where the latter's agent, who was to remove them, failed to do so. *Rodgers v. Jones*, 129 Mass. 420.

That the consignee of lumber which he refused on arrival retained the invoice for over a month without replying to the consignor is not sufficient evidence of acceptance. *Norman v. Phillips*, 14 Mees. & W. 277, 153 Eng. Reprint, 481.

Acceptance of a wagon in an unsatisfactory condition when sold is not established where the seller delivered the wagon in an unfinished condition without the purchaser's knowledge or authority. *Brewster v. Taylor*, 63 N. Y. 587.

² *Bicknell v. Owyhee Sheep & Land Co.* 31 Idaho, 696, 4 A.L.R. 897, 176 Pac. 782; *Beedy v. Brayman Wooden Ware Co.* 108 Me. 200, 36 L.R.A. (N.S.) 76, 79 Atl. 721, Ann. Cas. 1913B, 273.

c. Of bill of exchange.—In the absence of rebutting testimony the fact that a person's signature appears upon a bill of exchange where the acceptor's signature is usually found is sufficient proof of acceptance if the bill is directed to him, or is without direction to anyone.¹

¹ *Walton v. Williams*, 44 Ala. 348.

ACCIDENT.

1. Presumptions and burden of proof.
 - a. In general.
 - b. Suicide or accident.
2. Documentary evidence; verdict of coroner's jury.
3. Direct testimony.
4. Opinions.
5. Declarations.
6. Relevancy.

See also CARE; CAUSE; INTENT.

For accident as ground of injunction against a judgment, see note to *Merriman v. Walton*, 30 L.R.A. 786.

1. Presumptions and burden of proof.

a. *In general*.—The fact that other horses took fright at certain objects is not admissible to raise a presumption that the accident complained of happened, where it is claimed to be due to the fright of horses.¹

Besides the ordinary burden of proof resting upon every litigant holding the affirmative, there is in a suit to reform a writing on the ground of accident the additional burden of overcoming the strong presumption created by the contract itself.²

And where plaintiff in an action on an insurance policy has proved that the insured had upon his person bruises and wounds, evidencing that he had been recently injured by external violence; and, further, that such injuries caused his death, she has made out a prima facie case of death resulting from bodily injuries, "through external, violent, and accidental means."³

¹ *Cleveland, C. C. & I. R. Co. v. Wynant*, 114 Ind. 525, 5 Am. St. Rep. 644, 17 N. E. 118.

² *Epstein v. State Ins. Co.* 21 Or. 179, 27 Pac. 1045.

³ *Cronkhite v. Travelers' Ins. Co.* 75 Wis. 116, 17 Am. St. Rep. 184, 43 N. W. 731. See to the same effect, *Jenkin v. Pacific Mut. L. Ins. Co.* 131 Cal. 121, 63 Pac. 180; *Burnham v. Interstate Casualty Co.* 117 Mich. 142, 75 N. W. 445.

b. Suicide or accident.—Self-destruction, the courts say, is contrary to the general conduct of mankind, and the love of existence is so firmly implanted in the human breast that the presumption of suicide is utterly abhorrent to the law and cannot be indulged in,¹ and the burden of proving suicide is therefore placed upon the one alleging it.²

In some jurisdictions, where suicide is relied on as a defense in an action on an insurance policy, it seems that the burden of proof is not shifted by the fact that the verdict of a coroner's jury and the proofs of loss furnished by the beneficiary stated that the assured committed suicide.³ This has been said by high authority to be the law, even where the proofs of loss were introduced in evidence by the plaintiff.⁴ In North Carolina, however, it is said that the statement that the assured died by his own hand, in the proofs of loss furnished the insurance company, was, if unexplained, an admission of suicide, and, when introduced in evidence in an action on a policy of life insurance, "at once shifted the burden of proof upon the plaintiff."⁵

¹ *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. Rep. 1360; *Fidelity & C. Co. v. Love*, 49 C. C. A. 602, 111 Fed. 773; *National Union v. Thomas*, 10 App. D. C. 277; *Travelers' Ins. Co. v. Nitterhouse*, 11 Ind. App. 155, 38 N. E. 1110; *Mutual L. Ins. Co. v. Wiswell*, 56 Kan. 765, 35 L. R. A. 258, 44 Pac. 996; *Leman v. Manhattan L. Ins. Co.* 46 La. Ann. 1189, 24 L. R. A. 589, 49 Am. St. Rep. 348, 15 So. 388; *Cox v. Royal Tribe*, 42 Or. 865, 60 L. R. A. 620, 95 Am. St. Rep. 752, 71 Pac. 73; *Continental Ins. Co. v. Delpeuch*, 82 Pa. 225; *Brown v. Sun L. Ins. Co.* — Tenn. —, 51 L. R. A. 252, 57 S. W. 415; *Walcott v. Metropolitan L. Ins. Co.* 64 Vt. 221, 33 Am. St. Rep. 923, 24 Atl. 992.

The authorities on this point are carefully reviewed in the opinion of the Supreme Court of Missouri in *Brunswick v. Standard Acci. Ins. Co.* 278 Mo. 154, 7 A. L. R. 1213, 213 S. W. 45.

This presumption against suicide has been held to apply to Workmen's Compensation cases in many jurisdictions: *Humphrey v. Industrial*

Commission, 285 Ill. 372, 120 N. E. 816; Von Ette's Case, 223 Mass. 56, L.R.A.1916D, 641, 111 N. E. 696, 12 N. C. C. A. 551; note 5 A.L.R. 1680.

Contra: Ohaudier v. Stearns & C. Lumber Co. 206 Mich. 433, 5 A.L.R. 1673, 173 N. W. 198.

In an accident policy case the general rule that the burden of proving that death resulted from an accident rests on the plaintiff applies where the insured died from taking poison. Where, however, every hypothesis of death is reasonably negatived except accident or suicide the plaintiff may be aided by the presumption against suicide. Note 7 A.L.R. 1226 and cases cited.

² *Leman v. Manhattan L. Ins. Co.* 46 La. Ann. 1189, 24 L.R.A. 589, 49 Am. St. Rep. 348, 15 So. 388; *Boynton v. Equitable Life Assur. Soc.* 105 La. 202, 52 L.R.A. 687, 29 So. 490; *Cox v. Royal Tribe*, 42 Or. 365, 60 L.R.A. 620, 95 Am. St. Rep. 752, 71 Pac. 73; *Anthony v. Mercantile Mut. Acci. Asso.* 162 Mass. 354, 26 L.R.A. 406, 4 Am. St. Rep. 367, 38 N. E. 973.

³ *Knights Templars & M. Life Indeminty Co. v. Crayton*, 209 Ill. 550, 70 N. E. 1066; *Sartell v. Royal Neighbors*, 85 Minn. 369, 88 N. W. 985; *Mutual L. Ins. Co. v. Hayward*, — Tex. Civ. App. —, 27 S. W. 36.

⁴ *Supreme Lodge, K. P. v. Beck*, 36 C. C. A. 467, 94 Fed. 751, affirmed in 181 U. S. 49, 45 L. ed. 741, 21 Sup. Ct. Rep. 532.

⁵ *Spruill v. Northwestern Mut. L. Ins. Co.* 120 N. C. 141, 150, 27 S. E. 39. But see *Wharton v. New York L. Ins. Co.* 178 N. C. 135, 137, 100 S. E. 266.

2. Documentary evidence; verdict of coroner's jury.

In an action against a railroad company for negligently killing one while walking upon its track, the verdict of the coroner's jury, that deceased was accidentally run over by its train, is inadmissible.¹

¹ *Memphis & C. R. Co. v. Womack*, 84 Ala. 149, 4 So. 618.

The admissibility of the finding of coroner or coroner's jury to show cause of death is discussed in notes in 68 L.R.A. 285; 45 L.R.A.(N.S.) 404; L.R.A.1918E, 924. The admissibility of finding of coroner to show cause of death in workmen's compensation cases is discussed in note in 6 A.L.R. 548.

See also cases cited under title CAUSE, § 9, *infra*.

3. Direct testimony.

A witness cannot be asked whether an act by another than himself was accidental or done on purpose.¹

¹ *State v. Ross*, 32 La. Ann. 854; *Stone v. Denny*, 4 Met. 151.

4. Opinions.

A witness, having testified about the location, size, and shape of a hole in the highway where an accident occurred, cannot be allowed to state whether he thinks, if he had been driving, the accident would have happened.¹

¹ *Bunker v. Gouldsboro*, 81 Me. 188, 16 Atl. 543.

5. Declarations.

Upon the question whether or not a member of a hunting party met accidental death evidence of declarations of another member who had abandoned the hunt and sought assistance from a third, as to hearing a gun fired and a splash and seeing deceased fall from the boat in which he was, is admissible as part of the *res gestæ*.¹

Conversations of plaintiff in an action upon an insurance policy, tending to show an intent, previously entertained by the plaintiff, to bring upon himself an injury of the character for which he seeks to recover, are admissible upon the question whether the injury was intentional or accidental.²

¹ *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751, 12 S. E. 18.

² *Ætna L. Ins. Co. v. Vandecar*, 30 C. C. A. 48, 57 U. S. App. 446, 86 Fed. 282.

See also cases cited under title ADMISSIONS AND DECLARATIONS, § 32, *infra*.

6. Relevancy.

Proof that stockmen by accident sometimes misplace the brand on their stock is admissible upon the question of guilty knowledge in a prosecution for the theft of a steer.¹

¹ *Boren v. State*, 23 Tex. App. 28, 4 S. W. 463.

ACCORD AND SATISFACTION.

1. Burden of proof.
2. Presumption.
3. Parol evidence to vary writing.
4. Weight, effect, and sufficiency.

As to what constitutes, see note to *Jaffray v. Davis*, 11 L.R.A. 710.

Upon accord and satisfaction by part payment, see notes in 20 L.R.A. 785; 14 L.R.A. (N.S.) 443; 27 L.R.A. (N.S.) 439; and 4 A.L.R. 474.

1. Burden of proof.

The burden of proof rests on the party alleging the accord and satisfaction,¹ and he must establish every necessary element of it by competent evidence,² and he has the burden to show the satisfaction as well as the accord.³

¹ *Bahrenburg v. Conrad Schopp Fruit Co.* 128 Mo. App. 526, 107 S. W. 440.

² *Barrett v. Kern*, 141 Mo. App. 5, 121 S. W. 774.

³ *Simmons v. Oullahan*, 75 Cal. 508, 17 Pac. 543.

2. Presumption.

The lapse of twenty years after actual damages suffered from the breach of a covenant against encumbrances raises a presumption which, if not rebutted, will sustain a plea of accord and satisfaction.¹

¹ *Jenkins v. Hopkins*, 9 Pick. 543.

3. Parol evidence to vary writing.

Parol evidence is inadmissible to vary the agreement incorporated in a receipt, to the effect that property was received in satisfaction of a claim.¹

¹ *Stevens v. Wiley*, 165 Mass. 402, 43 N. E. 177.

4. Weight, effect, and sufficiency.

Proof of the discharge of a debt though not under seal, upon the payment of half the amount thereof by the check of a third person, is competent to show an accord and satisfaction.¹

But an agreement entered into before the breach of a covenant against encumbrances is insufficient to establish an accord and satisfaction of the subsequent breach.²

Nor is the lapse of twenty years from the time of making a contract to be performed *in futuro*, of itself, evidence of a new contract averred to have been performed and pleaded as an accord and satisfaction of the original contract.³

To avoid the presumption of accord and satisfaction arising from the acceptance of money for claims for damages, the party may prove that the particular claim in question was unknown to him, and could not reasonably have been learned of by him at the time of receiving the payment.⁴

A part payment of a liquidated indebtedness cannot ordinarily act as an accord and satisfaction. Nevertheless if evidence is offered to prove that there was a counterclaim or set-off asserted by the debtor, the original indebtedness is thereby rendered unliquidated, so that an accord and satisfaction may be shown to have resulted.⁵

¹ *Guild v. Butler*, 127 Mass. 386.

² *Batchelder v. Sturgis*, 3 Cush. 201.

³ *Siboni v. Kirkman*, 1 Mees. & W. 418, 150 Eng. Reprint, 497, 2 Gale, 51, 1 Tyrw. & G. 777, 5 L. J. Exch. N. S. 212.

⁴ *Scully v. Delamater*, 28 Fed. 114.

⁵ *Stanley Thompson Liquor Co. v. Southern Colorado Mercantile Co.* 65 Colo. 587, 4 A.L.R. 471, 178 Pac. 577; note 4 A.L.R. 474.

ACCOUNTS.

I. PROVING BOOKS OF ACCOUNT IN FAVOR OF ONE INTERESTED IN KEEPING.

1. Entries by the party himself.
 - a. Rule independent of statute.
 - b. Statutory rule.
2. Entries by party who has since deceased.
 - a. Common-law rule.
 - b. Statutory rule.
3. Entries by party who has since become insane.
4. Entries in partnership books by absent or deceased partner.
5. Entries made by bookkeeper.
 - a. Common-law rule.
 - (1) When the bookkeeper is accessible.
 - (2) When the bookkeeper is not accessible.
 - (3) When the bookkeeper is insane.
 - (4) When the bookkeeper is dead.
 - b. Statutory rule.
6. Effect of statute making party competent witness for self.
7. Effect of statute prohibiting party from testifying.
8. Effect of statute of limitations.
9. Effect of amount in controversy.
10. Rule when the party keeps a clerk.
 - a. Generally.
 - b. Who are clerks.
11. Form and requisites as to book and entry.
 - a. Generally.
 - b. Alterations, erasures, and mutilations.
 - c. Omission to affix price, weight, etc.
12. Entries; original or transferred.
 - a. General rule.
 - b. Entries transferred from memoranda.
 - c. Ledgers.
 - d. Balances.

I.—con'd.

13. Time for making the entries.
 - a. General rule.
 - b. Undated entries.
 - c. Lump charges.
14. Regularity as to course of business.
 - a. General rule.
 - b. Entries relating to party's business.
15. Entries showing intent to charge.
16. Authentication and correctness of books and entries.
 - a. Necessity generally.
 - b. Oath of the party himself.
 - c. Proof by customers.
17. Knowledge of the person making the entries.
 - a. In general.
 - b. Entries on information verified by informant.
 - c. Proof of knowledge of the persons making the entries in a modern business establishment.
18. Bringing home to adverse party.
19. What accounts are provable by books.
 - a. Generally.
 - b. Delivery of goods to third person.
 - c. Professional services.
 - d. Work done by servant.
 - e. Bank accounts.

II. EXPLANATIONS, CORRECTIONS, AND DISCREDITING.

20. Accounts not exclusively the best evidence.
21. Photographs.
22. Secondary evidence not rebuttable.
23. Interpreting symbols.
24. Time of entries.
25. Explaining.
 - a. In general.
 - b. By expert.
26. Discrediting.
 - a. By opinion.
 - b. By specific errors.

III. PROVING ACCOUNT IN AID OF ORAL TESTIMONY.

27. Contemporaneous entries.
28. Written details of facts testified to.

IV. MUTUAL ACCOUNTS.

- 29. Account rendered.
- 30. Pass books.
- 31. Conclusiveness.

V. PROVING AGAINST ONE INTERESTED IN KEEPING.

- 32. Authentication.
- 33. As admissions.
- 34. Agent's books.
- 35. Joint books.

See also ABSTRACTS; ACCOUNTS STATED; AUDIT; CREDIT; EMBEZZLEMENT; FORGOTTEN FACT; HANDWRITING; NEGATIVE; PAYMENT.

As to the use of a party's books of account as evidence in his favor generally, see note to *Smith v. Smith*, 52 L.R.A. 545-610. And as to what may be proved by books of account, see note to *Hall v. Chambersburg Woolen Co.* 52 L.R.A. 689.

As to the general use of account books in evidence see note to 15 *Columbia L. Rev.* 535.

Admissibility of account books in evidence in case of money loaned or payments made by party whose books are offered, see note in 2 L.R.A. (N.S.) 401.

I. PROVING BOOKS OF ACCOUNT IN FAVOR OF ONE INTERESTED IN KEEPING.

1. Entries by the party himself.

a. Rule independent of statute.—The rule that a party litigant may, independent of any statute expressly authorizing him so to do, give in evidence, in support of his claim of an account for goods sold and delivered, or work done and materials furnished, his books of account the entries in which have been made by himself, either with his suppletory oath, or accompanied by the proper preliminary proof, as required by the rule in the particular jurisdiction, has been so long acquiesced in, with the possible exception of one or two states noted below,¹ that its authority can hardly now be doubted.²

¹ In Maryland and Louisiana such books are not admissible. *Owings v. Low*, 5 Gill & J. 134; *Stallings v. Gottschalk*, 77 Md. 429, 26 Atl. 524; *Ward v. Leitch*, 30 Md. 326; *Cavelier v. Collins*, 3 Mart. 188; *Whitti-*

kam v. Swain, 9 La. Ann. 122; **Smith v. Harrathy**, 5 Mart. N. S. 320; **Johnston v. Breedlove**, 2 Mart. N. S. 508; **Kendall v. Bean**, 12 Rob. 407.

The court, however, in the case last cited, permitted witnesses who had made entries of matters within their personal knowledge to refer to such entries to refresh their memories. So also, in **Flower v. Downs**, 6 La. Ann. 539.

But a witness has no right to refresh his memory by reference to books, where it does not appear that the entries were made by him. **Par-goud v. Guice**, 6 La. 77, 25 Am. Dec. 202.

The reception in evidence without objection, of one of the party's books offered in his own behalf, is no reason for permitting him to introduce another book when objected to. **Lyons v. Teal**, 28 La. Ann. 592.

So, the books of an insolvent, or testimony as to their contents, unaided by any other evidence, cannot be accepted as proof to establish a claim of one creditor against an opposition of other creditors to a syndic's account. **Calder v. Their Creditors**, 47 La. Ann. 1538, 18 So. 520. Compare **New Orleans Canal & Bkg. Co. v. Leeds & Co.** 49 La. Ann. 123, 21 So. 168, holding otherwise where there is nothing suspicious in the appearance of the books, or in the manner in which they are kept, or in the entries as made, and they are supported by ample corroborative proof.

² **Dismukes v. Tolson**, 67 Ala. 386; **Moody v. Roberts**, 41 Miss. 74 (the first case in Mississippi holding such books admissible and overruling previous cases to the contrary); **Watrous v. Cunningham**, 71 Cal. 30, 11 Pac. 811; **Vosburgh v. Thayer**, 12 Johns. 461 (leading case); **Butler v. Cornwall Iron Co.** 22 Conn. 335; **Underwood v. Parrott**, 2 Tex. 166; **Cargill v. Atwood**, 18 R. I. 303, 27 Atl. 214; **Baldrige v. Penland**, 68 Tex. 441, 4 S. W. 565; **Bolling v. Fannin**, 97 Ala. 619, 12 So. 59; **Anchor Mill. Co. v. Walsh**, 108 Mo. 277, 32 Am. St. Rep. 600, 18 S. W. 904 (the first case in Missouri settling the rule as stated, and in effect overruling previous cases to the contrary); **Witherell v. Swan**, 32 Me. 247; **Holmes v. Marden**, 12 Pick. 169.

In **Arkansas** it has been held that entries in a merchant's book, made by himself, are not admissible in his own favor, even though he offer to verify the books by his own oath. **Burr v. Byers**, 10 Ark. 398, 52 Am. Dec. 239. Compare **Stanley v. Wilkerson**, 63 Ark. 556, 39 S. W. 1043, in which the court seems to incline to the adoption of the rule as stated in the text.

In **Indiana** the rule does not seem to be settled. Thus, in **Harrison v. Lagow**, 1 Blackf. 307, books offered by the plaintiff were held inadmissible because he had not proved them to be his.

In **De Camp v. Vandagriff**, 4 Blackf. 272, a blacksmith's book was excluded.

But in *Wilber v. Scherer*, 13 Ind. App. 428, 41 N. E. 837, it was held that permitting plaintiff to read to the jury from his book the various items of the account to which he had just testified, and as stated in his bill of particulars, was, if error at all, harmless, inasmuch as its only effect was to repeat his testimony, and it appeared that the defendant was allowed to testify fully to his version of the matter, which the jury had in part adopted.

A book kept by an assignee of an insolvent debtor was held in *Rush v. Hance*, 3 N. J. L. 860, to be competent evidence for the assignee in an action to recover for goods sold after the assignment and charged by him on the book.

And in *Bear v. Trexler*, 3 W. N. C. 214, it was held that the books of plaintiff's assignor, who had been absent from the country for seven years, and could not be found, were admissible on proof of the assignor's handwriting.

To render a party's book admissible for himself within the rule above, and supported by his oath alone, he must swear to a delivery of the articles charged. *Dwinel v. Pottle*, 31 Me. 167.

A physician's diary containing original entries of professional visits is admissible in an action to recover therefor upon proof of his employment, and of the fact that he keeps correct books of account, and that his debtors have settled with him from them and found them correct. *Knight v. Cunningham*, 6 Hun, 100.

The fact of attendance on the defendant or his family can ordinarily be proved by other persons, and some attendance ought to be shown; but proof of a single attendance two years previous to the entry in question does not satisfy the rule. *Morrill v. Whitehead*, 4 E. D. Smith, 239.

But in Mississippi it is not necessary that a physician suing an estate to recover for services rendered to the decedent should prove, except by his books, that he ever attended the intestate in his lifetime. *Bookout v. Shannon*, 59 Mass. 378.

b. Statutory rule.—Many of the states have statutes expressly providing for the admission of a party's books of account in his own favor.¹ These statutes all expressly recognize the admissibility of the books on a proper showing, to be made as required by the statutes themselves;² but they vary somewhat in form and language, and the way in which the admissibility of the books is recognized, and in which the terms of the statute are made applicable.³ But they all attain the same result, and that is that if the party desiring to introduce his books in evi-

dence in his own behalf accompanies the offer of the books with the proof required by the statute under which the offer is made, they are competent evidence for him.⁴

¹ Under an Alabama statute (Code, § 1808, now § 3975 of 1907 Code) providing that the original entries in the books of a physician are evidence for him in all actions for the recovery of his medical services, that the services were rendered, unless the defendant in open court deny on oath the truth of such entries; but the physician is required to prove the value of such service. And the physician's books are evidence of the items of his account for medicines administered and furnished to his patients in the course of his business, as well as of his active services. *Richardson v. Dorman*, 28 Ala. 679.

And proof that the original entries were in the physician's handwriting was said, in *Halliday v. Butt*, 40 Ala. 178, to be prima facie sufficient proof of their identity to admit them under this statute.

But after the exclusion of such a book, necessitated by the defendant's denial of their truth in open court upon oath, as provided by the statute, the latter has no right to testify in his own behalf as to which entries are correct and which incorrect. *Weaver v. Morgan*, 49 Ala. 142.

² The various requisites are substantially the same as those required by the common-law rule, and are noted infra this title in their appropriate places. See §§ 11-17.

³ Thus, in some of the states the statutes are enacted as independent statutes expressly for the purpose of allowing such evidence; whilst others are a part of, and embraced in, the statutes prohibiting a party from testifying for himself when his adversary is the personal representative of a deceased person, or is otherwise incapacitated, and form an exception to that prohibitive clause,—that is to say, the party offering his books is competent to make the proof necessary to their introduction in evidence, although his adversary be incapacitated as above, and his books are then evidence for him. Compare the various statutes for their provisions in this respect. For cases, see the succeeding notes of this section. See also § 7, *infra*.

⁴ Such statutes of both classes are to be found in the states from which the following cases and illustrations are cited as applying the terms of the statutes to the books under consideration: *Lovelock v. Gregg*, 14 Colo. 53, 23 Pac. 86; *Hooker v. Johnson*, 6 Fla. 730; *Alling v. Brazee*, 27 Ill. App. 595; *Moore v. Morris*, 1 Penn. (Del.) 412, 41 Atl. 889; *Talbotton R. Co. v. Gibson*, 106 Ga. 229, 32 S. E. 151; *Martin v. Scott*, 12 Neb. 42, 10 N. W. 532; *Shaffer v. McCrackin*, 90 Iowa, 578, 48 Am. St. Rep. 465, 58 N. W. 910; *Hay v. Peterson*, 6 Wyo. 419, 34 L.R.A. 581, 45

Pac. 1073; Webber v. Webber, 79 N. C. 572; Colbert v. Piercy, 25 N. C. (3 Ired. L.) 77; Thomson v. Porter, 3 S. C. Eq. (4 Strobb.) 58, 53 Am. Dec. 653; Foster v. Sinkler, 1 Bay, 40; Clark v. Howard, 10 Yerg. 250; Irwin v. Jordan, 7 Humph. 167; Branch v. Dawson, 36 Minn. 193, 30 N. W. 545; Callender v. Colegrove, 17 Conn. 1; Sharp v. Blanton, 194 Ala. 460, 69 So. 889.

Previous to the Illinois and Michigan statutes, books were still admissible. Boyer v. Sweet, 4 Ill. 120; Jackson v. Evans, 8 Mich. 476.

The Illinois statute did not change the character of the book, but merely added to and enlarged the provisions of the rule as it previously existed, and changed the character of the evidence necessary to its admission. House v. Beak, 141 Ill. 290, 33 Am. St. Rep. 307, 30 N. E. 1065; Brooks v. Funk, 85 Ill. App. 631; Taliaferro v. Ives, 51 Ill. 247.

In Connecticut, under a statute making admissible in actions of book debt, books containing the daily accounts of the party's business (Gen. Stat. p. 471, § 1041, now Conn. Gen. Stat. Rev. of 1918, § 6017, vol. 2, p. 1668); it has been held that in actions of assumpsit for goods sold the same rule applies, book debt and assumpsit being concurrent remedies in all cases where book debt will lie. Smith v. Law, 47 Conn. 431; Hawken v. Daley, 85 Conn. 16, 81 Atl. 1053. See also Plumb v. Curtis, 66 Conn. 154, 33 Atl. 998, holding § 31 of the practice act, making the books admissible in all actions for the recovery of a book debt to be a legitimate exercise of the legislative power to give greater effect to any particular kind of evidence that it possessed at common law.

The New Mexico statute (§ 2187, New Mexico Statutes 1915 Annotated), was held in McKenzie v. King, 14 N. M. 375, 93 Pac. 703, not to supersede the common-law rule thereby in effect overruling the case of Byerts v. Robinson, 9 N. M. 427, 54 Pac. 932, where it had been held that the statute must be complied with before the books could be admitted.

But the statute cannot be invoked when the books are clearly not shown to be within its terms. Price v. Garland, 3 N. M. 505, 6 Pac. 472. And see F. H. Hill Co. v. Sommer, 55 Ill. App. 345, admitting a party's books upon what the court deemed sufficient foundation upon common-law principles, without reference to any statute.

The Georgia statute substantially embodies the rule as it existed in that state prior to the statute. Taylor v. Tucker, 1 Ga. 231.

Under the Georgia statute of 1843, allowing the books of any regular craftsman to go to the jury in proof of open accounts, books kept in any occupation requiring such books to be kept are admissible for the same purpose and to the same extent as merchants' and shopkeepers' books. Ganahl v. Shore, 24 Ga. 17.

Prior to 1910 books of others than those doing a regular business and keeping daily entries thereof, who are not merchants, shopkeepers,

physicians, or blacksmiths, were not admissible. *Bass v. Gobert*, 113 Ga. 262, 38 S. E. 834. The statute was amended, however, in 1910 to include books of farmers, dairymen and planters. (Ga. Acts 1910, p. 57) vol. 5, Park's Anno. Code Ga. 1914, § 5769.

A loan agent's register, containing merely a record of loans negotiated by him, and their final disposition, is not a book of accounts within the meaning of the Iowa statute. *Security Co. v. Graybeal*, 85 Iowa, 543, 39 Am. St. Rep. 311, 52 N. W. 497; *United States Bank v. Burson*, 90 Iowa, 191, 57 N. W. 705.

Nor is a book purporting to be a record of notes owned by the party admissible to prove that at a certain time he held a note against another. *Kassing v. Ordway*, 100 Iowa, 611, 69 N. W. 1013.

Nor is a loan and collection register a book of accounts under the Nebraska statute. *Labaree v. Klosterman*, 33 Neb. 150, 49 N. W. 1102.

Nor is a register of bills receivable kept by a bank or banker. *Martin v. Scott*, 12 Neb. 42, 10 N. W. 532.

Nor is a check book from which checks are taken, containing on a stub or margin memoranda of the name of the payee, amount, date, etc., an account book under the Ohio statute. *Watts v. Shewell*, 31 Ohio St. 331.

The Vermont statute, allowing items of account to be adjusted in an action of book account, does not allow the adjustment of items of book account in an action of account. *Cilley v. Tenny*, 31 Vt. 401.

But it does not deprive the party offering the book of his common-law remedy. *Burnham v. Adams*, 5 Vt. 313.

2. Entries by party who has since deceased.

a. Common-law rule.—It has long been the practice in most of the states, even although the practice is not sanctioned by an express statute, to admit in evidence in favor of the estate of a deceased person the decedent's books of account upon proof that they were his books and of his handwriting, whenever the books would have been evidence for him if living.¹

¹*Odell v. Culbert*, 9 Watts & S. 66, 42 Am. Dec. 317; *McLellan v. Crofton*, 6 Me. 307; *Buckley v. Buckley*, 12 Nev. 423, 16 Nev. 180. *Contra*: *Mason v. Wedderspoon*, 43 Hun, 20.

The death of adverse party as affecting evidence with respect to book account is the subject of an extensive annotation in 6 A.L.R. 756.

And it is not necessary to accompany them with any evidence as to the time and manner in which the entries were made. *Hoover v. Gehr*, 62 Pa. 136.

And evidence subsequently offered, as to the time when the entries were

ABB. FACTS—6.

made is to be referred, with the books, to the jury, for them to determine whether or not the books are of original entry. *Van Swearingen v. Harris*, 1 Watts & S. 356.

In New Hampshire they are admitted, though supported only by the administrator's suppletory oath. *Dodge v. Morse*, 3 N. H. 232.

But testimony of the administrator that the books came into his hands as administrator as the intestate's books of original entry, and that he believes the debt to be unpaid, is not sufficient to warrant their admission without proof that the entries were in the intestate's handwriting. *Robinson v. Dibble*, 17 Fla. 457. Compare *Hoover v. Gehr*, 62 Pa. 136, in which the executor testified that the book admitted was the testator's book of original entries, was found at the testator's house, and that the entries were in his handwriting.

But a book kept by a testator is not admissible for his executors unless it contains the registration of some fact which is relevant to the issue, made by him in the course of his business or duty, and as to which he would at the time have been a competent witness. *Avery v. Avery*, 49 Ala. 193.

In Ohio it is held that the book is not of itself competent for the personal representative; but that proof that the decedent kept regular books, and of some of the items, and that the clerk was not a competent witness, authorizes the court, at its discretion, to admit the book. *Van Horne v. Brady, Wright* (Ohio) 451. See also *Cram v. Spear*, 8 Ohio, 494.

In *Rouyer v. Miller*, 16 Ind. App. 519, 44 N. E. 51, 45 N. E. 674, it was held that a page of a decedent's account book is not admissible for his administrator, where there is no proof that the entries were in his handwriting, or when they were made,—especially when the page in question does not have the appearance of being an account, but is rather a memorandum.

But a decedent's memorandum book, containing the items of an account, is *prima facie* admissible for the administratrix, where there is evidence that the entries were made at the time of the respective transactions to which they refer. *Lunsford v. Butler*, 102 Ala. 403, 15 So. 239.

In Missouri some of the earlier cases have held that neither the merchant's death, nor the statute making parties competent witnesses in their own behalf, changed the rule excluding a party's books as evidence for himself so as to admit them in favor of his legal representatives after his death. *Hensgen v. Mullally*, 23 Mo. App. 613. But it is by no means certain that the courts would still so hold in view of *Anchor Mill Co. v. Walsh*, 108 Mo. 277, 32 Am. St. Rep. 600, 18 S. W. 904.

So, in New York it has been held that an entry made by a party in his own books is not made competent in his favor by the fact that he is since deceased. *Mason v. Wedderspoon*, 43 Hun, 20.

And in *Case v. Potter*, 8 Johns. 211, an action by an administrator for

money loaned, it was held that the book of original entries in the intestate's handwriting is not evidence for the plaintiff; but if introduced without objection it might be considered by the jury in connection with other circumstances.

But in *Rexford v. Comstock*, 3 N. Y. Supp. 876, it was held that entries of legal service and of disbursements incident thereto, in books regularly kept by a lawyer in his business, made by himself and his partner, both of whom died before the person for whom the services were rendered, are competent, where the performance of any of the services charged for is proved, and there is proof that the books were the decedents' books, and proof by clients who had settled with them that they kept correct books.

b. Statutory rule.—In some of the states there are statutes expressly providing for the admission of books of account of a deceased person as evidence for his personal representative.¹

¹ As in Connecticut (Gen. Stat. 1918, § 5737, vol. 2, p. 1594). *Setchel v. Keigwin*, 57 Conn. 473, 18 Atl. 594; *Kinney v. United States*, 54 Fed. 313; *Douglas v. Chapin*, 26 Conn. 76.

And it is not necessary that the entries refer to the matter at issue; it is enough if they can be shown so to do by other evidence. *Peck v. Pierce*, 63 Conn. 310, 28 Atl. 524.

Although a statute makes the book of a deceased person, when proved to be regularly and fairly kept, evidence in favor of his executor or administrator, in *Mathews v. Sanders*, 15 Ark. 255, the court excluded a detached piece of paper having on it items of the services rendered, as not coming within the terms of the statute, notwithstanding there was supporting proof required by the statute. (*Crawford & Moses*, 1921, Digest of statutes of Arkansas, § 4134, p. 1161.)

In *Callaway v. McMillian*, 11 Heisk. 557, a private memorandum book was excluded as not coming within the terms of the Tennessee statute. (Ann. Code of Tenn. Shannon, 1918, § 5563, vol. 5, p. 5468.)

Proof that the books were the only books kept by the decedent; that settlements had been made with many clients who had found them correct,—was held, in *Patrick v. Jack*, 82 Ill. 81, to be a sufficient compliance with the Illinois statute to warrant their admission against one who, on examination before any controversy arose, made no objection. (*Hurd's Rev. Stats.* 1921, chap. 51, § 3, vol. 1, p. 1585.)

3. Entries by party who has since become insane.

It is error to reject a book of original entries of an insane person, offered by his guardian and proved to be in his handwriting, in connection with the guardian's testimony that the book came to him as the genuine and only book of the insane person, and that to the best of his knowledge and belief the

entries were original and contemporaneous with the transactions entered, and that the charges were unpaid, on the ground that it is inadmissible without the oath of the insane person.¹

¹ Holbrook v. Gay, 6 Cush. 215.

4. Entries in partnership books by absent or deceased partner.

The books of original entries of a partnership, kept by one of the partners who is at the time of the trial a nonresident of the state, are admissible on proof of the nonresidence and of the handwriting of the absent partner; and the fact that the bookkeeper was a copartner makes no difference.¹

¹ Alter v. Berghaus, 8 Watts, 77.

"The same necessity therefore existed for receiving the books in evidence that would have existed . . . [had the absent partner] been dead at the time of trial." New Haven & N. Co. v. Goodwin, 42 Conn. 230.

It is not necessary that the copartner by whom the entries were made be present and testify to their correctness; his copartner's suppletory oath is enough. Butler v. Cornwall Iron Co. 22 Conn. 335.

So, also, in Minnesota under the statute. Webb v. Michener, 32 Minn. 48, 19 N. W. 83. (Gen. Stat. of Minnesota, 1913, § 8437, p. 1876.)

Walter v. Parkham, 4 S. C. L. (3 M'Cord) 295, holds that the copartner present is not competent to prove the entries as having been made by his copartner on the ground of the latter's absence from the state, unless it be clearly proved that he is out of the state.

Proof of the entries as being in the handwriting of a deceased copartner, and of their being made in the regular and usual course of business, was held sufficient in Thomson v. Porter, 23 S. C. Eq. (4 Strobb.) 58, 53 Am. Dec. 653, to raise the presumption that the goods were sold and delivered to the party charged.

But in Romer v. Jaacksch, 39 Md. 585, holds that entries made in the course of business, by a deceased partner, are not evidence for the surviving partner in a suit by him against a debtor of the firm.

So held, also, in Burr v. Byers, 10 Ark. 398, 52 Am. Dec. 239, as to entries which were made by one who was held out to, and regarded by, the public as a partner.

The general subject of partnership books of account as evidence is discussed in the note 52 L.R.A. 833.

5. Entries made by bookkeeper.

a. Common-law rule—(1) *When the bookkeeper is accessible*.—The rule at common law as to entries which have been made by a person other than the party himself is that entries so made in the ordinary course of business, by a person whose

duty it was to make them, contemporaneously with the transactions recorded so as to form part of the *res gestæ*, are competent where the entries are proved by the person who made them, if he is alive and can be produced.¹ But not when the person who made them is, although accessible, not called to verify them.²

¹ *House v. Beak*, 141 Ill. 290, 33 Am. St. Rep. 307, 30 N. E. 1065; *Burnham v. Adams*, 5 Vt. 313; *Tunno v. Rogers*, 1 Bay, 480; *Burnham v. Chandler*, 15 Tex. 441; *Dialogue v. Hoven*, 7 Pa. 327; *Burke v. Wolfe*, 6 Jones & S. 263.

But in Maine a book of a party who cannot write, kept regularly every day by his wife under his direction, is not admissible for him in connection with his suppletory oath. *Luce v. Doane*, 38 Me. 478.

So, entries in account books of a bank are made competent evidence against a depositor, customer, or officer (*Humphrey v. People*, 18 Hun, 393, [to prove embezzlement]). See also *Re Wineham Shipbuilding, Boiler & Salt Co.* 26 Moak, Eng. Rep. 152, note, citing other cases); by producing the clerk who made the entries, he testifying to the transactions (*Burke v. Wolfe*, 6 Jones & S. 263, 268); or testifying that it was his uniform custom to make entries at the time of the transaction, and that he has no doubt the entry now offered was truly made. *Bank of Monroe v. Culver*, 2 Hill, 531.

Without such evidence they are not competent (*White v. Ambler*, 8 N. Y. 170), unless the party against whom they are adduced is a stockholder or officer.

It is error to receive them upon testimony of other officers or clerks of the bank who have not personal knowledge of the transactions. *Ocean Nat. Bank v. Carll*, 55 N. Y. 440.

But upon the issue whether moneys paid to one named by the depositor as her agent were chargeable to her, the bank upon examination of its treasurer can produce the bank ledger and ask him to state what the account therein contained respecting the items drawn out and a balance redeposited by the agent in his own name for the purpose of showing the manner in which the account was kept and the items and dates. *Wilcox v. Onondaga County Sav. Bank*, 40 Hun, 297.

² *Skipworth v. Deyell*, 83 Hun, 307, 31 N. Y. Supp. 918; *Burnham v. Chandler*, 15 Tex. 441; *Ford v. St. Louis, K. & N. W. R. Co.* 54 Iowa, 723; *Shipman v. Glynn*, 31 App. Div. 425, 52 N. Y. Supp. 691; *Bartholomew v. Farwell*, 41 Conn. 107; *Sterrett v. Bull*, 1 Binn. 237; *Merrill v. Ithaca & O. R. Co.* 16 Wend. 586, 30 Am. Dec. 130.

(2) *When the bookkeeper is not accessible.*—The general rule as to entries which were made by a bookkeeper regularly

employed as such, who is at the time of the trial beyond the jurisdiction of the court, is that the entries are, if otherwise unobjectionable within the rules shown in the preceding section, admissible upon proof of the fact of the absence of the bookkeeper and of his handwriting.¹

¹ *Burnham v. Chandler*, 15 Tex. 441; *Elms v. Chevis*, 2 McCord, L. 349; *Bolling v. Fannin*, 97 Ala. 619, 12 So. 59.

And it was so held in *Hay v. Kramer*, 2 Watts & S. 137, although his absence was not conclusively shown, and, if absent, he was only so temporarily.

So, also, when he is beyond the reach of the process of the court, and not accessible to a commission. *Heiskell v. Rollins*, 82 Md. 14, 51 Am. St. Rep. 455, 33 Atl. 263.

Or where he is a nonresident of the state, or is unable to be produced as a witness for any other good reason. *Vinal v. Gilman*, 21 W. Va. 301, 45 Am. Rep. 562.

And entries proved to be in the writing of a clerk, and to have been made in the regular course of business, were held admissible, in *Reynolds v. Manning*, 15 Md. 510, without proof of his death, when he was a foreigner by birth, and remained in this country but a few years and then returned home, and when last heard from, more than three years before, was in Australia.

In North Carolina it has been held that entries by a clerk are not competent as against the party charged. *Sloan v. McDowell*, 75 N. C. 29.

And in *Brewster v. Doane*, 2 Hill, 537, it was held that entries by a clerk cannot be given in evidence merely on the ground that the clerk is beyond the jurisdiction of the court, but may upon proof of his death.

(3) *When the bookkeeper is insane.*—Where the clerk who made the entries is insane, the book is admissible upon proof of his handwriting.¹

¹ *Union Bank v. Knapp*, 3 Pick. 96, 15 Am. Dec. 181; *Bolling v. Fannin*, 97 Ala. 619, 12 So. 59 (*dictum*).

(4) *When the bookkeeper is dead.*—If the entries were made by a bookkeeper who has since deceased, the books are admissible upon proof of his death and of his handwriting.¹

¹ *Livingston v. Tyler*, 14 Conn. 493; *Stroud v. Tilton*, 3 Keyes, 139; *Lewis v. Norton*, 1 Wash. (Va.) 76; *Elliott v. Dyche*, 80 Ala. 376; *Price v. Earl of Torrington*, 1 Salk. 285; *Bacon v. Vaughn*, 34 Vt. 73; *Ocean Nat. Bank v. Carll*, 9 Hun, 239 (bank books).

b. Statutory rule.—The common-law rule stated *supra*, and illustrated in the cases cited, is the rule substantially recognized by, and embodied in, the statutes of several of the states.¹

¹ Thus, in Colorado by statute (Courtright's Colo. Stats. 1914, § 7268, p. 2614), where the entries were made by third persons not present at the trial, it must be shown that the person who made them is either dead, or a nonresident of the state, and if the latter, that he was disinterested when making them, and that the entries were made in the usual course of trade and of his duty or employment; there must also be proof of his handwriting. *Charles v. Ballin*, 4 Colo. App. 186, 35 Pac. 279; *Farrington v. Tucker*, 6 Colo. 557.

So, also, under the Iowa statute, books are receivable in evidence as to entries properly authenticated, but not as to those not so authenticated by the bookkeepers. *Herriott v. Kersey*, 69 Iowa, 111, 28 N. W. 468. (See Compiled Code of Iowa, 1919, § 7330, p. 2121.)

The Illinois statute governing the admission of books of account does not apply to books kept by a clerk who is living in the state and able to testify to their correctness. The books are still admissible, but the party must make the preliminary proof required by the rule before the passage of the statute. *House v. Beak*, 141 Ill. 290, 33 Am. St. Rep. 307, 30 N. E. 1065. (Hurd's Rev. Stats. 1921, chap. 51, § 3, vol. 1, p. 1585.)

In Nebraska the entries must be verified by the bookkeeper, to the effect that he believes them just and true, or a sufficient reason must be given why such verification is not made. *Volker v. First Nat. Bank*, 26 Neb. 602, 42 N. W. 732; *Holland v. Commercial Bank*, 22 Neb. 571, 36 N. W. 112. (Neb. Rev. Stat. 1913, § 7904, ¶ 4, p. 2158.)

6. Effect of statute making party competent witness for self.

It is very generally held that the statute making parties competent witnesses to testify in their own behalf does not deprive them of the right to introduce their books in evidence.¹

¹ *Stroud v. Tilton*, 3 Keyes, 139; *Swain v. Cheney*, 41 N. H. 232; *Tomlinson v. Borst*, 30 Barb. 42; *Taggart v. Fox*, 11 Daly, 159; *Bushnell v. Simpson*, 119 Cal. 658, 51 Pac. 1080; *Nichols v. Haynes*, 78 Pa. 174.

But the rule in Maryland excluding the books is not changed by such a statute. *Romer v. Jaecksch*, 39 Md. 585.

7. Effect of statute prohibiting party from testifying.

Even in the absence of any exemption of books of account from the statute prohibiting a party from testifying when his

adversary is an executor or administrator, or insane person,¹ it is generally held that such statutes do not affect the common-law right of the party to introduce his books when otherwise unobjectionable.²

¹ As stated *supra* in § 1 b, many of the statutes contain such an express exemption.

Under the Vermont statute (Gen. Laws 1917, § 1893, p. 391), in actions of book account, and when the matter at issue is proper matter of book account, the party living may be a witness so far as to prove in whose handwriting the charges are, and when made, and no further. *Hunter v. Kittridge*, 41 Vt. 359. But not when the subject-matter of the entry is a mere memorandum of the fact, and not a proper item of book charge. *Jewett v. Winship*, 42 Vt. 204.

² *Snell v. Parsons*, 59 N. H. 521; *Young v. Luce*, 50 N. Y. S. R. 253, 21 N. Y. Supp. 225; *Bookout v. Shannon*, 59 Miss. 378; *Alling v. Brazee*, 27 Ill. App. 595; *Haines v. Christie*, 28 Colo. 502, 66 Pac. 883; *Kilbourn v. Anderson*, 77 Iowa, 501, 42 N. W. 431; *Jeffords v. Muldrow*, 104 S. C. 388, 6 A.L.R. 755, 89 S. E. 357.

See also note in 6 A.L.R. 756.

8. Effect of statute of limitations.

The fact that the account may be barred by the statute of limitations does not affect the admissibility of the books.¹

¹ *Lamb v. Hart*, 3 S. C. L. (1 Brev.) 105; *McLennan v. Bank of California*, 87 Cal. 569, 25 Pac. 760; *Thorn v. Moore*, 21 Iowa, 285. Compare *Butterweck's Estate*, 4 Pa. Dist. R. 563.

9. Effect of amount in controversy.

Under the North Carolina book-debt law a plaintiff may prove by his book and own oath a balance due to him of \$60 or under.¹ But not where the amount exceeds that sum.²

The limitation as to the amount for which a book is evidence of an account under the Tennessee statute³ applies to the plaintiff's book as well when it is offered by an executor or administrator as when it is offered by a living plaintiff.⁴

¹ So held, although the whole account was originally for more than \$60, but was reduced by credits below that amount. *McWilliams v. Cosby*, 26 N. C. (4 Ired. L.) 110. (See Stats. of N. C. 1919, § 1786, vol. 1, p. 800.)

That the amount of the account in an action under the book-debt law cannot be reduced by credits so as to give jurisdiction to the justice, see *Waldo v. Jolly*, 49 N. C. (4 Jones, L.) 173.

2 *Bland v. Warren*, 65 N. C. 372.

3 The Tennessee statute limits the amount provable to articles of \$75 in value. *Cave v. Baskett*, 3 Humph. 340; *Johnson v. Price*, 3 Head, 549. (See Ann. Code of Tenn. 1918, § 5562, vol. 5, p. 5468.)

4 *Perkins v. Moss*, 3 Heisk. 671.

10. Rule when the party keeps a clerk.

a. Generally.—Whether or not the admissibility of a party's book is dependent upon his proving that he kept no clerk, and whether his books are to be excluded if he did keep one, unless his absence is accounted for, are questions as to which there is conflict.¹

¹ That the admissibility of the book is so affected, see *Vosburgh v. Thayer*, 12 Johns. 461; *Underwood v. Parrott*, 2 Tex. 168; *Watrous v. Cunningham*, 71 Cal. 30, 11 Pac. 811; *Townsend v. Coleman*, 18 Tex. 418. And by statute in some states, *Talbotton R. Co. v. Gibson*, 106 Ga. 229, 32 S. E. 151. (Park's Ann. Code of Ga. 1914, § 5769, vol. 5, p. 3877.)

That it is not so affected, see *Mitchell v. Belknap*, 23 Me. 475. Compare *Kent v. Garvin*, 1 Gray, 148.

b. Who are clerks.—The rule excluding the book when the party kept a clerk refers to an employee having something to do with, and a general knowledge of, the business of his employer in reference to the goods sold or work done, and not to a bookkeeper with little means of personal knowledge as to the transactions, or slight information in relation thereto except that derived from others.¹

¹ *McGoldrick v. Traphagan*, 88 N. Y. 334; *Smith v. Smith*, 52 L.R.A. 545, with note.

A mere employee who tends to sales no further than merely delivering goods and keeping a memorandum of the delivery for a temporary purpose is not a clerk within the rule. *Sickles v. Mather*, 20 Wend. 72, 32 Am. Dec. 521; *Jackson v. Evans*, 8 Mich. 476.

The books are not to be excluded because the parties at times employed persons to help about the stores for a few days or months, who at times made entries in the books, where all the entries were made under the general supervision of the parties, with their knowledge and at their

suggestion and usually in their presence, and those made by the persons employed were proved to be correct. *Atwood v. Barney*, 80 Hun, 1, 29 N. Y. Supp. 810.

One whose sole business is to keep books is not a clerk within the rule which excludes books of account of a party who keeps a clerk. *Hurley v. Macey*, 94 App. Div. 9, 87 N. Y. Supp. 924.

11. Form and requisites as to book and entry.

a. Generally.—The construction or form of the book, or the material used, is not a matter of importance if it be capable of perpetuating a record of events, and the charges therein are fairly and honestly made in the regular course of business and at or about the time of the transaction to which they refer.¹

The entries should, however, be precise and definite.²

It is no valid objection to a book otherwise unobjectionable that the entries were made with a lead pencil.³

Nor is a physician's book objectionable because it contains well-known and usual abbreviations.⁴

Loose leaf ledger systems have been held admissible as books of original entry.⁵ Similarly card systems have been held admissible⁶ and also original sales slips.⁷

¹ *Hooper v. Taylor*, 39 Me. 224; *Moody v. Roberts*, 41 Miss. 74; *Bookout v. Shannon*, 59 Miss. 378; *Cummings v. Nichols*, 13 N. H. 420, 38 Am. Dec. 501.

Thus, several scraps or sheets of paper have been admitted as a book when the proof is otherwise sufficient. *Smith v. Smith*, 4 Harr. (Del.) 532; *Taylor v. Tucker*, 1 Ga. 231; *Bell v. McLeran*, 3 Vt. 185. Compare *Hay v. Peterson*, 6 Wyo. 419, 34 L.R.A. 581, 45 Pac. 107, excluding memorandum upon date on a calendar as not sufficient; and *Barber v. Bennett*, 58 Vt. 476, 56 Am. Rep. 565, 4 Atl. 231, excluding a loose paper for the same reason. And in *Thomas v. McKelvey*, 13 Serg. & R. 126, loose papers were excluded because on their face they were not worthy of the name of an account regularly kept.

Entries made in the regular course of business, according to the practice of the bookkeeper, may (it seems) be regarded like entries in the books for the purpose of receiving them (in connection with his oath), in his own favor as part of the *res gestæ*. *Re Tully*, 20 Fed. 812 (*dictum* in discussing whether falsifying such slips is forgery,—citing cases). So, also, a notched stick has been admitted. *Rowland v. Burton*, 2 Harr. (Del.) 288.

So, also, has a shingle. *Kendall v. Field*, 14 Me. 30, 30 Am. Dec. 728.

² *Richardson v. Emery*, 23 N. H. 220.

They need not be such as to be understood by the general public if they are intelligible to persons in the business; but where they are not intelligible to the common understanding, it would seem to be necessary to support them by other evidence as to their meaning and character. *Re Fulton*, 178 Pa. 78, 35 L.R.A. 133, 35 Atl. 880.

³ *True v. Bryant*, 32 N. H. 241; *Gibson v. Bailey*, 13 Met. 537; *Hill v. Scott*, 12 Pa. 168.

⁴ *Bay v. Cook*, 22 N. J. L. 343; *Cummings v. Nichols*, 13 N. H. 420, 38 Am. Dec. 501; *Bookout v. Shannon*, 59 Miss. 378. *Contra*: *Kelley's Estate*, 5 Pa. Dist. R. 263, as to the use of hieroglyphics.

⁵ *United Grocery Co. v. Dannelly & Son*, 93 S. C. 580, 77 S. E. 706, Ann. Cas. 1914D, 489; *Armstrong Clothing Co. v. Boggs*, 90 Neb. 499, 133 N. W. 1122, Ann. Cas. 1913A, 966, also mentioned in note in L.R.A. 1916B, 634.

See also *Wylie v. Bushnell*, 277 Ill. 484, 115 N. E. 618.

⁶ *Haley & Lang Co. v. Vecchio*, 36 S. D. 64, L.R.A. 1916B, 631, 153 N. W. 898; *Wigmore*, Ev. § 1548 and note in 33 Harvard L. Rev. 982.

Contra, as to doctor's cards. *Daniels's Estate*, 77 Phila. Leg. Int. (Pa.) 134.

⁷ *Braddock Lumber Co. v. Hecht*, 66 Pittsb. L. J. (Pa.) 668.

b. Alterations, erasures, and mutilations.—A book materially erased and altered cannot go to the jury unless the party offering it explains the erasures or alterations.¹ Otherwise, however, of immaterial alterations.²

And a book which has been mutilated by cutting out the leaves on which the account in suit had been should not be received,³ unless explained.⁴

¹ *Churchman v. Smith*, 6 Whart. 146, 36 Am. Dec. 211; *Campbell v. Holland*, 22 Neb. 587, 35 N. W. 871; *Eastman v. Moulton*, 3 N. H. 156; *Moody v. Roberts*, 41 Mass. 74; *Cogswell v. Dolliver*, 2 Mass. 217, 3 Am. Dec. 45; *State v. Collins*, 1 Marv. (Del.) 536, 41 Atl. 144; *Schettler v. Jones*, 20 Wis. 412.

That a book entry is open to explanation, see *Freer v. Budington*, 6 N. Y. S. R. 319. *Contra*: *Richardson v. Wingate*, 1 Ohio Dec. Reprint, 478. And *Cook v. Brister*, 19 N. J. L. 73, holds that an entry written on an erasure cannot be explained by the party stating that his bookkeeper had by mistake charged another person, and had then erased it and entered it as it appeared.

² *Morris v. Briggs*, 3 Cush. 342; *Lloyd v. Lloyd*, 1 Redf. 399; *James v. Harvey*, 1 N. J. L. 228.

So, also, of falsifications in the book, but which do not affect the entries in question. *Webster v. San Pedro Lumber Co.* 101 Cal. 326, 35 Pac. 871.

³ *Lovelock v. Gregg*, 14 Colo. 53, 23 Pac. 86; *Johnson v. Fry*, 88 Va. 695, 12 S. E. 973, 14 S. E. 183.

⁴ *Campbell v. Holland*, 22 Neb. 587, 35 N. W. 871 (where the leaf had been torn out because it had become soiled and unfit for use).

c. Omission to affix price, weight, etc.—The mere fact that no prices are carried out does not affect the competency of the entries.¹ Nor is their competency affected by the mere omission of the weight or quantity.²

¹ *Remick v. Rummery*, 69 N. H. 605, 45 Atl. 574; *Jones v. Orton*, 65 Wis. 9, 26 N. W. 172; *Steele v. Manufacturing Co.* 4 Kulp, 414. *Contra*: *Hagaman v. Case*, 4 N. J. L. 370.

But entries have been held inadmissible when they furnish nothing by which the propriety of the prices charged can be tested or criticized by witnesses familiar with the subject. *McGarry's Estate*, 9 Pa. Dist. R. 172.

² *Pratt v. White*, 132 Mass. 477.

12. Entries; original or transferred.

a. General rule.—Books of account, whether sought to be used under the common-law rule, or under statutes regulating their reception in evidence, and whether the entries were made by the party himself, or by a bookkeeper employed for that purpose, must contain the original or first permanent record of the transactions.¹

¹ This requirement is one recognized by all the cases cited *supra* and *infra*, and by the following: *Moody v. Roberts*, 41 Miss. 74; *Cogswell v. DOLLIVER*, 2 Mass. 217, 3 Am. Dec. 45; *Watrous v. Cunningham*, 71 Cal. 30, 11 Pac. 811; *Inslee v. Prall*, 23 N. J. L. 457; *Vosburgh v. Thayer*, 12 Johns. 461; *Baldrige v. Penland*, 68 Tex. 441, 4 S. W. 565; *Skipworth v. Deyell*, 83 Hun, 307, 31 N. Y. Supp. 918; *James v. Wharton*, 3 McLean, 492, Fed. Cas. No. 7,187; *Hooker v. Johnson*, 6 Fla. 730; *Wyman v. Wilcox*, 66 Vt. 26, 28 Atl. 321; *McDavid v. Ellis*, 78 Ill. App. 381.

b. Entries transferred from memoranda.—Entries may be original although transferred from some memoranda, made as a temporary assistance to the memory upon a slate, book, paper, or other substance; and its material is of no consequence so long as it is a mere minute, not intended to be preserved as evidence itself of the transaction, but to be used in the preparation of such evidence.¹ This is particularly true in modern business establishments where memoranda of the many daily transactions are prepared by clerks and later entered on the permanent book records by bookkeepers.²

The fact that some of the entries are not the first or original entries is no valid objection as to those entries which are original, where the improper entries are exceptions, and are not offered in evidence.³

Nor is the character of the book as one of original entry affected because the temporary memoranda were made by a person other than the one who kept the book offered in evidence.⁴

But entries transferred from temporary memoranda must have been transferred within a reasonable time.⁵

¹ *Patton v. Ryan*, 4 Rawle, 408; *Webb v. Michener*, 32 Minn. 48, 19 N. W. 82; *Faxon v. Hollis*, 13 Mass. 427; *Hall v. Glidden*, 39 Me. 445; *Landis v. Turner*, 14 Cal. 573; *Ewart v. Morrell*, 5 Harr. (Del.) 126; *McGoldrick v. Wilson*, 18 Hun, 443; *Hartley v. Brookes*, 6 Whart. 189; *Arnold v. Sabin*, 1 Cush. 525; *Groschell v. Knoll*, 10 Ky. L. Rep. 314; *Smith v. Sanford*, 12 Pick. 139, 22 Am. Dec. 415.

In *Ladd v. Sears*, 9 Or. 244, a bank's cash book and depositor's balance book were allowed to go in evidence as against the objection that the books were not books of original entry.

² *Givens v. Pierson*, 167 Ky. 574, 181 S. W. 324, Ann. Cas. 1917C, 956. Note in 29 Harvard L. Rev. 863.

³ *Wollenweber v. Ketterlinus*, 17 Pa. 389; *Chisholm v. Beaman Mach. Co.* 160 Ill. 101, 43 N. E. 796; *Armstrong v. Landers*, 1 Penn. (Del.) 449, 42 Atl. 617.

⁴ As where they were first made on a slate by the party's foreman in the factory. *Sickles v. Mather*, 20 Wend. 72, 32 Am. Dec. 521.

Or by employees or salesmen upon shingles, loose scraps of paper, slate, or memorandum book. *Paine v. Sherwood*, 21 Minn. 225; *Levine v. Lancashire Ins. Co.* 66 Minn. 138, 68 N. W. 855.

Or on the delivery cart by servants who delivered the goods. *Miller v. Shay*, 145 Mass. 162, 1 Am. St. Rep. 446, 13 N. E. 468.

Or upon boards and paper memoranda by sawyers who sawed and delivered the lumber. *Davison v. Powell*, 16 How. Pr. 467; *Taylor v. Tucker*, 1 Ga. 231.

But entries made up from receipts given by a servant of the party to whom the goods were delivered are not original. *Guthrie v. Mann*. — Tex. Civ. App. —, 35 S. W. 710.

⁵ *Redlich v. Bauerlee*, 98 Ill. 134.

Usually the same day or the day following is proper. *Drummond v. Hyams*, 16 S. C. L. (Harp.) 268, 18 Am. Dec. 649; *Plummer v. Struby-Estabrooke Mercantile Co.* 23 Colo. 190, 47 Pac. 294; *Webb v. Michener*, 32 Minn. 48, 19 N. W. 82; *Ingraham v. Bockius*, 9 Serg. & R. 285, 11 Am. Dec. 730.

But delay of two or three days without explanation is fatal. *Groff's Estate*, 14 Phila. 306; *Grady v. Thigpin*, 6 Fla. 668; *Vicary v. Moore*, 2 Watts, 451, 27 Am. Dec. 323. *Contra*: *Landis v. Turner*, 14 Cal. 573.

An entry transferred from temporary memoranda at the end of a week's work of sixty hours was upheld in *Jeffries v. Urmey*, 3 Houst. (Del.) 653; *Filkins v. Baker*, 6 Lans. 516.

Once a month was upheld in *Redlich v. Bauerlee*, 98 Ill. 134.

As to entries from a slate, transferred when the slate was full, compare *Forsythe v. Norcross*, 5 Watts, 432, 30 Am. Dec. 334 (excluding them); *Hall v. Glidden*, 39 Me. 445 (admitting them).

See also cases cited § 13, *infra*.

c. Ledgers.—A ledger is usually held not to be a book of original entries.¹

But it may still be used under the rule of evidence allowing secondary evidence upon proper foundation laid therefor.²

And a ledger may be admissible where the entries are in fact the original entries.³

¹ *Estes v. Jackson*, 21 Ky. L. Rep. 859, 53 S. W. 271; *Bracken v. Dillon*, 64 Ga. 243, 37 Am. Rep. 70; *Griesheimer v. Tannenbaum*, 124 N. Y. 650; *Stetson v. Wolcott*, 15 Gray, 545; *First Nat. Bank v. Williams*, 4 Ind. App. 501, 31 N. E. 370.

But see *Bush v. Fourcher*, 3 Ga. App. 43, 59 S. E. 459.

² *Stanley v. Wilkerson*, 63 Ark. 556, 39 S. W. 1043; *Rigby v. Logan*, 45 S. C. 651, 24 S. E. 56.

But the bookkeeper must be produced, if alive and accessible, to verify the entries. *Price v. Garland*, 3 N. M. 505, 6 Pac. 472.

And a ledger is not admissible when books of original entry are accessible. *Pohl v. Bradford & R. Bros.* — Tex. Civ. App. —, 25 S. W. 984; *Vilmar v. Schall*, 3 Jones & S. 67.

Where the original books of entry were destroyed by fire but before the fire occurred the general balances due had been transferred to a "ledger" which a witness testified contained a true copy of balances due on all accounts, the ledger was held admissible. *Perley v. McGray*, 115 Me. 398, 99 Atl. 39.

³ *Swain v. Cheney*, 41 N. H. 232; *Jones v. DeKay*, 3 N. J. L. 955; *Gibson v. Bailey*, 13 Met. 537; *Toomer v. Gadsden*, 35 S. C. L. (4 Strobb.) 193; *Hoover v. Gehr*, 62 Pa. 136; *Sanborn v. Cunningham*, 4 Cal. Unrep. 95, 33 Pac. 894; *Anonymous*, 21 Misc. 656, 48 N. Y. Supp. 277; *Byerts v. Robinson*, 9 N. M. 427, 54 Pac. 932; *McGoldrick v. Traphagen*, 88 N. Y. 338; *Gifford v. Thomas*, 62 Vt. 34, 19 Atl. 1088.

But a single original entry does not make the ledger a book of original entry. *Fitzgerald v. McCarty*, 55 Iowa, 702, 8 N. W. 646.

d. Balances.—An entry of what remains due as a balance after allowing all set-offs and counterclaims is not an original entry.¹

¹ *McClintock's Appeal*, 58 Mich. 152, 24 N. W. 549; *Buckner v. Meredith*, 1 Brewst. (Pa.) 306; *Baldrige v. Penland*, 68 Tex. 441, 4 S. W. 565; *Contra*: as to balance found due on settlement, *Spear v. Peck*, 15 Vt. 566.

13. Time for making the entries.

a. General rule.—Entries should be made at or near the time of the transactions recorded;¹ although it is not fatal to them that they are not made the same day, so long as they are made in the usual course of business.²

But a book is not evidence when it appears that the entries, although of various dates, were made all at one time.³

¹ *Watrous v. Cunningham*, 71 Cal. 30, 11 Pac. 811; *Prince v. Smith*, 4 Mass. 455; *Moody v. Roberts*, 41 Miss. 74; *Davis v. Sanford*, 9 Allen, 216; *State, Rumsey, Prosecutor, v. New York & N. J. Teleph. Co.* 49 N. J. L. 322, 8 Atl. 290; *Lane v. May & T. Hardware Co.* 121 Ala. 296, 25 So. 809; *Dismuke v. Tolson*, 67 Ala. 386.

Usually more than one day ought not to be allowed to intervene, unless justified by the peculiar nature of the business. *Walter v. Bollman*, 8 Watts, 544.

In Iowa and Nebraska it is error to admit a book when it is not first shown, as required by statute, that the entries were made at or near the time of the transaction entered, unless satisfactory reasons appear

for not making such proof. *Anderson v. Ames*, 6 Iowa, 486; *Atkins v. Seeley*, 54 Neb. 688, 74 N. W. 1100.

² *Bay v. Cook*, 22 N. J. L. 343; *Kaughley v. Brewer*, 16 Serg. & R. 133, 16 Am. Dec. 554.

A single charge for work continuing from day to day for several days was upheld in *Yearsley's Appeal*, 48 Pa. 531.

But if the work continues for months, charges should be made from week to week, or in other limited terms. *Cummings v. Nichols*, 13 N. H. 420, 38 Am. Dec. 501.

An entry of goods sold, made before the goods are delivered or set apart for delivery, is not good. *Rhoades v. Gaul*, 4 Rawle, 403, 27 Am. Dec. 277.

But an entry begun when the goods were ordered, while their quantity and value were uncertain, and filled up after the particulars have been ascertained, and the goods delivered, is good. *Malony v. Benner*, 3 Grant, Cas. 233; *Koch v. Howell*, 6 Watts & S. 350.

So held, also, of an entry made when the goods were loaded and started, in *Keim v. Rush*, 5 Watts & S. 377.

And in *Wollenweber v. Ketterlinus*, 17 Pa. 389, of an entry made when the articles were furnished and ready for delivery except packing in boxes, although they may not be taken away for several days.

³ *Eastman v. Moulton*, 3 N. H. 156; *Davis v. Sanford*, 9 Allen, 216; *Eberhardt v. Schuster*, 10 Abb. N. C. 374; *Lynch v. McHugo*, 1 Bay, 33; *Treadway v. Treadway*, 5 Ill. App. 478; *Geiger's Appeal*, 1 Monaghan, (Pa.) 547, 16 Atl. 851.

b. Undated entries.—The rule that entries must have been made at the time they purport to have been made implies that there must be dates, so far, at least, that the court may see that the case comes within the rule.¹

¹ Although it is not necessary that the precise day of the month should be affixed to the charge in all cases. *Cummings v. Nichols*, 13 N. H. 420, 38 Am. Dec. 501.

In *Davis v. Sanford*, 9 Allen, 216, undated entries were excluded.

And under the Pennsylvania affidavit of defense law items of an account must be dated in the copy filed. *Harbison v. Hawkins*, 81* Pa. 142.

But *Doster v. Brown*, 25 Ga. 24, 71 Am. Dec. 153, holds the omission of the date to be not fatal to the book.

c. Lump charges.—Lump charges are a fatal objection to the admissibility of the book.¹ And a charge for sundries, if standing alone, is objectionable for generality.²

¹ *State, Rumsey, Prosecutor, v. New York & N. J. Teleph. Co.* 49 N. J. L.

- 322, 8 Atl. 290; *Cargill v. Atwood*, 18 R. I. 303, 27 Atl. 214; *Bustin v. Rogers*, 11 Cush. 346; *Corr v. Sellers*, 100 Pa. 169; *Baumgardner v. Burnham*, 10 W. N. C. 445. *Contra*: *Newell v. Keith*, 11 Vt. 214.
- So held of a single item of \$360 for thirty-six months' board. *McLaughlin v. Weer*, 1 Marv. (Del.) 267, 40 Atl. 1122.
- And of an item for three months' services. *Henshaw v. Davis*, 5 Cush. 146.
- So, also, of a charge in a physician's book merely for medicine, without specifying the kind. *Lance v. McKenzie*, 2 Bail. L. 449. *Contra*: *Re Staggers*, 8 Pa. Super. Ct. 260. And *Bassett v. Spofford*, 11 N. H. 167, upheld a charge for "visits and medicines" because it did not appear that the charge varied from the usual mode in which physicians made charges, or that the amount was larger than was usually received.
- In *Bay v. Cook*, 22 N. J. L. 343, charges embracing services of two or three days were sustained as against the objection that they did not specify for what services.
- ² But not where it appears that there is a credit given for the same amount in the same language and on the same date. *Cornelius v. Ivins*, 10 N. J. L. 56.
- Nor where a bill of particulars is furnished. *McClure v. Byrd*, 2 Overt. 21.
- Nor where the entry is for a bill of goods extending over several days, and was only charged after all the order had been filled. *Le Franc v. Hewitt*, 7 Cal. 186.

14. Regularity as to course of business.

a. General rule.—To justify the reception of a party's books it must appear that they are his regular books of account, containing entries of his business transactions from day to day in the regular course of his business.¹

But a book containing no entries other than a charge for which the action is brought, and which purports to be but a single transaction, although embracing several articles at one time, is not admissible.²

¹ *Ryan v. Dunphy*, 4 Mont. 356, 47 Am. Rep. 355, 1 Pac. 710; *Moody v. Roberts*, 41 Miss. 74; *Sanford v. Miller*, 19 Ill. App. 536.

Cash books and other books of occasional entry are not admissible. *Kotwitz v. Wright*, 37 Tex. 82.

In Iowa and Nebraska the book must show a continuous dealing with other persons generally, or several items charged at different times against the other party in the same book or set of books. *Arney Bros. v. Meyer*, 96 Iowa, 395, 65 N. W. 337; *Whisler v. Drake*, 35 Iowa, 103; *Van Every v. Fitzgerald*, 21 Neb, 36, 59 Am. Rep. 835, 31 N. W. 264,

Books of a bank sued for a balance due from it on account, containing entries of moneys received and paid out, are admissible only so far as they show actual transactions had with the plaintiff. *Kuenster v. Woodhouse*, 101 Wis. 216, 77 N. W. 165.

² *Ryan v. Dunphy*, 4 Mont. 356, 44 Am. Rep. 355, 1 Pac. 710; *Kibbe v. Bancroft*, 77 Ill. 18.

So held, even although it is explained that this was done at the request of the party charged. *Re Fulton*, 178 Pa. 78, 35 L.R.A. 733, 35 Atl. 880.

In Vermont, book account may be maintained although the only item of charge is for a horse. *Kingsland v. Adams*, 10 Vt. 201. But *Ames v. Fisher*, Brayton, 39, held that it could not be maintained for a single charge for a domestic spinning jenny.

b. Entries relating to party's business.—The books must also be the books of the party engaged in the business to which they refer, and the entries relate to that business, and not to matters in no way connected therewith.¹

¹ *Chicago, St. L. & N. O. R. Co. v. Province*, 61 Miss. 288; *Baldrige v. Penland*, 68 Tex. 441, 4 S. W. 565.

The books are not evidence of a casual sale not in the course of the party's business, and of which it is usual to take other evidence of sale. *Shoemaker v. Kellog*, 11 Pa. 310; *Stuckslager v. Neel*, 123 Pa. 53, 16 Atl. 94.

15. Entries showing intent to charge.

The entries must purport to have been made with an intent to charge the party sought to be held liable.¹

¹ *Moody v. Roberts*, 41 Miss. 74; *Walter v. Bollman*, 8 Watts, 544; *Hale v. Ard*, 48 Pa. 22.

But charges for labor, though not in the usual form of accounts, sufficiently show an intent to charge, when they show the nature of the charge, the date when, and for whom, the labor was performed, its duration and kind. *Remick v. Rumery*, 69 N. H. 605, 45 Atl. 574.

16. Authentication and correctness of books and entries.

a. Necessity generally.—It must also appear that the transactions were correctly recorded, or, as it is sometimes expressed, the books must appear to have been fairly and honestly kept.¹

¹ *Moody v. Roberts*, 41 Miss. 74; *Kling v. Tunstall*, 109 Ala. 608, 19 So

907; *American F. Ins. Co. v. First Nat. Bank*, — Tex. Civ. App. —, 30 S. W. 384; *Irish v. Horn*, 84 Hun, 121, 32 N. Y. Supp. 455.

It must appear that the party keeping and producing the books is usually precise and punctilious respecting the entries therein, and that they are designed at least to embrace all the items of account which are proper subjects of book entry. *Countryman v. Bunker*, 101 Mich. 218, 59 N. W. 422. Compare *Peck v. Pierce*, 63 Conn. 310, 28 Atl. 524.

In Iowa the charges must be verified by the party who made them, to the effect that he believes them just and true, unless a sufficient reason be given why such verification is not made. *Karr v. Stivers*, 34 Iowa, 123; *Arney Bros. v. Meyer*, 96 Iowa, 395, 65 N. W. 337.

b. Oath of the party himself.—In several of the states—apparently those in which the suppletory oath of the party is received with his book—it is held that he is a competent witness to prove that the entries are true.¹

¹ *Mathes v. Robinson*, 8 Met. 269, 41 Am. Dec. 505; *Black v. Shooler*, 2 McCord, L. 293; *Taylor v. Tucker*, 1 Ga. 231; *Landis v. Turner*, 14 Cal. 573.

And permitting the party to so testify to entries against a deceased person does not make him a witness to a transaction between himself and the deceased person. *Robinson v. Dibble*, 17 Fla. 457; *Cargill v. Atwood*, 18 R. I. 303, 27 Atl. 214; *Jones v. Gammans*, 11 Nev. 249; *Roche v. Ware*, 71 Cal. 375, 60 Am. Rep. 539, 12 Pac. 284; *Anthony v. Stinson*, 4 Kan. 211. *Contra*: *Dismukes v. Tolson*, 67 Ala. 386; *Davis v. Seaman*, 64 Hun, 572, 19 N. Y. Supp. 260. And *Martin v. Scott*, 12 Neb. 42, 10 N. W. 532, holds that the party is incompetent, but that his wife is not.

c. Proof by customers.—Both at common law and by express statute in some states, the correctness of the books is to be proved by customers who testify that they had dealt with the party and settled by his books, and that they had found his accounts correct.¹

¹ *Vosburgh v. Thayer*, 12 Johns. 461; *Smith v. Smith*, 163 N. Y. 168, 52 L.R.A. 545, 57 N. E. 300.

This proof must be made by dealers or regular customers, and not by employees. *Hauptman v. Catlin*, 1 E. D. Smith, 729; *Walbridge v. Simon*, 13 Misc. 634, 34 N. Y. Supp. 939.

And the witnesses must have examined the books or settled upon the faith of them; it is not enough that they state that they found the bills rendered correct. *Beatty v. Clark*, 44 Hun, 126; *Bower v. Smith*, 8 Ga. 74.

Settlements since suit begun are not insufficient so long as it is shown that the accounts settled were embraced in the period of time covering the account in question. *Foster v. Coleman*, 1 E. D. Smith, 85.

A single witness is enough. *Beattie v. Qua*, 15 Barb. 132. But not where there is also an adverse witness who impeaches the book. *Morrill v. Whitehead*, 4 E. D. Smith, 239.

In Michigan the rule was formerly as stated in the text. *Jackson v. Evans*, 8 Mich. 476. *Contra*: since the statute making parties competent witnesses for themselves. *Montague v. Dougan*, 68 Mich. 98, 35 N. W. 840; *Seventh-Day Adventist Pub. Asso. v. Fisher*, 95 Mich. 274, 54 N. W. 759.

17. Knowledge of the person making the entries.

a. In general.—As a general rule, it is essential, as to entries made by a living witness, that he shall be able to state that at or about the time the entries were made he knew their contents, and knew them to be true, so that the entries and the testimony of the witness concurrently shall be equivalent to a present affirmation of the truth of their contents.¹

¹ *Kerns v. McKean*, 76 Cal. 87, 18 Pac. 122; *Dismukes v. Tolson*, 67 Ala. 386; *Swan v. Thurman*, 112 Mich. 416, 70 N. W. 1023; *Hill v. Johnson*, 38 Mo. App. 383; *Dykman v. Northbridge*, 80 Hun, 258, 30 N. Y. Supp. 164; *Thomas v. Price*, 30 Md. 483; *Dodge v. Morrow*, 14 Ind. App. 534, 41 N. E. 967, 43 N. E. 153. *Contra*: *Imhoff v. Fleuerer*, 2 Phila. 35; *Jones v. Long*, 3 Watts, 325; *Bailey v. Barnelly*, 23 Ga. 582; *Smith v. Law*, 47 Conn. 431.

b. Entries on information verified by informant.—It is not fatal to a book otherwise unobjectionable that the entries were first made on temporary memoranda and transferred to the book, provided that the original entries on the memoranda and the copying on the book are verified by the various persons who made them.¹

¹ *State v. Shinborn*, 46 N. H. 497, 88 Am. Dec. 224; *Payne v. Hodge*, 7 Hun, 612; *Paine v. Sherwood*, 21 Minn. 225; *House v. Beak*, 141 Ill. 290; *Kessler v. McConachy*, 1 Rawle, 435; *McCoy v. Lightner*, 2 Watts, 347. See also cases cited under §§ 12, b, and 13, a, *supra*.

c. Proof of knowledge of the persons making the entries in a large modern business establishment.—The volume and complexity of present day commercial transactions have become so great that it is generally impossible for any one witness or even group of witnesses to have complete knowledge of any particu-

lar transaction. The old rule that to admit a book entry made in the regular course of business, an identifying witness must be produced or accounted for as dead or incapacitated has therefore been relaxed, in the case of large firms or corporations where a great number of clerks have participated in getting particular items entered on the books, to admit in evidence any entries kept as a permanent business record, upon identification by the bookkeeper or other person in general charge of such records, without requiring the calling of all the witnesses who made the separate entries.¹

¹ *State v. Virgens*, 128 Minn. 422, 151 N. W. 190, where books and records of a large mail order establishment were admitted in a murder trial as evidence of the sale and delivery of a revolver to defendant, without being verified by the several clerks who made the original entries.

Montgomery & M. Lumber Co. v. Ocean Park Scenic R. Co. 32 Cal. App. 32, 161 Pac. 1171. Lumber orders were entered in triplicate, duplicate remaining in the book as the permanent record. Manager of Company testified books were kept under his direction and were correct. No salesmen were called or accounted for but books were allowed in evidence over objection.

Similarly the testimony of numerous witnesses as to book entries was held to be both inconvenient and unnecessary in the following cases: *W. Va. Arch. & Builders v. Stewart*, 68 W. Va. 506, 36 L.R.A. (N.S.) 899, 70 S. E. 113; *Chesapeake & O. R. Co. v. Stojanowski*, 112 C. C. A. 310, 191 Fed. 720; *Squires v. O'Connell*, 91 Vt. 35, 99 Atl. 268.

In *Givens v. Pierson*, 167 Ky. 574, 181 S. W. 324, Ann. Cas. 1917C, 956, slips from which entries had been made had been destroyed by fire and so the identity of those making the slips had been lost; nevertheless the entries were admitted in evidence.

18. Bringing home to adverse party.

Testimony of the party producing his account in his own favor, that he thinks the other party saw the entry, is not enough to make it evidence against the latter.¹ But proof that a debtor to whom a statement of his account was rendered examined the book at the time when, and from which, it was rendered, and made no objection to its correctness, renders the book competent as an admission against him.²

¹ *Manion Blacksmith & Wrecking Co. v. Carreras*, 19 Mo. App. 162 (judgment reversed because founded upon this evidence).

Memoranda made on the stubs in a note book on the delivery of notes, and held inadmissible unless in the presence and with the knowl-

edge of the party receiving the notes, are not rendered competent by testimony that such person was sitting down about 6 feet away at the time. *Roberts v. Patterson*, 77 Ill. App. 394.

Entries made by a bookkeeper under the direction of his employer, as to facts of which he has no personal knowledge, are not admissible in evidence, especially against one not present when they were made. *Hart v. Kendall*, 82 Ala. 144, 3 So. 41.

An account book containing memoranda of settlements made by one party in the presence of the other, and retained by the latter, is admissible against the latter. *McDavid v. Ellis*, 78 Ill. App. 381.

* *Raub v. Nisbett*, 118 Mich. 248, 76 N. W. 393.

So, also, where the items in the book were read over to him, and he objected to only a few items. *Lever v. Lever*, 2 Hill, Eq. 158.

Or where the book has been used as the basis of an accounting and settlement between the parties. *Hanson v. Jones*, 20 Mo. App. 595.

Or where the parties looked over the book, and the debtor said he was satisfied the account was correct. *Beales v. Lyons*, 14 N. Y. Week. Dig. 368.

Or where there is other testimony to show that the book was correctly kept, and has been recognized by the debtor in his settlement with other persons as correct. *West v. Van Tuyl*, 119 N. Y. 620, 23 N. E. 450.

And a guardian's book is admissible against his ward where it appears that the latter had access to the book, and did in fact examine it and make entries therein, as well as the guardian. *Fowler v. Hebbard*, 40 App. Div. 108, 57 N. Y. Supp. 531.

19. What accounts are provable by books.

a. Generally.—Usually, of course, a party desiring to use his own books in his own behalf does so for the purpose of proving an account for goods sold and delivered, or for the performance of work and labor, and materials furnished.¹

¹ This is the principle involved in the cases cited in the preceding sections of the title. And the cases in the following sections show rather the exceptions to the general rule, that is to say, whether the books are competent to prove the particular account in question.

b. Delivery of goods to third person.—A tradesman's book is evidence to charge the original debtor only; but it is not admissible against one who merely assumed to pay the debt of the person to whom the goods were delivered.¹

And where the books or the evidence in the case show that the goods were delivered to some person other than the one sued and against whom the charges on the books are made, and

the controversy is not merely as to the amount or quantity, but whether the party sued is in fact chargeable, many of the courts hold that the books of themselves are not competent evidence of the delivery; but that the order, direction, or request to so deliver the goods to such third person must first be proved by other competent evidence.¹

But the fact that the charges are against the agent of the party against whom recovery is sought, instead of against the party himself, does not render the book inadmissible.²

¹ *Poultney v. Ross*, 1 Dall. 238, 1 L. ed. 117.

The book is not competent to prove a promise of payment by the defendant. *Somers v. Wright*, 114 Mass. 171; *Petriken v. Baldy*, 7 Watts & S. 429.

But that the entries are against the person receiving the goods, while proper to be considered by the jury on the question as to whom the credit was given, is not decisive against the admissibility of the books; and that fact is not conclusive that the person charged was the original debtor. *Winslow v. Dakota Lumber Co.* 32 Minn. 237, 20 N. W. 145; *Greene v. Burton*, 59 Vt. 423, 10 Atl. 575; *Mackey v. Smith*, 21 Or. 598, 28 Pac. 974; *Fiske v. Allen*, 8 Jones & S. 76; *Dunlap v. Hooper*, 66 Ga. 211.

² *Kinloch v. Brown*, 30 S. C. L. (1 Rich.) 223; *Soper v. Veazie*, 32 Me. 122; *Kerr v. Love*, 1 Wash. (Va.) 172; *Tenbroke v. Johnson*, 1 N. J. L. 288; *Atwood v. Barney*, 80 Hun, 1, 29 N. Y. Supp. 810; *Wheeler's Estate*, 13 Phila. 373.

Other courts, as in New Hampshire, hold that when it appears by the book, or upon the examination of the party, that the goods were delivered to a third person, who might be called as a witness, the book is not competent evidence of the delivery. *Webster v. Clark*, 30 N. H. 245.

In Massachusetts books, although supported by the suppletory oath of the clerk who made the entries, are not competent to prove to whom credit was given when that fact is in issue. *Kaiser v. Alexander*, 144 Mass. 71, 12 N. E. 209.

But where there is authority to so deliver the goods, the party's books properly authenticated, or supported by his suppletory oath, are competent to prove the delivery. *Woodward v. Remington*, 81 Hun, 160, 30 N. Y. Supp. 743; *Mitchell v. Belknap*, 23 Me. 475.

³ *Dicken v. Winters*, 169 Pa. 126, 32 Atl. 289; *Montague v. Dougan*, 68 Mich. 98, 35 N. W. 840; *Smith v. Jessup*, 5 Harr. (Del.) 121.

The legal presumption where goods are sold to an agent is that credit is given to the principal, and entries on the vendor's books charging the agent, though of much weight on this question, are not conclusive that credit was given exclusively to him. *Foster v. Persch*, 68 N. Y. 400. See further, on the question, CREDIT.

c. Professional services.—An account for professional services, such as those of an attorney or physician, is generally held to be provable by a book of accounts.¹

¹ That they are, see: *Black v. Reybold*, 3 Harr. (Del.) 528 (attorney); *Snell v. Parsons*, 59 N. H. 521 (attorney); *Codman v. Coldwell*, 31 Me. 560 (attorney); *Foster v. Coleman*, 1 E. D. Smith, 85 (physician); *Martin v. Scott*, 12 Neb. 42, 10 N. W. 532 (physician); *Bookout v. Shannon*, 59 Miss. 378 (physician).

In Pennsylvania the question does not seem to have been settled by the supreme court of that state. Thus, in *Hale v. Ard*, 48 Pa. 22, the court said, of the services of a lawyer, that if the question had been properly before them they should hesitate before receiving the entry. And a like expression of opinion is found in *Re Fulton*, 178 Pa. 78, 35 L.R.A. 133, 35 Atl. 880. But some of the other courts have received books to prove a physician's account. *German's Estate*, 16 Phila. 318. But it has been held otherwise of an attorney's account. *Meany v. Kleine*, 3 W. N. C. 474. And *Foreman's Estate*, 7 Pa. Dist. R. 215, doubts whether an account for lawyers' or surgeons' services was provable by his book.

d. Work done by servant.—And a book is not admissible to prove an account for work and labor done because some of the work was done by the party's servant.¹

¹ *Barker v. Haskell*, 9 Cush. 218; *Mathes v. Robinson*, 8 Met. 269, 41 Am. Dec. 505; *Mathews v. Sanders*, 15 Ark. 255 (although the court here suggested that the account was susceptible of being more readily proved by original evidence). But in *Wright v. Sharp*, 1 Browne (Pa.) 344, the plaintiff was not allowed to read his book in order to prove work done by his servant.

e. Bank accounts.—The books of a bank showing the deposit account of an individual from whom an accounting is demanded in court are proper evidence upon such accounting, although they are not his account books nor books of original entry.¹

¹ *State ex rel. Spokane & E. Trust Co. v. Superior Ct.* 109 Wash. 634, 9 A.L.R. 157, 187 Pac. 358.

II. EXPLANATIONS, CORRECTIONS, AND DISCREDITING.

20. Accounts not exclusively the best evidence.

Books of original entry, although they are the best evidence of their own contents,¹ are not necessarily the best evidence of

the facts entered therein; and the party's nonproduction of his books (unless they have been duly called for) does not preclude him from proving the charges by the testimony of a witness of the admissions of the adverse party.²

Moreover, where the books of original entry are numerous and cannot be conveniently examined in court, and the fact to be proved is the general result of an examination of the whole collection, any competent person who has examined the books may testify as to what such an examination discloses, provided the result is capable of being ascertained by calculation.³

¹ *Clark v. Dearborn*, 6 Duer, 309, holding that even to prove down to what date an account was kept with a bank the books of the bank must be produced, or foundation for secondary evidence laid. *F. Dohmen Co. v. Niagara F. Ins. Co.* 96 Wis. 38, 71 N. W. 69 (books themselves are the best evidence of their contents); *Schotte v. Puscheck*, 79 Ill. App. 31 (not competent for witness to state contents of books of original entry not offered in evidence).

Roden v. Brown, 103 Ala. 324, 15 So. 598 (bookkeeper cannot testify to contents of bank book not produced).

But the cashier of a bank having supervision of the books and business may testify that a person has no account with the bank and no money deposited there subject to check, although his knowledge is principally gained from the books of the bank. *State v. McCormick*, 57 Kan. 440, 57 Am. St. Rep. 341, 46 Pac. 777.

Witness, who knows certain facts contained in books of a bank independent of such books, may testify thereto, although the books themselves would be the best evidence of their contents if his knowledge were obtained therefrom. *Iowa State Bank v. Novak*, 97 Iowa, 270, 66 N. W. 186.

A statement in a letter from a receiver of a bank of what the bank books disclosed is inadmissible in an action to recover a deposit, as the books themselves are better evidence. *Arnold v. Penn*, 11 Tex. Civ. App. 325, 32 S. W. 353.

A witness who kept the plaintiff's books, testifying to the correctness of the account sued upon, but basing his evidence upon an examination of the books, together with other documents, and admitting that he did not sell the goods, is not competent to prove their sale and delivery, —the books themselves being higher evidence than this information derived from them. *Solomon v. Creech*, 82 Ga. 445, 9 S. E. 165.

A book account cannot be proved without introducing the books or accounting for their nonproduction, unless the evidence establishes the correctness of the account irrespective of knowledge acquired from the books, as they are the best evidence. *Birmingham Lumber Co. v. Brinson*, 94 Ga. 517, 20 S. E. 437.

² State, Rumsey, Prosecutor, v. New York & N. J. Teleph. Co. 49 N. J. L. 322, 8 Atl. 290; Dodge v. Morrow, 14 Ind. App. 539, 41 N. E. 967, 43 N. E. 153 (books of original entries inadmissible unless better evidence not obtainable).

Foreman's Estate, 7 Pa. Dist. R. 214 (book entries inadmissible when transaction admits of more satisfactory proof).

Whitaker v. White, 69 Hun, 258, 23 N. Y. Supp. 487 (entry inadmissible when the person who made it can testify to its contents without its aid).

Price v. Garland, 3 N. M. 505, 6 Pac. 472 (ledgers and account books not admissible unless it is first shown that the person in whose handwriting they are cannot be produced in court).

Walker v. Laney, 27 S. C. 150, 3 S. E. 63. (An account may be proved by the personal knowledge of a witness or the admissions of a debtor, as well as by a book of original entry.)

³ Inter-State Finance Corp. v. Commercial Jewelry Co. 280 Ill. 116, 117 N. E. 440; People v. Gerold, 265 Ill. 448, 107 N. E. 165, Ann. Cas. 1916A, 636; Hollingsworth v. State, 111 Ind. 289, 12 N. E. 490; Ruth v. State, 140 Wis. 373, 122 N. W. 733; Wigmore, Ev. § 1230.

21. Photographs.

Photographic copies of accounts and other papers, which, by reason of being public records, cannot be removed for production in court, may be received.¹

Otherwise of originals the genuineness of which is disputed.²

¹ Leathers v. Salvor Wrecking & Transp. Co. 2 Woods, 680, Fed. Cas. No. 8,164.

² 1 Cent. L. J. 121.

22. Secondary evidence not rebuttable.

He who by refusing to produce his accounts when duly called for lets in his adversary's secondary evidence of their contents cannot contradict that evidence.¹

¹ Bogart v. Brown, 5 Pick. 18; Platt v. Platt, 58 N. Y. 646, 649.

McGuinness v. School Dist. No. 10, 39 Minn. 499, 41 N. W. 103 (holding that he cannot afterwards introduce the book itself for purpose of contradicting the secondary evidence).

Otherwise of a public record equally accessible to both. Tyng v. United States Submarine & Torpedo Boat Co. 1 Hun, 161, affirmed in 60 N. Y. 644, s. c. more fully, 49 How. Pr. 360.

He may produce the book to prove another part of the account. Ibid.

^{*} And refusal to produce as evidence on a collateral question does not alone establish fraud, nor exclude other evidence of the facts. Burr v. American Spiral Spring Butt Co. 81 N. Y. 175, 8 Abb. N. C. 403.

23. Interpreting symbols.

A cross, check, or other unintelligible mark on the face of an account may be explained by the writer; and with his testimony to the fact noted by it, it is competent evidence for the jury.¹

¹ North Bank v. Abbot, 13 Pick. 465, 25 Am. Dec. 334.

The explanation of the meaning of certain arbitrary signs and peculiar forms of entry appearing in account books admitted in evidence is admissible. Singer Mfg. Co. v. Leeds, 48 Ill. App. 297.

A witness who made book entries, and who testifies that certain blue marks or checks near the entries were not made until long afterwards, should not be allowed to explain the meaning of the checks. Schuchman v. Winterbottom, 31 N. Y. S. R. 184, 9 N. Y. Supp. 733.

24. Time of entries.

The opinion of a witness is not competent on the question whether entries in an account were in fact made at the same or different times.¹ Entries made in the ordinary course of duty, by a third person not appearing to have had any interest, are, in the absence of evidence to the contrary, presumed by law to have been made at the time they bear date.²

¹ Phoenix F. Ins. Co. v. Philip, 13 Wend. 81; Ellingwood v. Bragg, 52 N. H. 488, 490.

² Jermain v. Denniston, 6 N. Y. 276, reversing Jermain v. Worth, 5 Denio, 342 (entry by bank officer in dealer's pass-book).

(In other cases, if the competency of the entry depends on the date, there must be independent evidence of the date.)

25. Explaining.

a. In general.—A party whose accounts have been put in evidence, either in his own favor, or against him, may explain them by oral evidence of the intent and meaning of the entries.¹

¹ Arnold v. Allen, 9 Daly, 198; Meeker v. Claghorn, 44 N. Y. 349; Foster v. Persch, 68 N. Y. 400.

Champion v. Joslyn, 44 N. Y. 653. (In an action for the balance of an account stated by defendant, he may claim an omitted item but cannot testify as a witness as to his reason, not communicated to plaintiff, for omitting it.)

Harrison v. Kirke, 6 Jones & S. 396 (error to refuse to allow the party to

testify how commissions were really entered in his account, though not appearing as such).

Richard v. Wellington, 66 N. Y. 308, reversing 5 Hun, 181 (competent to show that a credit in an account rendered was not an admission relevant to the transaction against which it was credited, but arose in an independent transaction.)

Quincey v. White, 63 N. Y. 370, reversing Quincey v. Young, 5 Daly, 327 (competent to prove that one defendant had simultaneously a separate account as tending to prove that the account in question was joint).

Pierson v. Atlantic Nat. Bank, 77 N. Y. 304. (To show that entries apparently charging a cashier were really against his bank, plaintiff might show that similar entries had been made of a former transaction with a bank.)

An entry in a book of accounts, if ambiguous, may be explained by parol, but it cannot be shown to mean something which its language does not import. Strong v. Kamm, 13 Or. 172, 9 Pac. 331.

b. By expert.—A bookkeeper cannot be allowed to explain, as an expert, books not shown to have been kept under any technical or scientific system of bookkeeping, and which do not appear to require explanation.¹ But an expert in bookkeeping may explain entries which might be ambiguous and require explanation to make their precise meaning certain.²

¹ McKay v. Overton, 65 Tex. 82.

² Rogers v. State, 26 Tex. App. 404, 9 S. W. 762; Guarantee Co. of N. A. v. Mutual Bldg. & L. Asso. 57 Ill. App. 254 (expert bookkeeper may testify as to the meaning of entries and the true state of accounts where the books are voluminous and intricate).

Books prepared by experts employed, pursuant to a stipulation entered into by the attorneys, by the referee in an action for dissolution of a copartnership and an accounting, to reduce into a tangible form the accounts of a firm which have been kept in such a manner as to be unintelligible, are admissible in evidence, in connection with the report of the referee, for the purpose of enabling the court to comprehend the accounts. Roberts v. Eldred, 73 Cal. 394, 15 Pac. 16.

A competent witness may state the results of his examination of books of account which are in evidence, to aid the jury. State v. Cadwell, 79 Iowa, 432, 44 N. W. 700.

A written statement of a depositor's account, made by an expert bookkeeper from the books of a bank, may be given in evidence and read to the jury, where such bookkeeper is introduced as a witness and opportunity is given for cross-examination. Culver v. Marks, 122 Ind. 554, 7 L.R.A. 489, 17 Am. St. Rep. 377, 23 N. E. 1086.

26. Discrediting.

a. By opinion.—The accuracy of an account cannot be impugned by asking a witness what is the party's character in respect to keeping accounts; for this calls for an opinion, instead of specific facts.¹

¹ *Long v. Taylor*, 29 Hun, 127 (holding it not error to exclude such a question).

Tomlinson v. Borst, 30 Barb. 42, 46, holding evidence of moral character incompetent; and that only business character (meaning obviously reputation and not the witness's opinion), and business capacity, and mode of keeping books can be shown.

An account kept by one of the parties to a suit founded on an alleged settlement of such account may be impeached by evidence that the one keeping it said that it would be easy to beat the other party in a lawsuit because he kept no account. *Day v. Gregory*, 60 Ill. App. 34.

b. By specific errors.—It is not competent, for the purpose of discrediting the accuracy of an account, to show an error in entries of transactions entirely disconnected with that in question, for this would involve trying a collateral issue.¹

¹ *Burnham v. Strafford*, 58 Vt. 194, 2 Atl. 126 (holding that the rule is the same as to official accounts as in respect to private; and the same where the object of putting the account in evidence is to prove a negative from the absence of an entry on the subject, as where the object is to prove a charge entered).

Gardner v. Way, 8 Gray, 189.

Compare *Read v. Smith*, 1 Hun, 263, 3 Thomp. & C. 760. (Plaintiff's account book was admitted to prove loans, some of which defendant claimed had been paid. The defendant was permitted to call for the preceding and following entries, in themselves irrelevant, to test the accuracy of the entries, or their contemporaneous character; s. p. *Metropolitan Nat. Bank v. Hale*, 28 Hun, 341.)

In *Rodenbough v. Rosebury*, 24 N. J. L. 491, it was held that excluding evidence of a single incorrectness was not error, for a single error could not impair the credibility of the books.

But books of account may be exhibited to show the omission of a proper entry, whereby a mistake was caused in a subsequent settlement. *Elsworth Coal Co. v. Quade*, 28 Mo. App. 421.

See also *Teague v. Irwin*, 134 Mass. 303, where, in an action for deceit in the sale of the stock of a corporation, the defendant called the treasurer, who produced his journal or cash book and testified that he showed it to plaintiff, the latter was permitted to cross-examine the witness to show that the books were not fairly kept, and did not correctly show the company's affairs.

III. PROVING ACCOUNT IN AID OF ORAL TESTIMONY.

27. Contemporaneous entries.

Entries in an account, or other contemporaneous memoranda, are made competent by producing a witness who testifies that he gave correct information to the writer, although he did not see the entries; and producing also the writer, who testifies that he, at the time, and knowing his informant, correctly entered the information so received.¹

¹ *New York v. Second Ave. R. Co.* 102 N. Y. 572, 55 Am. Rep. 839, 7 N. E. 905 (time book of labor and delivery book of material).

See also ACCOUNT STATED.

Compare *Chaffee v. United States*, 18 Wall. 516, 21 L. ed. 908.

A witness who at the time of purchasing a bill of goods entered each item in a book, with the cost thereof, may use the book as a memorandum; and it may be introduced in evidence in corroboration of the witness and as a detailed statement of the items involved, upon its being shown by his testimony that he knows the entries to be correct, and that they were made at the time of the transaction in question. *St. Paul F. & M. Ins. Co. v. Gotthelf*, 35 Neb. 351, 53 N. W. 137.

Books of account are admissible as entries made at the time of the transactions, for the purpose of corroborating the testimony of a witness as to the date of such transactions, without being proved in accordance with the state statutes relating to account books. *Bean v. Lambert*, 77 Fed. 862.

Testimony with reference to contemporaneous entries made by the witness is properly rejected where the books in which the entries are made are neither offered in evidence nor produced in court. *Banking House of Wilcoxson & Co. v. Darr*, 139 Mo. 660, 41 S. W. 227.

28. Written details of facts testified to.

A witness called to prove a number of items may use an account or list to refresh his memory, being required by the court thereupon to testify to each item separately. Or if without the account he cannot recollect all the items he may, in the discretion of the court, be allowed to testify to the result and the correctness of the account; and the account is then admissible as a statement in detail of what he has testified to.¹

¹ *Singer v. Brockamp*, 33 Minn. 501, 24 N. W. 189; *McCormick v. Pennsylvania C. R. Co.* 49 N. Y. 303; *Howard v. McDonough*, 77 N. Y. 592, affirming 8 Daly, 365.

Compare *Harvey v. Cherry*, 76 N. Y. 436, affirming 12 Hun, 354 (where exclusion was sustained).

A memorandum of items of sale made up from the order book of the seller is not admissible in evidence, where a witness testifies to a distinct recollection of all the sales contained in the memorandum. *Donlon v. English*, 89 Hun, 67, 35 N. Y. Supp. 82.

Testimony of a witness from memory, aided only by some detached writings accidentally preserved, as to an entire course of business between him and another, and amounts of money advanced by him for the business, is inadmissible where the account books are not produced, nor their absence satisfactorily accounted for. *Stirling v. Wagner*, 4 Wyo. 5, 31 Pac. 1032, 32 Pac. 1128.

An employer may refer to the entries in a ledger by his bookkeeper to ascertain a balance due from a customer, where the books of original entry have been burned, and the bookkeeper is beyond the jurisdiction of the court. *Rigby v. Logan*, 45 S. C. 651, 24 S. E. 56.

Where plaintiff is examined as a witness on his own behalf, original entries in his books of account, if shown to have been correctly made, may be read in evidence, but not the copy of them; the latter may be used only to refresh the memory. *Bonnet v. Glattfeldt*, 120 Ill. 166, 11 N. E. 250.

A copy of the last page of an account on which the items of an entire account are footed up, and to the correctness of which the debtor did not object when it was shown him, is admissible in evidence as an admission of its correctness by the debtor, though the book is only a copy, the book of original entries having been burned. *Snodgrass v. Caldwell*, 90 Ala. 319, 7 So. 834.

IV. MUTUAL ACCOUNTS.

29. Account rendered.

An account in the handwriting of one party, produced from the possession of the other party, may be presumed to have been rendered by the former to the latter.¹

¹ *Nichols v. Alsop*, 10 Conn. 263.

As to effect, see ACCOUNT STATED.

30. Pass books.

Pass books containing debit and credit entries, and proved to have been kept usually in the possession of one party and delivered from time to time to the other for the purpose of writing up, and to have been written up accordingly and returned, are

admissible against either party, irrespective of whether their contents are original entries or not.¹

¹ *Burke v. Wolfe*, 6 Jones & S. 263, 267.

A pass book for groceries, given to the person for whom it is made out and which has been continuously in his possession, is admissible in evidence in an action for the groceries furnished, as the entries therein will be presumed to be correct. *Wilshusen v. Binns*, 19 Misc. 547, 43 N. Y. Supp. 1085.

A pass book containing entries of goods purchased by the defendant at the plaintiff's market, and retained by the defendant without objection as to the correctness of the entries, except that she stated that she ought to have a certain class of meat at 1 cent less per pound than the amount charged, is admissible in evidence in an action against her for goods sold. *Weigle v. Brautigam*, 74 Ill. App. 285.

31. Conclusiveness.

A bank pass book written up and returned, and not objected to, becomes conclusive as an account stated.¹

¹ *Leather Mfrs.' Nat. Bank v. Morgan*, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657.

See also ACCOUNT STATED.

V. PROVING AGAINST ONE INTERESTED IN KEEPING.

32. Authentication.

To render an entry in an account book competent against the party whose book it is, it is enough to show that the entry is in his handwriting,¹ or that it is in the handwriting of some servant or agent of his, or even that it appears on the face of the account that it is one of a series of entries continuing for such a length of time as to justify an inference that the writer was a recognized servant or agent.²

¹ *Nichols v. Alsop*, 10 Conn. 263 (so holding of an unsigned account rendered).

A piece of wood with figures indicating that defendant is indebted to plaintiff in a specified amount is admissible in evidence where plaintiff has testified that the figures were made by defendant, although the latter denies making them. *Nagle v. Fulmer*, 98 Iowa, 585, 67 N. W. 369.

² *Root v. Great Western R. Co.* 65 Barb. 619. (Entries in book kept by a railway company affirmed in 55 N. Y. 636, apparently without discussing this point. The length of time seems a question for the jury.)

33. As admissions.

Book entries made by a party in the regular course of his business are admissible in evidence on behalf of the adverse party when in the nature of admissions.¹

¹ *German Nat. Bank v. Leonard*, 40 Neb. 676, 59 N. W. 107; *McCain v. Peart*, 145 Pa. 516, 22 Atl. 981; *Hanson v. Jones*, 20 Mo. App. 595; *Plummer v. Struby-Estabrooke Mercantile Co.* 23 Colo. 190, 47 Pac. 294.

An entry in books of account, made by one not connected with the litigation, is admissible in evidence when the fact stated is against his interest, and when the entry is offered after his death. *Heidenheimer v. Johnson*, 76 Tex. 200, 13 S. W. 46.

The accounts on the books of a corporation are evidential as admissions against a director and officer of the corporation, who had access to the books. *Bird v. Magowan*, — N. J. Eq. —, 43 Atl. 278.

34. Agent's books.

Entries in the books of a party's agent are competent against the party.¹

¹ *Standard Oil Co. v. Triumph Ins. Co.* 64 N. Y. 85, 91, affirming 3 Hun, 591, 6 Thomp. & C. 300.

An account kept by one who acted as an agent of the testatrix, in her lifetime, which was examined and settled by her, is good evidence as against her without other vouchers, upon the settlement of her executors. *Re Bolton*, 71 Hun, 32, 24 N. Y. Supp. 799, affirmed in 141 N. Y. 554, 35 N. E. 1079.

Original book or record entries made contemporaneously with the facts, by an agent in the performance of his duties, are properly excluded, in the absence of proof that such agent cannot be found, except that the party offering them swears that his place of residence is unknown, without stating whether any effort has been made to ascertain it. *St. Louis, I. M. & S. R. Co. v. Henderson*, 57 Ark. 402, 21 S. W. 878.

Books of account of the agents of a mortgagee, containing entries in regard to the loan for which the note and mortgage were given, are admissible in an action to foreclose the mortgage. *Dexter v. Berge*, 76 Minn. 216, 78 N. W. 1111.

35. Joint books.

Entries in books of a firm¹ or association² are competent against a member, even in favor of another member of the whole body, if it be shown that the one against whom they are offered had access to the books and opportunity to know of the

entries. Evidence that he had no actual knowledge goes to their weight, not to their competency.

¹ Fairchild v. Fairchild, 64 N. Y. 471, affirming 5 Hun, 407 (firm books evidence between the partners).

² Morris v. Haas, 54 Neb. 579, 74 N. W. 828.

Entries upon the books of a dissolved firm, made by one of the former partners without the knowledge or consent of the other, are incompetent against the latter upon the issue of his indebtedness to the firm. Bank of British N. A. v. Delafield, 80 Hun, 564, 30 N. Y. Supp. 600.

On the settlement of partnership accounts, the partnership books are competent evidence, but it may be shown, *aliunde*, that they do not contain a full statement of the partnership transactions. Glover v. Hembree, 82 Ala. 324, 8 So. 251.

Where the business has been almost exclusively conducted by one member of the firm, and the books kept by him, the other member is entitled to introduce evidence of the incorrectness of the entries in such books, and also to show that others not entered should be made; but such evidence may be overthrown by countervailing testimony. Carpenter v. Camp, 39 La. Ann. 1024, 3 So. 269.

The existing books of a partnership may be used on an accounting of the partnership affairs, and the proof derived from them may be supplemented by such other competent evidence as the parties can offer, where the partner whose duty it is to keep the firm books has neglected for a time to perform that duty. Van Name v. Van Name, 38 App. Div. 451, 56 N. Y. Supp. 659.

Entries on the books of a firm which is succeeded by a firm having a special partner are inadmissible in an action against the latter to charge him with the debts of the firm on the ground that his capital was not paid in, in cash, as required by statute, in the absence of proof of his knowledge of the entries, although the old books were used for keeping the accounts of the new firm. Kohler v. Lindenmeyr, 129 N. Y. 498, 29 N. E. 957.

See KNOWLEDGE.

ACCOUNT STATED.

1. Account rendered and not objected to.
2. Part payment on account rendered.
3. Reservation of objection.
4. Objections to part.
5. Reasonable time.
6. Giving note implies accounting in full.
7. To impeach.
8. Account admissible without original books.
9. Authority of agent to make a settlement having the effect of an account stated.

See also ACCOUNTS.

As to what constitutes, see note to *Vanbebbber v. Plunkett*, 27 L.R.A. 811.

Upon effect of, see note to *Priestley's Appeal*, 4 L.R.A. 503.

On the question of the conclusiveness of an account stated, see an extensive note in 11 A.L.R. 586.

1. Account rendered and not objected to.

While the mere rendition of an account by one party to another does not show an account stated,¹ it is well settled that the rendition of an account and its retention by the party to whom sent, without objection within a reasonable time, give it the force and effect of a stated account.² The principle of the decisions is that, if the account has been kept so long that it must be inferred that the party receiving it has had time to examine it and object to it if it was wrong, he must be presumed to have acquiesced in it if he remains silent.³ But to give an account rendered the force of an account stated, because of silence on the part of the person receiving it, the circumstances must be such as to justify an inference of assent on his part to its correctness;⁴ and, if the party to whom the account is rendered objects within a reasonable time, there is no room for inferring an admission of its correctness.⁵ The earlier rule in law upon the subject of accounts stated was that it was applicable to merchants only; but the needs of modern business have

so enlarged it that it may be properly applied to all classes of business men.⁶ As in the case of an account which has become stated by express agreement, so also where assent is implied from a failure to object to an account rendered, the account is regarded as *prima facie* correct,⁷ and the onus of showing error or fraud in such an account is on the party who has retained it.⁸

But the presumption of acquiescence in an account rendered, arising from its retention without objection after the lapse of a reasonable time, is not conclusive, but only evidence of an admission, and is therefore subject to disproof,⁹ and, although the presumption is sometimes spoken of as a "legal presumption,"¹⁰ or as "a rule of law,"¹¹ or as "an implication of law,"¹² it is generally held that the weight to be given to the retention of the accounts without objection is, just as in the case of other evidential facts, ordinarily for the jury, except where, upon the state of fact presented, the presumption of assent is so strong as to preclude a contrary conclusion.¹³

¹ *Irvine v. Young*, 1 Sim. & Stu. 333, 57 Eng. Reprint, 134, 1 L. J. Ch. 108; *Toland v. Sprague*, 12 Pet. 334, 9 L. ed. 1107; *Rowland v. Donovan*, 16 Mo. App. 554; *Emery v. Pease*, 20 N. Y. 62; *Guernsey v. Rexford*, 63 N. Y. 641; *Shaw v. Lobe*, 58 Wash. 219, 29 L.R.A. (N.S.) 333, 108 Pac. 450.

² *Tickel v. Short*, 2 Ves. Sr. 239, 28 Eng. Reprint, 154; *Wiggins v. Burckham*, 10 Wall. 129, 19 L. ed. 884; *Cooper v. Coates*, 21 Wall. 105, 22 L. ed. 481; *Talcott v. Chew*, 27 Fed. 273; *Langdon v. Roane*, 6 Ala. 518, 41 Am. Dec. 60; *First Nat. Bank v. Allen*, 100 Ala. 476, 27 L.R.A. 426, 46 Am. St. Rep. 80, 14 So. 335; *Brown v. Brown*, 16 Ark. 202; *Terry v. Sickles*, 13 Cal. 427; *Martyn v. Arnold*, 36 Fla. 446, 18 So. 791; *Field v. Reid*, 21 Ga. 314; *Miller v. Bruns*, 41 Ill. 293; *Ingle v. Norrington*, 126 Ind. 174, 25 N. E. 900; *White v. Campbell*, 25 Mich. 463; *Smith v. Marvin*, 27 N. Y. 137, 25 How. Pr. 317; *Samson v. Freedman*, 102 N. Y. 699, 7 N. E. 419; *Truman, H. & Co. v. Owens*, 17 Or. 523, 21 Pac. 665; *Thompson v. Fisher*, 13 Pa. 310; *Goldsmith v. Latz*, 96 Va. 680, 32 S. E. 483; *Engfer v. Roemer*, 71 Wis. 11, 36 N. W. 618; *Crane v. Stansbury*, 173 Cal. 631, 161 Pac. 7; *May & E. Co. v. Farmers Union Mercantile Co.* 120 Ark. 316, 179 S. W. 490; *Hanan v. Sanford*, 69 Or. 204, 137 Pac. 772.

³ *Dows v. Durfee*, 10 Barb. 213.

⁴ *Champion v. Recknagel*, 6 App. Div. 151, 39 N. Y. Supp. 814; *Spellman v. Muehlfeld*, 166 N. Y. 245, 59 N. E. 817, reversing 48 App. Div. 265, 62 N. Y. Supp. 749.

Evidence of a bookkeeper of a creditor that he prepared a statement of the debtor's account, put it in a stamped envelope addressed to the debtor, placed it in an open mail box in his employer's office, from which postmen always took any mail which might be there, and that he never knew of any objection by the debtor to such statement, is sufficient evidence of assent by the debtor to the statement to go to the jury on the issue of an account stated. *Bee v. Tierney*, 58 Ill. App. 552.

⁵ *White v. Campbell*, 25 Mich. 463.

⁶ *Fleischner v. Kubli*, 20 Or. 328, 25 Pac. 1086; *Crawford v. Hutchinson*, 38 Or. 578, 65 Pac. 84; *Nodine v. First Nat. Bank*, 41 Or. 386, 68 Pac. 1109; *Shepard v. Bank of State*, 15 Mo. 143; *Missouri P. R. Co. v. Palmer*, 55 Neb. 559, 76 N. W. 169.

The rule is applied not only to accounts of matters within the peculiar knowledge of the party receiving the account,—as of goods furnished to him,—but to the general account between merchants, to an agent for selling and leasing lands and receiving the consideration moneys and the rents, and to accounts of sales rendered by commission merchants. *Dows v. Durfee*, 10 Barb. 213.

So, also, as between a factor or commission merchant and his principal. *Ledoux v. Porche*, 12 Rob. (La.) 543; *Flower v. O'Bannon*, 43 La. Ann. 1042, 10 So. 376; *Smedley v. Williams*, 1 Pars. Sel. Eq. Cas. 359; *Bevan v. Cullen*, 7 Pa. 281; *Thompson v. Fisher*, 13 Pa. 310; *Newburger-Morris Co. v. Talcott*, 219 N. Y. 505, 3 A.L.R. 287, 114 N. E. 846.

For citation of additional authorities and a full discussion of the principles involved in cases arising between principal and factor see note in 3 A.L.R. 293.

So, also, as between attorney and client. *Crawford v. Hutchinson*, 38 Or. 578, 65 Pac. 84.

The rule is applicable to a private corporate body engaged in trade and conducting its affairs through the instrumentality of officers and agents, as well as to individual natural persons carrying on business in the same way. *Bradley v. Richardson*, 23 Vt. 720.

And the rule applies to an account rendered by auctioneers to their employers. *Townes v. Birchett*, 12 Leigh, 173.

⁷ *Gooch v. Vaughan*, 92 N. C. 610; *Goldsmith v. Latz*, 96 Va. 680, 32 S. E. 483; *McLaughlin v. United States*, 36 Ct. Cl. 138.

⁸ *Powell v. Powell*, 10 Ala. 900; *Andrews v. Hobson*, 23 Ala. 219; *Ledoux v. Porche*, 12 Rob. (La.) 543; *Philips v. Belden*, 2 Edw. Ch. 1; *Lockwood v. Thorne*, 11 N. Y. 170, 62 Am. Dec. 81; *Lambert v. Craft*, 98 N. Y. 342; *Gooch v. Vaughan*, 92 N. C. 610; *Townes v. Birchett*, 12 Leigh. 173.

⁹ *Wiggins v. Burkham*, 10 Wall. 129, 19 L. ed. 884; *Sloan v. Guice*, 77 Ala. 394; *Hardy v. Chesapeake Bank*, 51 Md. 562, 34 Am. Rep. 325; *Kenneth Invest. Co. v. National Bank*, 96 Mo. App. 125, 70 S. W. 173; *Rich v. Eldredge*, 42 N. H. 153; *Guernsey v. Rexford*, 63 N. Y. 631; *Spellman v. Muehlfeld*, 166 N. Y. 245, 59 N. E. 817; *Sergeant v. Ewing*, 30 Pa. 75; *Jones v. DeMuth*, 137 Wis. 120, 118 N. W. 542.

An account stated between the parties is *prima facie*, but not conclusive, evidence of the accuracy and correctness of the items. *Hollenbeck v. Ristine*, 105 Iowa, 488, 67 Am. St. Rep. 306, 75 N. W. 355.

But the acceptance and retention of an account without objection, although tending to establish an admission of correctness, is not conclusive. It may be met by proof of mistake undiscovered while the account was so retained, and the question then becomes one of fact for the jury. *Sharkey v. Mansfield*, 90 N. Y. 227, 43 Am. Rep. 161.

¹⁰ *Hall v. Sloan*, 9 Phila. 138.

¹¹ *Ingle v. Norrington*, 126 Ind. 174, 25 N. E. 900.

¹² *Charlotte Oil & Fertilizer Co. v. Hartog*, 29 C. C. A. 56, 42 U. S. App. 716, 85 Fed. 150.

¹³ *Hamilton-Brown Shoe Co. v. Choctaw Mercantile Co.* 80 Ark. 438, 97 S. W. 284; *Quincey v. White*, 63 N. Y. 370; *Talcott v. Chew*, 27 Fed. 273; *Allen-West Commission Co. v. Patillo*, 33 C. C. A. 194, 61 U. S. App. 94, 90 Fed. 628.

Western Newspaper Union v. Segerstrom Piano Mfg. Co. 118 Minn. 230, 136 N. W. 752; *Millard v. Bennett*, 161 Iowa, 242, 139 N. W. 914.

For an extensive treatment of the question of the effect of retaining statement of account to render it an account stated see notes in 29 L.R.A. (N.S.) 334 and L.R.A.1917C, 447.

2. Part payment on account rendered.

Making part payment on an account rendered is enough to go to the jury, as showing an account stated.¹

¹ *Samson v. Freedman*, 102 N. Y. 699, 7 N. E. 419.

Silence on the part of a debtor for two weeks after receiving an account, payments thereon on account thereafter, and a promise to pay money every month as he can spare it until paid, with a statement that he owes the balance as a gambling debt, are sufficient to sustain a finding that an account was stated. *Mulford v. Cæsar*, 53 Mo. App. 263.

3. Reservation of objection.

A reservation of the right to correct errors, etc., if any, does

not deprive the account stated of effect, but leaves the burden on the party reserving the right to prove error.¹

¹ *Samson v. Freedman*, 102 N. Y. 699, 7 N. E. 419; *McKay v. Overton*, 65 Tex. 82.

The insertion of the statement that errors and omissions are accepted does not prevent it being an account stated. *Fleischner v. Kubli*, 20 Or. 328, 25 Pac. 1086; *Branger v. Chevalier*, 9 Cal. 353; *Kent v. Highleyman*, 28 Mo. App. 614.

4. Objections to part.

Objections made to specified items only do not prevent the rest of the account from becoming an account stated as if no objections were made.¹

And an account rendered may be regarded as stated, so far as the quantity therein charged is concerned, where the only objection made thereto was in regard to the price.²

¹ *Wiggins v. Burkham*, 10 Wall. 129, 19 L. ed. 884.

That one item is disputed will not prevent the amount of the others from becoming an account stated. *Mulford v. Cæsar*, 53 Mo. App. 263.

The objection to some only of the items in the account will admit the others to be correct. *Joseph v. Southwark Foundry & Mach. Co.* 99 Ala. 47, 10 So. 327; *Burns v. Campbell*, 71 Ala. 286; *Tuggle v. Minor*, 76 Cal. 96, 18 Pac. 131; *Ware v. Manning*, 86 Ala. 238, 5 So. 682; *Power v. Root*, 3 E. D. Smith, 70; *McLaughlin v. United States*, 36 Ct. Cl. 138.

As to the effect, generally, of a dispute as to certain items of an account upon assent to other items, see note in 7 L.R.A. (N.S.) 924.

² *Dakin v. Walton*, 85 Hun, 561, 33 N. Y. Supp. 203

5. Reasonable time.

The Federal courts, and some others which have followed their lead, hold that what is a reasonable time is, where the facts are clear, always a question exclusively for the court. Where the proofs are conflicting, the question is a mixed one of law and fact.¹ On the other hand it has been held in several jurisdictions that the question is one of fact.² What is a reasonable time will depend upon the relation of the parties and the usual course of their business.³

¹ *Toland v. Sprague*, 12 Pet. 300, 9 L. ed. 1093; *Wiggins v. Burkham*, 10

Wall. 129, 19 L. ed. 884; *Standard Oil Co. v. Van Etten*, 107 U. S. 325, 1 Sup. Ct. Rep. 178, 27 L. ed. 319; *Edwards v. Hoefflinghoff*, 38 Fed. 635; *Daytona Bridge Co. v. Bond*, 47 Fla. 136, 36 So. 445; *Martyn v. Arnold*, 36 Fla. 446, 18 So. 791; *Brown v. Kimmel*, 67 Mo. 430; *Fleischner v. Kubli*, 20 Or. 328, 25 Pac. 1086; *Howell v. Johnson*, 38 Or. 571, 64 Pac. 659; *Ault v. Interstate Sav. & L. Asso.* 15 Wash. 627, 47 Pac. 13; *State v. Illinois C. R. Co.* 246 Ill. 188, 92 N. E. 814.

² *Lewis v. Utah Constr. Co.* 10 Idaho, 214, 77 Pac. 336; *Austin v. Ricker*, 61 N. H. 97; *Moran v. Gordon*, 33 Ill. App. 46; *Hollenbeck v. Ristine*, 105 Iowa, 488, 67 Am. St. Rep. 306, 75 N. W. 355; *Peter v. Thickstun*, 51 Mich. 589, 17 N. W. 68; *Little v. McClain*, 134 App. Div. 197, 118 N. Y. Supp. 916.

³ *Darby v. Lastrapes*, 28 La. Ann. 605; *Freeman v. Howell*, 4 La. Ann. 196, 50 Am. Dec. 561; *Lockwood v. Thorne*, 12 Barb. 487; *Harris v. Ely*, *Selden's Notes*, 37; *Howell v. Johnson*, 38 Or. 571, 64 Pac. 659; *Porter v. Patterson*, 15 Pa. 229; *Colket v. Ellis*, 1 W. N. C. 246; *Ault v. Interstate Sav. & L. Asso.* 15 Wash. 627, 47 Pac. 13; *Bainbridge v. Wilcocks*, *Baldw.* 536, *Fed. Cas. No.* 755.

Twelve days between merchants at home is not too short a time to turn an account rendered, and not objected to, into an account stated. *Wiggins v. Burkham*, 10 Wall. 129, 19 L. ed. 884.

Between merchants at home an account which has been presented, and to which no objection has been made after the lapse of several posts, is treated, under ordinary circumstances, as being by acquiescence a stated account. *Brown v. Vandyke*, 8 N. J. Eq. 795, 55 Am. Dec. 250; *Freas v. Truitt*, 2 Colo. 489.

Keeping the rendered account three or four years after receiving it without objection will make it a stated account. *Bruen v. Hone*, 2 Barb. 586.

Where brokers on December 26 mailed an account to their customer with notice that if it was not paid by the 31st day they would bring suit against him, and suit was brought on January 14, it was held that the account had become stated. *Knickerbocker v. Gould*, 115 N. Y. 533, 22 N. E. 573.

6. Giving note implies accounting in full.

The giving of a promissory note raises a legal, but not a conclusive, presumption that at its date the parties adjusted all demands between them, and found a balance thereupon due of an amount represented by the note.¹

¹ *Lake v. Tysen*, 6 N. Y. 461; *Proctor v. Thompson*, 13 Abb. N. C. 340, 351.

7. To impeach.

To impeach an account stated the books of account on the faith of which it was made are admissible in evidence as admissions of the party against his interest, to show the manner in which the settlement was made and an erroneous balance struck.¹

¹ *Hanson v. Jones*, 20 Mo. App. 596.

8. Account admissible without original books.

Statements of account made up and assented to by the parties,¹ or not objected to within a reasonable time after rendition,² are admissible in evidence without production of the books of original entry.

¹ *Jacksonville, M. P. R. & Nav. Co. v. Warriner*, 35 Fla. 197, 16 So. 898.

² *Mackin v. O'Brien*, 33 Ill. App. 474; *Goddard Tool Co. v. Crown Electrical Mfg. Co.* 219 Ill. App. 34.

The books of account of plaintiff in an action on an account stated are not admissible in evidence independently of the alleged account. *Sterling Lumber Co. v. Stinson*, 41 Neb. 368, 59 N. W. 888.

9. Authority of agent to make a settlement having the effect of an account stated.

Ordinarily an agent may make a settlement or assent to an account so as to make it an account stated,¹ providing he is acting within the scope of his powers.² So, too, an officer of a corporation may only bind his principal, as to an account stated, when he has authority to make a binding contract on such a subject.³

¹ *E. W. McLellan Co. v. East San Mateo Land Co.* 166 Cal. 736, 137 Pac. 1145; *Batavian Bank v. Minneapolis, St. P. & S. Ste. M. R. Co.* 123 Wis. 389, 101 N. W. 687; *Dolman v. Kaw Constr. Co.* 103 Kan. 635, 2 A.L.R. 67, 176 Pac. 145.

² *Dowagiac Mfg. Co. v. Hellekson*, 13 N. D. 257, 100 N. W. 717.

³ *Wilson v. Investment Co.* 80 Or. 233, 156 Pac. 249.

For an extensive discussion of the authority of an agent to assent to an account stated and the citation of other cases, see note in 2 A.L.R. 71.

For a discussion of account stated as between principal and factor, see *Newburger-Morris Co. v. Talcott*, 219 N. Y. 505, 3 A.L.R. 287, 114 N. E. 846 and note in 3 A.L.R. 293.

ACKNOWLEDGMENT.

1. Burden of proof.
2. Presumptions.
3. Best and secondary evidence.
4. Unacknowledged or defectively acknowledged deed, or record thereof, as evidence.
 - a. Necessity of acknowledgment.
 - b. Time of acknowledgment.
 - c. Defective acknowledgment.
5. Parol and extrinsic evidence.
6. Privileged communications to notary.
7. What defects disregarded.
8. Sufficiency of evidence to impeach certificate of acknowledgment.

As to acknowledgment to take a debt out of the statute of limitations, see Abbott, Trial Ev. (3d ed.) p. 2235.

Sufficiency of abbreviation to show official character of officer taking acknowledgment, see note to Summer v. Mitchell, 14 L.R.A. 815.

Validity of acknowledgment of deed of trust taken by the trustee, see note to Rothschild v. Dougher, 16 L.R.A. 719.

Leaving blank for name of party in certificate of acknowledgment, see note to Milner v. Nelson, 19 L.R.A. 279.

Right of interested persons to take acknowledgment, see note to Havemeyer v. Dahn, 33 L.R.A. 332.

1. Burden of proof.

A married woman who united with her husband in a conveyance has the burden of proof, when attacking the deed for want of due execution, if she admits signing it, and the certificate of acknowledgment is in lawful form.¹

One claiming under a deed from a married woman must show that the deed was fully explained to her by the officer, as required by statute, where the certificate of acknowledgment fails to state such fact.²

The burden of proving that the acknowledgment of a deed is valid in the foreign state where it was executed, although defective under the laws of the state where it is offered in evidence, rests upon the party offering it.³

¹ People ex rel. Ellert v. Cogswell, 113 Cal. 129, 35 L.R.A. 269, 45 Pac. 270.

² Norton v. Davis, 83 Tex. 32, 18 S. W. 430.

³ Kruger v. Walker, 94 Iowa, 506, 63 N. W. 320.

2. Presumptions.

A certificate of acknowledgment is presumptive, but not conclusive, evidence that an instrument was duly executed.¹

¹ *Albany County Sav. Bank v. McCarty*, 71 Hun, 227, 24 N. Y. Supp. 991. In Alabama the presumption will be indulged that a deed recorded in the proper office for more than twenty years was legally proved or acknowledged. *England v. Hatch*, 80 Ala. 247.

It will be presumed that an error in the description in a deed of a wife's separate property, pointed out to her husband before acknowledgment and corrected before delivery of the deed, was corrected before the wife acknowledged it, in the absence of evidence as to when it was done. *Houston v. Jordan*, 82 Tex. 352, 18 S. W. 702.

Also that an acknowledgment was made in the state shown by the venue, although the officer before whom it was made has no power to take it in such state. *Rogers v. Pell*, 154 N. Y. 518, 49 N. E. 75.

And that a probate officer would not take proof of a deed otherwise than in a case allowed by law. *Devereux v. McMahon*, 102 N. C. 284, 9 S. E. 635.

But that the officer who took the acknowledgment of a mortgage was the vice president of the mortgagee corporation does not create a presumption that he was a stockholder so as to render the acknowledgment void, where the act under which the corporation was organized does not make ownership of stock a qualification for such office. *Florida Sav. Bank & Real Estate Exch. v. Rivers*, 36 Fla. 575, 18 So. 850.

3. Best and secondary evidence.

A certified copy of a deed which has never been acknowledged so as to authorize its legal registration is not admissible in evidence, even on proper affidavit of the loss of the original.¹

Nor is a certified copy of an unacknowledged bill of sale admissible where the loss of the original is not accounted for, and no attempt is made to prove its execution.²

¹ *Hill v. Taylor*, 77 Tex. 295, 14 S. W. 366.

A duly certified copy of a recorded deed is admissible as presumptive evidence of the truth of the record itself, and of the fact of conveyance of title, although the execution and acknowledgment of the deed are in dispute. *Sudlow v. Warshing*, 108 N. Y. 520, 15 N. E. 532.

² *Reynolds v. Campling*, 23 Colo. 105, 46 Pac. 639.

4. Unacknowledged or defectively acknowledged deed, or record thereof, as evidence.

a. Necessity of acknowledgment.—The record of an unac-

known deed will not be received as evidence of its execution.¹

A deed purporting to have been regularly acknowledged is not rendered inadmissible because the record fails to show an acknowledgment thereof.² Nor is a tax deed in the statutory form inadmissible although not acknowledged or recorded, where neither is essential to the passing of title under it.³

An unacknowledged chattel mortgage is competent evidence where the mortgagees immediately took possession of the mortgaged chattels.⁴

¹ Clark v. Wilson, 27 Ill. App. 610, affirmed in 127 Ill. 449, 11 Am. St. Rep. 143, 19 N. E. 860.

Formerly a deed of assignment on record in a public office of another state was held in New York not to be within U. S. Rev. Stats. § 905, relating to the records and judicial proceedings of the courts of states and territories when offered for evidence in the courts of another state, and had to be acknowledged and properly certified as required by chap. 195, N. Y. Laws 1848, before it could be admitted in evidence. Johnston v. Granger, 17 Misc. 54, 39 N. Y. Supp. 848. This law, however, has now been repealed. See 2nd ed. Birdseye, Cummings & Gilbert's Consol. Laws of New York, Ann. 1919, vol. 9, p. 9404.

A deed is good between the parties to it, without an acknowledgment, and a party who acquired an interest in the land before the deed was executed cannot object to its reception in evidence for any defect in its acknowledgment. Hewitt v. Morgan, 88 Iowa, 468, 55 N. W. 478.

An acknowledgment taken in another state must be shown in all respects to have complied with the law in force in that state, and also to be in accordance with the usages of that state, in order to entitle the deed to be admitted in evidence under Compiled Code of Iowa, 1919, §§ 6376, 6377, p. 1904, providing that all deeds and conveyances of land within the state executed prior to Jan. 1, 1884, and which were acknowledged or proved according to and in compliance with the laws and usages of the state in which said deeds were acknowledged and proved, are effectual and valid to all intents and purposes. Kruger v. Walker, — Iowa, —, 59 N. W. 65.

The record of a deed apparently properly executed and acknowledged is evidence that it was in fact executed as it purports to have been, notwithstanding the deed is void or voidable by reason of extrinsic facts.

Clague v. Washburn, 42 Minn. 371, 44 N. W. 130.

² Gardner v. Port Blakely Mill Co. 8 Wash. 1, 35 Pac. 402.

³ Ellis v. Clark, 39 Fla. 714, 23 So. 410.

⁴ Webber v. Mackey, 31 Ill. App. 369.

b. Time of acknowledgment.—A deed is admissible as color

of title in connection with the grantee's actual possession for the statutory period, although not acknowledged until shortly before suit brought.¹ Nor does the fact that a deed executed before the commencement of an action of trespass to try title was acknowledged after commencement, make the title an after-acquired one, and render the deed inadmissible where it was valid without acknowledgment.²

A tax deed not acknowledged as required by statute is not *prima facie* evidence of the regularity of the tax proceedings, nor is it made so by the subsequent separate recording of an acknowledgment made by the officer who executed the deed long after his term expired.³

¹ *McInerny v. Irvin*, 90 Ala. 275, 7 So. 841.

² *Morgan v. Baker*, — Tex. Civ. App. —, 40 S. W. 27.

³ *Johnston v. Sutton*, 45 Fed. 296.

c. Defective acknowledgment.—The record of a deed is inadmissible where the acknowledgment is a mere nullity,¹ or unless it is substantially in accordance with the statute.²

A defectively acknowledged deed is competent evidence tending to show ownership in the grantee,³ and is admissible against some of the purported grantors who did properly acknowledge it.⁴ But a deed not made by defendant, or executed or acknowledged in the manner prescribed by statute, is inadmissible against him in a real action without proof of its execution *aliunde*.⁵ Nor is a deed admissible where the certificate of acknowledgment fails to show that the person who acknowledged the deed was either known to the officer or proved before him to be the person whose name was signed to the conveyance.⁶

A deed from a married woman is admissible as color of title, although her privy examination does not appear to have been taken.⁷ And a deed from a married woman and other persons is properly admitted in evidence against such other persons, although it is not legally acknowledged by the married woman so as to be admissible against her.⁸ Also a deed by a husband and wife conveying a homestead is admissible to sustain plaintiff's title although the wife's acknowledgment is defective, where it was executed nearly thirty years before, and neither the grantors nor those claiming under them are asserting any rights.⁹ So, a power of attorney executed by a married woman

is admissible in evidence as a basis for a partition, where a parol partition would be sufficient.¹⁰

¹ Trowbridge v. Addoms, 23 Colo. 518, 48 Pac. 535.

² Maxwell v. Higgins, 38 Neb. 671, 57 N. W. 388.

No length of time will render admissible in evidence as an ancient statement a certified copy of the record of a deed which was not properly acknowledged, and was improperly registered. Hill v. Taylor, 77 Tex. 295, 14 S. W. 366.

The record of a deed stating the grantor's first name to be Jones, and that it was acknowledged by "James," is inadmissible in evidence. Stephens v. Motl, 81 Tex. 115, 16 S. W. 731.

But a clerical error in the name of the grantor, in the record of the acknowledgment of a deed, does not render the record of the deed inadmissible in evidence upon proper proof that such error has been made. Heil v. Redden, 45 Kan. 562, 26 Pac. 2.

³ Banbury v. Sherin, 4 S. D. 88, 55 N. W. 723.

⁴ Minor v. Powers, — Tex. Civ. App. —, 38 S. W. 400.

⁵ Lydiard v. Chute, 45 Minn. 277, 47 N. W. 967.

⁶ Davidson v. Wallingford, 88 Tex. 619, 32 S. W. 1030.

⁷ Smith v. Allen, 112 N. C. 223, 16 S. E. 932.

⁸ Garcia v. Illg, 14 Tex. Civ. App. 482, 37 S. W. 471.

⁹ Cosby v. Stimson, — Tex. Civ. App. —, 26 S. W. 275.

¹⁰ Martin v. Harris, — Tex. Civ. App. —, 26 S. W. 91.

5. Parol and extrinsic evidence.

The general rule is that the acknowledgment of an instrument must be shown by the certificate of the officer taking it, and cannot be proved by parol, nor can a defective acknowledgment be aided or cured by extrinsic evidence.¹ Thus, parol evidence is inadmissible to show that the privy examination of a married woman has been regularly taken, or that the officer taking the same has through accident, inadvertence, or mistake omitted some material statement required by statute to be set forth in the certificate.² And it cannot be shown by parol that the party executing an instrument was personally known to the officer taking the acknowledgment.³

In the case of a deed actually executed by a married woman of full age and sound mind, a certificate of her separate examination and acknowledgment, in the form prescribed by the statute, and duly recorded with the deed, cannot afterwards, except for fraud, be controlled or avoided by extrinsic evidence

of the manner in which the examination was conducted by the magistrate.⁴

And where the certificate of acknowledgment of a mortgage is in proper form, parol evidence cannot be received, in the absence of fraud or imposition, to show that it is untrue in fact.⁵

But it is competent to show by parol that parties alleged to have acknowledged an instrument did not appear before the officer.⁶

And parol evidence is admissible that one who took an acknowledgment was a notary public and used a seal of a particular kind, where his official character is only collaterally involved;⁷ also that one before whom the acknowledgment of a mortgage was taken was a justice of the town where the mortgagors resided, although the acknowledgment only shows him to have been a justice of the county.⁸ And the acknowledgment of a married woman to a lost deed may be established by parol or circumstantial evidence.⁹

¹ *Elliott v. Piersol*, 1 Pet. 328, 7 L. ed. 164; *Pendleton v. Button*, 3 Conn. 406; *O'Ferrall v. Simplot*, 4 Iowa, 381; *McClure v. McClurg*, 53 Mo. 173; *Solt v. Anderson*, 71 Neb. 826, 99 N. W. 678; *Elwood v. Klock*, 13 Barb. 50; *Hughes v. Wright*, — Tex. Civ. App. —, 97 S. W. 525; *Harrisonburg First Nat. Bank v. Paul*, 75 Va. 594, 40 Am. Rep. 740; *Leftwich v. Neal*, 7 W. Va. 569.

² *Harrisonburg First Nat. Bank v. Paul*, 75 Va. 594, 40 Am. Rep. 740.

³ *Lindley v. Smith*, 46 Ill. 523. But see *Hutton v. Webber*, 28 Jones & S. 247, 17 N. Y. Supp. 463, in which parol evidence was admitted to show that the notary taking the acknowledgment personally knew that the parties making it were the individuals described in and who executed the instrument.

⁴ *Hitz v. Jenks*, 123 U. S. 297, 31 L. ed. 156, 8 Sup. Ct. Rep. 143; *Watson v. Watson*, 118 Ill. 50, 7 N. E. 95 (holding that fraud or collusion on the part of the officer must be shown).

A regular statutory certificate of acknowledgment of a deed made by a husband and wife is conclusive evidence of the facts therein stated, in the absence of fraud. Authorities cited in *Ford v. Osborne*, 45 Ohio St. 1, 12 N. E. 526.

⁵ *Shelton v. Aultman & T. Co.* 82 Ala. 315, 8 So. 232.

⁶ *Bouvier-Iaeger Coal Land Co. v. Sypher* (U. S. C. C. W. Va.) 186 Fed. 644.

⁷ *Stooksberry v. Swann*, 12 Tex. Civ. App. 66, 34 S. W. 369.

⁸ *Rehkopf v. Miller*, 59 Ill. App. 662.

⁹ *Daniels v. Creekmore*, 7 Tex. Civ. App. 573, 27 S. W. 148.

6. Privileged communications to notary.

Communications made to a lawyer in his capacity of notary public, while before him for the purpose of acknowledging a mortgage, are not privileged, if he was not consulted in his professional capacity as to the execution of the mortgage, although he suggested and made some interlineations and filled some blanks.¹

¹ Aultman v. Daggs, 50 Mo. App. 280.

7. What defects disregarded.

Formal defects or omissions in the certificate may be disregarded if what is contained can be construed as stating in substance all that is required.¹

Defective acknowledgment by a married woman is not void, except on the objection of herself or those claiming under her.²

¹ Smith v. Boyd, 101 N. Y. 472, 5 N. E. 319.

² Delafield v. Brady, 38 Hun, 404.

8. Sufficiency of evidence to impeach certificate of acknowledgment.

It is a well-established rule that the certificate of acknowledgment of a deed cannot be impeached except by evidence which is clear and convincing beyond a reasonable doubt;¹ and the unsupported testimony of a party to a deed, that he did not execute it, will not prevail over the official certificate of the officer taking the acknowledgment.² Even the testimony of a notary who took the acknowledgment of a deed by husband and wife, that the wife was not present and did not acknowledge the deed, has been held to be of little weight as against his certificate.³ But a certificate of acknowledgment was held to have been overthrown by evidence of five witnesses, two of whom were physicians, that on the day on which the execution of the deed was acknowledged the grantor was sick in bed, and was subjected to a surgical operation.⁴

¹ Russell v. Baptist Theological Union, 73 Ill. 337; Chivington v. Colorado Springs Co. 9 Colo. 597, 14 Pac. 212; Ford v. Ford, 27 App. D. C. 401.

² L.R.A. (N.S.) 442, 7 Ann. Cas. 245; Lennon v. White, 61 Minn. 150,

63 N. W. 620; *Barker v. Avery*, 36 Neb. 599, 54 N. W. 989; *Morris v. Sargent*, 18 Iowa, 90; *Barnett v. Proskauer*, 62 Ala. 486; *Saginaw Bldg. & L. Asso. v. Tennant*, 111 Mich. 515, 69 N. W. 118; *Barrett v. Davis*, 104 Mo. 549, 16 S. W. 377; *Smith v. Allis*, 52 Wis. 337, 9 N. W. 155; *Cover v. Manaway*, 115 Pa. 338, 2 Am. St. Rep. 552, 8 Atl. 393; *Pickens v. Knisely*, 29 W. Va. 1, 11 S. E. 932; *Williamson v. Carskadden*, 36 Ohio St. 664; *Bennett v. Edgar*, 46 Misc. 231, 93 N. Y. Supp. 203.

² *Kerr v. Russell*, 69 Ill. 669, 18 Am. Rep. 634; *Lickmon v. Harding*, 65 Ill. 505; *Gritten v. Dickerson*, 202 Ill. 372, 66 N. E. 1090; *Johnson v. Van Velsor*, 43 Mich. 208, 5 N. W. 265; *Adams v. Smith*, 11 Wyo. 200, 70 Pac. 1043; *Marden v. Dorthy*, 12 App. Div. 176, 42 N. Y. Supp. 834; *Shell v. Holston Nat. Bldg. & L. Asso. — Tenn. —*, 52 S. W. 909.

³ *Wilson v. South Park*, 70 Ill. 46.

⁴ *Paxton v. Marshall*, 18 Fed. 361.

For other cases on sufficiency of evidence to impeach certificate of acknowledgment, see notes in 6 L.R.A. (N.S.) 442, and 41 L.R.A. (N.S.) 1176.

ACQUIESCENCE.

1. Burden of proof.
2. Acts and declarations.
3. Relevancy.

1. Burden of proof.

To bar a party by acquiescence the burden of proving that his acquiescence was with the full knowledge of all the facts and of all existing legal rights is upon the one who alleges acquiescence.¹

¹ *Pence v. Langdon*, 99 U. S. 578, 581, 25 L. ed. 420, 421. (current suspicion and rumor are not enough); *Zimmerman v. Fraley*, 70 Md. 561, 17 Atl. 560; *Adair v. Brimmer*, 74 N. Y. 539, 554 (ratification by *cestui que trust*).

There can be no presumption that a depositor has acquiesced in the payment of checks bearing a forged signature while they remain in the custody of the bank and he has no notice or knowledge of them. *McCarty v. First Nat. Bank*, 204 Ala. 424, 15 A.L.R. 153, 85 So. 754.

See *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674.

ABB. FACTS—9.

In order to establish an acquiescence equivalent to assent in a certain mode of dealing with the subject-matter of a mail contract, the burden is on the contractor to show knowledge or information, by the department, of his conduct in the premises. *United States v. Carr*, 132 U. S. 644, 33 L. ed. 483, 10 Sup. Ct. Rep. 182.

2. Acts and declarations.

Evidence of silent acquiescence in work done pursuant to negotiations for a contract is admissible upon the issue whether or not there was a completed contract to do the work.¹

And a statement made in the presence of defendant is admissible primarily to show that he acquiesced in the statement either by express assent, or by silence, or by such conduct as fairly implies assent, although it is not admissible as being itself evidence of any fact narrated in such statement.²

Adjoining landowners who for a long term of years treat a fence as the boundary between them will be deemed to have acquiesced in the boundary thus established.³

And the facts that a police captain removed from office failed for three months and ten days to proceed against the action of the board, well knowing the ground of removal, his receipt of pension money in the interim, the surrender of the police paraphernalia, promptly seeking employment elsewhere, and silence on his part although aware of the fact that steps were being taken to fill his place,—were deemed sufficient to establish acquiescence in the removal.⁴

¹ *Hodges v. Sublett*, 91 Ala. 588, 8 So. 800.

² *People v. Mallon*, 103 Cal. 513, 37 Pac. 512.

³ *Andrews v. Meredith*, 131 Iowa, 716, 109 N. W. 287; *Amber v. Cain*, — Iowa, —, 110 N. W. 1053. See also *Holmes v. Judge*, 31 Utah, 269, 87 Pac. 1009; and *Younkers v. White*, 136 Iowa, 23, 111 N. W. 824.

⁴ *People ex rel. McLaughlin v. Police Comrs.* 174 N. Y. 450, 95 Am. St. Rep. 596, 67 N. E. 78, reversing 79 App. Div. 82, 79 N. Y. Supp. 710.

3. Relevancy.

If any claim of acquiescence is made to defeat plaintiff's claim, he may prove everything done by way of protest or remonstrance.¹

¹ *Chapel v. Smith*, 80 Mich. 100, 45 N. W. 69.

See **ASSENT**; **CONSENT**; **ESTOPPEL**; **RATIFICATION**.

ADDRESS.

1. Privileged communications.
2. City directory.

And see ABANDONMENT; ABSENCE; DOMICIL; FICTITIOUS PERSON; RESIDENCE.

1. Privileged communications.

The privilege of professional communications does not ordinarily preclude the attorney from testifying to the address of his client.¹ But if the communication is made to him confidentially for the purpose of professional advice, it is privileged.²

Confidential communications between a husband and wife, which tend to show the address of either at a particular time, are privileged.³

¹ *Markevich v. Royal Ins. Co.* 162 App. Div. 640, 147 N. Y. Supp. 1004; *United States v. Lee*, 107 Fed. 702; *Richards v. Richards*, 64 Misc. 285, 119 N. Y. Supp. 81; *Ex parte Campbell*, L. R. 5 Ch. 703; 23 L. T. N. S. 289, 18 Week Rep. 1056.

And see *Bohling v. Bronson*, 130 App. Div. 895, 115 N. Y. Supp. 29; and *O'Connor v. O'Connor*, 62 Misc. 53, 115 N. Y. Supp. 965, holding that an attorney may be required to disclose his client's address before the other party can be compelled to try the action.

² *Re Arnott*, 60 L. T. N. S. 109, 37 Week Rep. 223, 5 Morrell, 286; *Re Trainor*, 146 App. Div. 117, 130 N. Y. Supp. 682.

The court may require the attorney to disclose the client's address as the condition of obtaining a favor, such as the opening of a default, postponing the cause, and the like. 2, *Abbott, New Pr. & Forms*, 500.

³ The date and place from which letters appear to have been written by a man to his wife, and his signature, together with the envelope and the postmarks and address thereon, are not admissible in evidence to prove that he knew her residence at the time, on a prosecution against him for perjury in a divorce suit, in swearing that he did not know her whereabouts, because such letters were confidential communications between him and his wife. *Selden v. State*, 74 Wis. 271, 17 Am. St. Rep. 144, 42 N. W. 218.

2. City directory.

A city directory is not, without testimony as to its correctness, admissible to prove the place of business of a person named therein.¹

¹ Langley v. Smith, 3 N. Y. S. R. 276.

ADMISSIONS AND DECLARATIONS.

1. Witness not hearing or understanding whole conversation.
2. Recollection of exact words.
3. Identifying the speaker.
4. Reference to things not specified.
5. Statute requiring writing.
6. Undelivered writing.
7. Admissions or declarations against interest in civil pleadings.
 - a. In general.
 - b. Sworn and unsworn pleadings.
 - c. Parties against whom the admissions contained in the pleadings may be shown.
 - d. Withdrawn or superseded pleadings.
 - e. Conclusiveness of admissions in pleadings.
 - f. Admissibility of one plea or count on issue raised by another.
 - g. Necessity of introducing pleadings in evidence.
8. Admissions or declarations against interest in criminal pleadings.
 - a. Plea of *nolo contendere*.
 - b. Plea of guilty.
9. Admissions or declarations in a judicial proceeding.
 - a. In general.
 - b. In unauthenticated document used.
 - c. Admission made on former trial for purpose of defeating continuance.
 - d. Testimony given upon preliminary examination by witnesses not available at time of trial.
 - e. Admissions made by one accused of crime during a trial or in a judicial proceeding.
10. Admissions by silence.
11. Records of one's society.
12. Best and secondary.

13. Knowledge.
14. Admissions pending compromise, privileged.
15. Contradicting.
16. Change of opinion.
17. Entire statement or conversation.
18. Conduct against admissions.
19. Declarations by injured person to physician examining him in order to qualify as a witness.
20. Statements by assured outside of his application as evidence against beneficiary.
21. Proof against one person of declarations by another to show partnership.
22. Declarations against title by former owner whether he is available as a witness or not.
23. Declarations of one since deceased against his own marriage.
24. Declarations of testator.
 - a. To show undue influence.
 - b. On issue of testator's intention in destroying will.
 - c. To overcome or sustain presumption of revocation, where will cannot be found.
 - d. To prove existence or contents of lost or destroyed will.
25. Declarations of deceased subscribing witness to will.
26. Admissibility of declarations of persons who would be incompetent as witnesses.
 - a. Declarations of infants too young to be sworn as witnesses.
 - b. Declarations by husband and wife as *res gestæ*.
 - c. Declarations by convicts and unpardoned felons as *res gestæ*.
 - d. Declarations of insane persons.
27. Admissibility of statements in presence of party as affected by his mental or physical condition at the time.
28. Reports by agent or employee to employer, to prove fact in issue.
29. Declarations out of court by one whose name is charged to have been forged.
30. Declarations as to pedigree.
31. Declarations as to a state of mind.
 - a. Declarations concerning the alienation of affections.
 - b. Declarations of deceased parent as to paternity of child.
32. Declarations of intention.
33. Declarations of deceased confessing a crime.

See also ACCOUNTS; ACCOUNT STATED; BOUNDARIES, § 6; DYING DECLARATIONS; LETTERS; PEDIGREE; PRIVILEGE; TELEPHONE CONVERSATIONS; THREATS.

Admissibility of evidence given through interpreter, see note to Com. v. Vose, 17 L.R.A. 813.

Upon how near the main transaction a declaration must be made to constitute part of the *res gestæ*, see note to *Ohio & M. R. Co. v. Stein*, 19 L.R.A. 733.

1. Witness not hearing or understanding whole conversation.

To enable a witness to testify to an admission it is not necessary that he should have heard or understood the whole of the conversation.¹

¹ *Denver & R. G. R. Co. v. Neis*, 10 Colo. 56, 14 Pac. 105. See other authorities in Criminal Trial Brief; *s. p.* *State v. Carson*, 95 N. C. 593. See also CONVERSATION.

Evidence of what the defendant, charged with fraudulently taking water from water pipes, said about a secret pipe, may be given by anyone hearing the remark. *St. Louis v. Arnot*, 94 Mo. 275, 7 S. W. 15.

Testimony as to what plaintiff said is not inadmissible because the witness adds, "My men told me he said so,"—where it is shown that the witness did not understand English, and that while he heard the statements of plaintiff he understood them only as they were interpreted to him in plaintiff's presence. *Blazinski v. Perkins*, 77 Wis. 9, 45 N. W. 947.

Statements of defendant in an action for slander in regard to plaintiff, made several years before the trial, and offered to show malice, are not rendered inadmissible by the mere fact that defendant spoke in German, and that the witness, who understood both English and German, testified to such statements in English. *Born v. Rosenow*, 84 Wis. 620, 54 N. W. 1089.

2. Recollection of exact words.

It is not necessary that the witness should be able to testify to the exact language;¹ but he must be able to give the substance.² He may state the impression on his mind as to the fact of what was said,³ but not what he understood to be meant by what he testifies was said.⁴

¹ *Ruch v. Rock Island*, 97 U. S. 693, 24 L. ed. 1101 (holding thus of witness now produced to prove the testimony given, on a former trial, by a witness now dead; and the court says that claiming to repeat the precise language is a suspicious circumstance).

Compare cases in Criminal Trial Brief, giving illustrations of vital effect of slight mistakes.

² *Dennis v. Chapman*, 19 Ala. 29, 54 Am. Dec. 186, with note. (Held, not error to reject the testimony of a witness who did not propose to

state the language nor the substance of a party's admissions against interest, but merely to give his understanding of them.)

Hale v. Silloway, 1 Allen, 21. (The witness cannot state what others understood.)

§ **Whitman v. Morey**, 63 N. H. 448, 2 Atl. 899 (not error to allow witness, who could not recall the language, to say that the speaker was favorably inclined to a person named. It was for the trial judge to determine whether this was her impression of the substance of what was said, and competent, or the inference the witness drew from what was said, and therefore incompetent).

¶ **Hibbard v. Russell**, 16 N. H. 410, 41 Am. Dec. 733. (Here witness testified the party said he was "good for the note," or "had got to pay the note." Not error to exclude testimony that he understood that the party intended to pay it.)

Evidence of casual statements or admissions by a party, made in casual conversations and to disinterested persons, is very weak testimony, because of the liability of the witness to misunderstand or forget what was really said or intended by the party. **Haven v. Markstrum**, 67 Wis. 493, 30 N. W. 720.

The verbal admissions of a party, when made understandingly and deliberately, often afford satisfactory evidence; but as a general rule the statements of witnesses as to verbal admissions of a party should be received with great caution. **Allen v. Kirk**, 81 Iowa, 658, 47 N. W. 906.

An instruction that oral admissions of a party should be received with great caution, because a witness may not have correctly understood them, or may not have correctly recollected and repeated them, is erroneous. **Zenor v. Johnson**, 107 Ind. 69, 7 N. E. 751.

Evidence of oral admissions after the lapse of ten years, without any special circumstance to aid the memory of the witness, is to be received with great caution. **O'Bannon v. Virgus**, 32 Ill. App. 473.

3. Identifying the speaker.

The witness must be able to identify the person to whose admission he testifies.¹

1 **Whitney v. Brownell**, 71 Iowa, 251, 32 N. W. 285 (uncertainty as to which of two defendants made the admission, fatal).

And admissions stated by a witness to have been made by several persons, but one of whom is in privity with the parties, must be wholly rejected when those made by such person are not distinguished from those made by the other. **Smith v. Williams**, 89 Ga. 9, 32 Am. St. Rep. 67, 15 S. E. 130.

Arthur v. Arthur, 38 Kan. 691, 17 Pac. 187. (Witness, who was a stranger to the party, and derived all his information as to identity from the

speaker claiming to be such party, cannot testify to his statements as admissions.) But see **IDENTITY**.

Testimony of a witness as to statements made by one whom he believed to be defendant is inadmissible for indefiniteness, when it is so vague and uncertain that its relation to the subject at issue is merely conjectural. *Laidlaw v. Sage*, 158 N. Y. 73, 44 L.R.A. 216, 52 N. E. 679, reversing 2 App. Div. 374, 37 N. Y. Supp. 770.

Proof of admissions which the witness testifies were made either by a party to the action or else by a stranger is inadmissible. *Redding v. Godwin*, 44 Minn. 355, 46 N. W. 563.

As to necessity of identifying person speaking over telephone, see **post**, **TELEPHONE CONVERSATION**.

4. Reference to things not specified.

The witness testifying to a conversation cannot state his understanding as to what or who was referred to by language which requires explanation, unless he is limited to his understanding from the conversation itself.¹

¹ *Marcy v. Stone*, 8 Cush. 4, 54 Am. Dec. 736 (error to allow witness, who had stated the whole conversation, to say what he understood was "the land" referred to, the question not being thus limited).

Cutler v. Carpenter, 1 Cow. 81. (Witness cannot state belief as to what time the statement in the admission referred to, if there was nothing in the conversation from which he draws conclusion.)

5. Statute requiring writing.

It is not competent to prove an act for the validity of which the law prescribes a writing, by evidence that the party orally admitted having performed or having executed such a writing, unless a foundation for secondary evidence is first laid.¹

¹ *Boynton v. Rees*, 8 Pick. 329, 19 Am. Dec. 326 (*dictum*; statute of frauds).

Bivins v. McElroy, 11 Ark. 23, 52 Am. Dec. 258 (statute of frauds).

Fox v. Reil, 3 Johns. 477 (reason for nonproduction of subscribing witness to unacknowledged deed not dispensed with by proof that the grantor admitted executing the deed).

S. P., in criminal cases, see Criminal Trial Brief. Compare *Day v. Leal*, 14 Johns. 404, holding that a receipt acknowledging the execution of a bond and warrant of attorney is sufficient evidence of their existence as against the signer, without producing them.

So, too, declarations of a third person as to verbal waiver by insurance agent of a condition in the policy which provided that such a waiver could be made only by writing in the body of the policy are inadmissible in an action on the policy. *Pennsylvania F. Ins. Co. v. Faires*, 13 Tex. Civ. App. 111, 35 S. W. 55.

6. Undelivered writing.

A writing which the writer has never delivered nor shown is not competent as proving his admission of a fact therein stated, unless it be one of a private nature, such as a personal diary.¹

But if delivered or shown, the instrument is not incompetent to prove an admission because it lacks the authentication necessary to make it effective for the purpose for which it was intended.²

¹ *Wilcox v. Wilcox*, 46 Hun, 32 (letter unsent, found among papers of the writer after his death).

Robinson v. Cushman, 2 Denio, 149 (undelivered specialty).

So, also, of an admission contained in a deposition taken in the cause, but not put in evidence because the party is in court. *Priest v. Way*, 87 Mo. 16 (error to allow such admissions to be read).

Declarations of a third person, since deceased, that he knew that a deed of gift of land was never delivered and had been destroyed by the donor, are inadmissible against the heir of the donee. *Blalock v. Miland*, 87 Ga. 573, 13 S. E. 551.

Instructions privately given to the officer taking the acknowledgment of an instrument, to make a record of the terms on which it was to be delivered, and private conversations with him in regard to it, are not admissible in evidence, in favor of the party giving such instructions, on the question whether it was properly delivered. *Porter v. Metcalf*, 84 Tex. 468, 19 S. W. 696.

² *Kaufman v. Schœffel*, 46 Hun, 571; *Jackson ex dem. Bradt v. Brooks*, 8 Wend. 426, affirmed in 15 Wend. 111, but no opinion reported (bond).

Morrell v. Crawley, 17 Abb. Pr. 76 (sealed lease executed by agent, and void for want of sealed authority, competent as against the principal to prove value of use and occupation).

7. Admissions or declarations against interest in civil pleadings.

a. In general.—It is one of the elementary rules of pleading that a party is not required to prove the allegations admitted by his adversary to be true. When therefore a possible ground of

claim or defense is disclaimed by a party, he is concluded, as a matter of pleading, from making use of that claim or defense in the proceedings.¹ Where, however, this rule of pleading is inapplicable, the admission in the pleading must be used if at all as a matter of evidence, under the rules applying generally to admissions against interest. Not infrequently courts have treated admissions against interest as matters of evidence in cases where the rules of pleading ought to govern.²

¹ Note 14 A.L.R. 22.

² *Wm. Wrigley, Jr. Co. v. L. P. Larson, Jr. Co.* 166 C. C. A. 14, 253 Fed. 914, where averments in a bill in equity were held conclusive against the original complainant as proof sustaining a counterclaim. *Southwestern Broom & Warehouse Co. v. City Nat. Bank*, 52 Okla. 422, 153 Pac. 204.

b. Sworn and unsworn pleadings.—Where the party himself has sworn to his pleading the admissions contained therein are admissible against him either in the same action¹ or in some subsequent proceeding,² and even though the verification is only upon information and belief.³

While many courts have held admissions in unverified pleadings inadmissible⁴ it has usually been on the ground that the admissions were not those of the party himself but mere suggestions of counsel.⁵ Hence if such party can be directly connected with the pleadings as by showing that he signed them⁶ or authorized or adopted the allegations,⁷ the pleading is admitted in evidence. Other jurisdictions have adopted the better reasoned rule that such unverified pleadings are admissible either in the same case⁸ or other cases⁹ but that the weight of such evidence may be destroyed by proof of lack of authorization.¹⁰

¹ *Cook v. Barr*, 44 N. Y. 156; *Hengst's Appeal*, 24 Pa. 413; *Johnson v. Butte & S. Copper Co.* 41 Mont. 158, 48 L.R.A.(N.S.) 938, 108 Pac. 1057; *Darling v. Miles*, 57 Or. 593, 111 Pac. 702, 112 Pac. 1084.

² *Elliott v. Hayden*, 104 Mass. 180; *Humphrey v. Monida & Y. Stage Co.* 115 Minn. 18, 131 N. W. 498; *Earhart v. Agnew*, — Tex. Civ. App. —, 190 S. W. 1140; *Stitch v. State*, 10 Okla. Crim. Rep. 441, 137 Pac. 887.

- ³ Pope v. Allis, 115 U. S. 363, 29 L. ed. 393, 6 Sup. Ct. Rep. 69; First Nat. Bank v. Hogan, — Tex. Civ. App. —, 185 S. W. 880; Tumlin v. Tumlin, 195 Ala. 457, 70 So. 254.
- ⁴ Creal v. Gallup, 145 C. C. A. 284, 231 Fed. 96; Bledsoe v. Jones, 145 Ala. 685, 40 So. 111; Farr v. Rouillard, 172 Mass. 303, 52 N. E. 443.
- ⁵ McDermott v. Mitchell, 47 Cal. 249; Charlie's Transfer Co. v. Leedy & Co. 9 Ala. App. 652, 64 So. 205.
- ⁶ Radclyffe v. Barton, 161 Mass. 327, 37 N. E. 373; Cook v. Barr, 44 N. Y. 156.
- ⁷ Cady v. Doxtator, 193 Mich. 170, 14 A.L.R. 10, 159 N. W. 151; Salo v. Duluth & I. R. R. Co. 121 Minn. 78, 140 N. W. 188; State v. Atlantic Coast Line R. Co. 202 Ala. 558, 81 So. 60.
- ⁸ Linn v. Clark, 295 Ill. 22, 128 N. E. 826; Shurtliff v. Extension Ditch Co. 14 Idaho, 416, 94 Pac. 574.
- ⁹ McTyer v. Stearns, 142 Ga. 850, 83 S. E. 955; Every v. Rains, 84 Kan. 560, 115 Pac. 114.
- ¹⁰ Nicholson v. Snyder, 97 Md. 415, 55 Atl. 484; Ritchey v. Seeley, 68 Neb. 120, 93 N. W. 977, 94 N. W. 972, 97 N. W. 818.

c. Parties against whom the admissions contained in the pleadings may be shown.—In the absence of special statute¹ admissions in a pleading may always be put in evidence against the pleader himself by his opponent. Thus admissions in declarations,² bills of particulars,³ cross bills,⁴ answers,⁵ and answers to interrogatories⁶ have been held admissible.⁷ Ordinarily such admissions cannot be shown against the pleaders' codefendant.⁸ When, however, a privity is shown to exist between the codefendants, as that they are partners,⁹ or principal and agent,¹⁰ the admissions of one are admissible against the other. So too admissions in the pleadings of the owner of an interest in property may be shown against his codefendants claiming title under or through him, unless the pleadings were filed after title passed out of the pleader.¹¹

It is the general rule that admissions, otherwise admissible, are admissible against the pleader in proceedings other than those in which filed, on behalf of the pleader's opponent in the former action,¹² on behalf of other parties thereto,¹³ or, except in cases of estoppel, on behalf of an entire stranger to the former action.¹⁴ Likewise admissions may be shown in a subsequent proceeding against persons claiming under the pleader.¹⁵

¹ Lyons v. Ward, 124 Mass. 364.

- ² Hocking Valley R. Co. v. Helber, 91 Ohio St. 231, 110 N. E. 481.
- ³ Parrot v. Nugent, 91 N. J. L. 302, 102 Atl. 899.
- ⁴ Lewis v. Crouch, — Tex. Civ. App. —, 85 S. W. 1009.
- ⁵ Knoche v. Pratt, 194 Mo. App. 300, 187 S. W. 578; Freeman v. Ackerson, 94 N. J. L. 308, 110 Atl. 701.
- ⁶ Beem v. Farrell, — Iowa, —, 108 N. W. 1044.
- ⁷ See also cases cited in § 7 b, supra.
- ⁸ Coryell v. Olmstead, 64 Colo. 378, 14 A.L.R. 5, 172 Pac. 14, Weisenberger v. Huebner, 264 Pa. 316, 107 Atl. 763.
- ⁹ Rector v. Rector, 8 Ill. 105.
- ¹⁰ Stackpole v. Hancock, 40 Fla. 362, 45 L.R.A. 814, 24 So. 914.
- ¹¹ Sawyers v. Sawyers, 106 Tenn. 597, 61 S. W. 1022; Rust v. Mansfield, 25 Ill. 336.
- ¹² Craig v. United R. Co. — Mo. —, 14 A.L.R. 17, 185 S. W. 205; Cornely v. Campbell, 95 Or. 345, 186 Pac. 563, 187 Pac. 1103.
- ¹³ Morrison v. Leach, 75 W. Va. 468, 14 A.L.R. 12, 84 S. E. 177; Ward v. Alpine Twp. 204 Mich. 619, 171 N. W. 446.
- ¹⁴ Allen v. United States Fidelity & G. Co. 269 Ill. 234, 109 N. E. 1035; Farley v. Frost-Johnson Lumber Co. 133 La. 497, L.R.A. 1915A, 200, 63 So. 122, Ann. Cas. 1915C, 717; Keown v. Hughes, 233 Mass. 1, 123 N. E. 98; Stone v. First Nat. Bank, 100 Or. 532, 197 Pac. 304.
- ¹⁵ Redwater Land & Canal Co. v. Reed, 26 S. D. 466, 128 N. W. 702; Warner v. Sapp, — Tex. Civ. App. —, 97 S. W. 125.

d. Withdrawn or superseded pleadings.—With few exceptions,¹ admissions in pleadings which have been withdrawn, superseded or amended are admitted against the pleader in the proceeding in which filed,² and also in other proceedings.³

- ¹ Schuh v. R. H. Herron Co. 177 Cal. 13, 169 Pac. 682; Wiley v. Northern P. R. Co. 60 Wash. 597, 111 Pac. 801.
- ² Admitted against parties plaintiff: Andrus v. Business Men's Acci. Asso. 283 Mo. 442, 13 A.L.R. 779, 223 S. W. 70; Hess v. Vinton Colliery Co. 255 Pa. 78, 14 A.L.R. 1, 99 Atl. 218; Bartlow v. Chicago, B. & Q. R. Co. 243 Ill. 332, 90 N. E. 721.
- Admitted against parties defendant: Garrison Grain & Lumber Co. v. Farmers Mercantile Co. 181 Iowa, 568, 164 N. W. 791; Rheinfort v. Abel, 76 N. J. Eq. 485, 74 Atl. 479.
- ³ Every v. Rains, 84 Kan. 560, 115 Pac. 114

e. Conclusiveness of admissions in pleadings.—When an admission is treated as a matter of pleading excusing the pleaders opponent from offering evidence on the point admitted, the

admission is necessarily conclusive,¹ but only in the action in which filed and not in that after withdrawal. But where the question arises solely on the admissibility of the admissions in the pleadings as evidence, they are never conclusive, whether in the action in which filed² or in other actions.³

¹ *Southwestern Broom & Warehouse Co. v. City Nat. Bank*, 52 Okla. 422, 153 Pac. 204.

² *Riggs v. New Orleans, T. & M. R. Co.* 148 La. 717, 87 So. 723; *National Live Stock Ins. Co. v. Elliott*, 60 Ind. App. 112, 108 N. E. 784; *G. W. Blanchard & Son Co. v. American Realty Co.* — N. H. —, 108 Atl. 291; *Andrus v. Business Men's Acci. Asso.* 283 Mo. 442, 13 A.L.R. 779, 223 S. W. 70.

³ *Kington v. Ewart*, 100 Kan. 49, 164 Pac. 141; *Farley v. Frost-Johnson Lumber Co.* 133 La. 497, L.R.A.1915A, 200, 63 So. 122, Ann. Cas. 1915C, 717.

f. Admissibility of one plea or count on issue raised by another.—In view of the common practice of permitting of inconsistent pleas in the same pleading, the rule in the majority of jurisdictions is that the admissions made by a pleader in one count or plea are not admissible against him on an issue raised by his averment in another.¹ In a few states, however, such admissions are permitted to be shown.² Where inconsistent pleas are prohibited by statute³ or where the pleas or counts are not inconsistent⁴ it would seem that admissions in one plea ought to be admitted on the issue raised by the other.

¹ *Larry v. Herrick*, 58 N. H. 40; *Gilreath v. Furman*, 57 S. C. 289, 35 S. E. 516; *Hines v. Warden*, — Tex. Civ. App. —, 229 S. W. 957.

² *Second Nat. Bank v. Hults*, — Iowa, —, 182 N. W. 175; *Howard v. Glenn*, 85 Ga. 238, 21 Am. St. Rep. 156, 11 S. E. 610; *State ex rel. Crow v. Firemen's Fund Ins. Co.* 152 Mo. 1, 45 L.R.A. 363, 52 S. W. 595.

³ *Derby v. Gallup*, 5 Minn. 119, Gil. 85.

⁴ *Stevenson v. Avery Coal & Min. Co.* 143 Ill. App. 397.

g. Necessity of introducing pleadings in evidence.—In most jurisdictions a pleading must be introduced in evidence even in the case in which filed before the admissions contained therein are available as proof regardless of whether such plead-

ing has been abandoned or superceded¹ or is then in force.² In other states both abandoned pleadings³ and those forming the issues on the trial⁴ are held to be in evidence without introduction.

¹ *Scoville v. Brock*, 79 Vt. 449, 118 Am. St. Rep. 975, 65 Atl. 577; *Briscoe v. Metropolitan Street R. Co.* 222 Mo. 104, 120 S. W. 1162; *Kimmons v. Abraham*, — Tex. Civ. App. —, 158 S. W. 256.

² *Mullen v. Union Cent. L. Ins. Co.* 182 Pa. 150, 37 Atl. 988; *Louisville & N. R. Co. v. Hull*, 113 Ky. 561, 57 L.R.A. 771, 68 S. W. 433.

³ *Bowes v. Cannon*, 50 Colo. 262, 116 Pac. 336; *Smith v. Pelott*, 63 Hun, 632, 44 N. Y. S. R. 242, 18 N. Y. Supp. 301.

⁴ *Carpenter v. Carpenter*, 126 Mich. 217, 85 S. W. 576; *Holmes v. Jones*, 121 N. Y. 461, 24 N. E. 701; *Field v. Surpless*, 83 App. Div. 268, 82 N. Y. Supp. 127; *Hilliard v. Lyons*, 103 C. C. A. 651, 180 Fed. 685.

For an exhaustive review of the authorities on the admissibility of pleadings containing admissions against interest see note in 14 A.L.R. 22.

For the mode of putting in evidence the pleading in a civil action, see *Abbott's Civil Jury Trials*, 4th ed. chap. xiv.

8. Admissions or declarations against interest in criminal pleadings.

a. Plea of nolo contendere.—The plea of *nolo contendere* admits the facts only for the purpose of the pending prosecution; and, if accompanied by a protestation of the defendant's innocence, cannot, like a plea of guilty, be used in a civil suit, as an admission of the facts charged in the indictment.¹

¹ *Criminal Trial Brief*; *Com. v. Horton*, 9 Pick. 206; *Com. v. Tilton*, 8 Met. 232; *Birchard v. Booth*, 4 Wis. 67; *Buck v. Com.* 42 Phila. Leg. Int. 353.

b. Plea of guilty.—A plea of guilty is clearly admissible in evidence as an admission in a civil case but it is generally held not to be conclusive.¹ A withdrawn plea of guilty may also, according to the weight of authority, be admitted in evidence as an admission in a civil case,² or as an admission or confession in a criminal prosecution,³ provided such plea was originally entered voluntarily.

¹ *Spain v. Oregon-Washington R. & Nav. Co.* 78 Or. 355, 153 Pac. 470,

Ann. Cas. 1917E, 1104; Crawford v. Bergen, 91 Iowa, 675, 60 N. W. 205; Markett v. Gemke, 154 N. Y. Supp. 780; note in 16 Columbia L. Rev. 348.

Contra: Erie R. Co. v. Reigherd, 20 L.R.A.(N.S.) 295, 92 C. C. A. 590, 166 Fed. 247, 16 Ann. Cas. 459, and cases there cited, holding such an admission conclusive.

² Parker v. Couture, 63 Vt. 449, 21 Atl. 1102; Green v. Bedell, 48 N. H. 546. See also note in 29 Harvard L. Rev. 783.

³ State v. Carta, 90 Conn. 79, L.R.A.1916E, 634, 96 Atl. 411; State v. Hand, 71 N. J. L. 137, 58 Atl. 641 (even though accused was not cautioned as to his rights); State v. Blay, 77 Vt. 56, 58 Atl. 794; State v. Bringgold, 40 Wash. 12, 82 Pac. 132, 5 Ann. Cas. 716. See also notes in 16 Columbia L. Rev. 421 and 14 Mich. L. Rev. 586.

Contra: State v. Meyers, 99 Mo. 107, 12 S. W. 516; People v. Ryan, 82 Cal. 617, 23 Pac. 121. See also dissenting opinion in State v. Carta, *supra*, and note in L.R.A.1916E, 640.

9. Admissions or declarations in a judicial proceeding.

a. In general.—An admission in court in the testimony of a party has the same effect as if made in his pleadings and may be used against him.¹ An admission contained in an affidavit verified by the party is none the less competent against him because expressed to be on information and belief.²

Merely casual, hasty, inconsiderate admissions of counsel in the course of a trial do not bind his client; the evidence of such admissions should be excluded, although the client was present when the admissions were made and did not correct his counsel or disclaim his authority.³

¹ State v. Brooks, 99 Mo. 137, 12 S. W. 633.

Statements made upon a previous trial, by a party to an action, are admissible in evidence against him, not only to contradict his present testimony, but as evidence upon the issues. McPhillips v. New York, N. H. & H. R. Co. 39 N. Y. S. R. 50, 14 N. Y. Supp. 928, affirming 37 N. Y. S. R. 263, 13 N. Y. Supp. 917.

Statements made by a husband as to communications between him and his wife while giving testimony, although admitted without objection, are inadmissible on a second trial when objection is made. Kelley v. Andrews, 102 Iowa, 119, 71 N. W. 251.

² Chicago & N. W. R. Co. v. Ohle, 117 U. S. 123, 29 L. ed. 837, 6 Sup. Ct. Rep. 632.

³ Davidson v. Gifford, 100 N. C. 18, 6 S. E. 718.

An admission by a party that certain witnesses would swear to certain facts if a continuance was granted and their testimony obtained does not admit the truth of their statements. *Burris v. Court*, 48 Neb. 179, 66 N. W. 1131. See also cases cited under subsection c, *infra*.

b. In unauthenticated document used.—A copy of an affidavit which has been used by the party as evidence in the course of the proceedings in the same cause is competent evidence against him as an admission, irrespective of whether the authentication was sufficient to render it competent as a copy.¹

¹ *Urtetiqui v. D'Arcy*, 9 Pet. 692, 9 L. ed. 276.

c. Admission made on former trial for purpose of defeating continuance.—The authorities are all in accord in holding that an admission made at the time a continuance is sought is not, if the continuance is granted, admissible in evidence at a subsequent trial, when the emergency for which the admission was made has ceased to exist.¹

¹ *State v. Butler*, 151 N. C. 672, 25 L.R.A.(N.S.) 169, 65 S. E. 993, 19 Ann. Cas. 402; *Ryan v. Beard*, 74 Ala. 306; *State v. Felter*, 32 Iowa, 49; *Driggs v. Morgan*, 10 Rob. (La.) 119; *State v. Bryant*, 93 Mo. 273, 6 S. W. 102; *Padgitt v. Moll*, 159 Mo. 143, 52 L.R.A. 854, 81 Am. St. Rep. 347, 60 S. W. 121; *Cutler v. Cutler*, 130 N. C. 1, 57 L.R.A. 209, 89 Am. St. Rep. 854, 40 S. E. 689.

Upon the somewhat analogous question, whether a waiver of a privilege as to confidential communications is available on a second trial, see note in 6 L.R.A.(N.S.) 1082.

d. Testimony given upon preliminary examination by witnesses not available at time of trial.—The objection generally raised to the admission at a criminal trial of testimony given at the preliminary examination by a witness who cannot be produced is that the accused is thereby deprived of his right to be confronted with the witnesses against him. An overwhelming majority of the courts, however, have adopted the view that this right of the accused is not invaded if he had an opportunity to confront the witnesses and cross-examine them at the prelim-

inary hearing, provided he was present as the party charged with the offense which was being investigated and the offense there charged and the one being tried are substantially the same.¹ It is not essential to the admission of such testimony that the accused be actually represented by counsel at the examination,² and any objection to the admission of such testimony may be waived.³

The circumstances most generally recognized as justifying the admission of such testimony are that the witness is dead,⁴ insane,⁵ too ill to attend the trial,⁶ beyond reach of the process of the court,⁷ or absent by procurement.⁸

¹ For an exceptionally able discussion for and against the admission of such testimony, see the opinions in *State v. McO'Blenis*, 24 Mo. 402, 69 Am. Dec. 435. To the same effect are: *United States v. Greene*, 146 Fed. 796; *State v. King*, 24 Utah, 482, 91 Am. St. Rep. 808, 68 Pac. 418; *Kendrick v. State*, 10 Humph. (Tenn.) 479; *State v. Alphonse*, 34 La. Ann. 9; *Johnson v. State*, 1 Tex. App. 333; *Com. v. Richards*, 18 Pick. 434, 29 Am. Dec. 608; *State v. Harmon*, 70 Kan. 476, 78 Pac. 805; *Barnett v. People*, 54 Ill. 325; *State v. Fitzgerald*, 63 Iowa, 268, 19 N. W. 202; *Dolan v. State*, 40 Ark. 455; *Lowe v. State*, 86 Ala. 47, 5 So. 435; *People v. Gilhooley*, 108 App. Div. 234, 95 N. Y. Supp. 636, 19 N. Y. Crim. Rep. 541, affirmed without opinion in 187 N. Y. 551, 80 N. E. 1116; *State v. Heffernan*, 22 S. D. 513, 25 L.R.A. (N.S.) 868, 118 N. W. 1027.

Contra: *United States v. Angell*, 11 Fed. 34; *State v. Potter*, 6 Idaho, 584, 57 Pac. 431, overruling *Territory v. Evans*, 2 Idaho, 651, 7 L.R.A. 646, 23 Pac. 232.

² *Butler v. State*, 83 Ark. 272, 103 S. W. 382; *McNamara v. State*, 60 Ark. 400, 30 S. W. 762; *People v. Gilhooley*, 108 App. Div. 234, 95 N. Y. Supp. 636, 19 N. Y. Crim. Rep. 541, affirmed without opinion in 187 N. Y. 551, 80 N. E. 1116.

³ *Bostick v. State*, 3 Humph. 344; *Wells v. State*, — Ark. —, 16 S. W. 577.

⁴ *State v. Elliott*, 90 Mo. 350, 2 S. W. 411; *State v. George*, 60 Minn. 503, 63 N. W. 100; *Roberts v. State*, 68 Ala. 515; *O'Brian v. Com.* 6 Bush, 563; *State v. Byers*, 16 Mont. 565, 41 Pac. 708; *State v. Taylor*, 61 N. C. (Phill. L.) 508; *People v. Dowdigan*, 67 Mich. 95, 38 N. W. 920; *Johnston v. State*, 2 Yerg. 58; *Potts v. State*, 26 Tex. App. 663, 14 S. W. 456.

⁵ *Marler v. State*, 67 Ala. 55, 42 Am. Rep. 95.

⁶ *Spencer v. State*, 132 Wis. 509, 122 Am. St. Rep. 989, 112 N. W. 462, 13 Ann. Cas. 969; *People v. Droste*, 160 Mich. 66, 125 N. W. 87; *Reg. v. Harney*, 4 Cox, C. C. 441. *Contra*: *State v. Wheat*, 111 La. 860,

35 So. 955 (where witness could probably be present at the next term); and *People v. Bojorquez*, 55 Cal. 463, holding that where the statute permits depositions taken at the examination to be read at the trial in certain cases, the fact that the witness was too ill to attend was insufficient, this not being one of the statutory grounds.

⁷ *Cowell v. State*, 16 Tex. App. 58; *State v. Stewart*, 34 La. Ann. 1037; *Knight v. State*, 103 Ala. 48, 16 So. 7.

But see, *Finn v. Com.* 5 Rand. (Va.) 701; *Hall v. State*, 6 Baxt. 522; *Pittman v. State*, 92 Ga. 480, 17 S. E. 856; *State v. Houser*, 26 Mo. 431.

⁸ *Rex v. Barber*, 1 Root, 76; *State v. Houser*, 26 Mo. 431 (dictum).

For a discussion of all the different phases of this question, with a full review of the authorities, see note in 25 L.R.A.(N.S.) 868.

e. Admissions made by one accused of crime during a trial or in a judicial proceeding.—Admissions made by one arraigned in a criminal proceeding or while on trial are admissible against him.¹ But a confession of an accused at a coroner's inquest is not admissible against him.²

¹ Admissions made while in the custody of an officer, and while arraigned in a magistrate's court, are admissible in evidence in a civil action against the one making them, where they were not made under the influence of fear produced by threats, promises, or deceptions. *Notara v. De Kamalaris*, 22 Misc. 337, 49 N. Y. Supp. 216.

The testimony of a justice of the peace as to an admission of a defendant on trial before him is competent evidence. *State v. Duffy*, 57 Conn. 525, 18 Atl. 791.

See also notes in 18 L.R.A.(N.S.) 772; 50 L.R.A.(N.S.) 1077; and L.R.A. 1916E, 641.

² *People v. Ferola*, 215 N. Y. 285, 109 N. E. 500. See also note in 16 Columbia L. Rev. 143.

10. Admissions by silence.

Where one fails to contradict a damaging statement made in his presence under such circumstances as would naturally call for denial if untrue, and he hears, understands and is physically able to make a reply, he is taken to adopt the statement as his own and it may be offered against him as an admission.¹ This rule applies even where the person is under arrest and the statement charges him with a crime,² in which case the statement may be introduced at the trial as that of the defendant,³

although the better rule seems to be that the weight of such statement and also the question of whether it really amounted to an implied admission are matters for the jury to determine after hearing all the evidence.⁴ It has also been held that such a statement once admitted in evidence is sufficiently positive in character to sustain a conviction as "supporting evidence."⁵ The better rule seems to be that a statement of this sort should not be considered binding where the defendant claims that he remained silent upon advice of counsel.⁶

¹ *Baldarachi v. Leach*, — Cal. App. —, 186 Pac. 1060; *Wigmore, Ev.* §§ 1071, 1072; *People v. Seff*, 296 Ill. 120, 129 N. E. 533; *Donnelly v. State*, 26 N. J. L. 601; *Merriweather v. Com.* 118 Ky. 870, 82 S. W. 592, 4 Ann. Cas. 1039.

The rule does not operate however where the statement is made purely for the purpose of drawing out evidence: *Boney v. Boney*, 161 N. C. 614, 77 S. E. 784; nor to a case where a husband, estranged from his wife, listened without comment to a statement made by her in her last illness: *Pederson v. Nixon*, 284 Ill. 421, 120 N. E. 323.

² *Kelley v. People*, 55 N. Y. 565, 14 Am. Rep. 342; *People v. Koerner*, 154 N. Y. 355, 48 N. E. 730; *State v. Musick*, 101 Mo. 260, 14 S. W. 212; *Com. v. Brown*, 264 Pa. 85, 107 Atl. 676.

For a full discussion of the cases on this subject see note in 25 L.R.A. (N.S.) 543.

A few states adopt a contrary rule holding that the statement cannot be admitted if the accused was under arrest at the time: *Com. v. Kenney*, 12 Met. (Mass.) 235, 46 Am. Dec. 672; *Com. v. McDermott*, 123 Mass. 440, 25 Am. Rep. 120; but see also *Com. v. Spiropoulos*, 208 Mass. 71, 94 N. E. 451, where after statement was made, accused said "me no talk, I want to see my lawyer," and the court ruled both statement and answer were admissible; *State v. Foley*, 144 Mo. 600, 46 S. W. 733.

See also *United States ex rel. Castro v. Williams*, 203 Fed. 155, holding that refusal of an alien seeking admission to the United States to answer questions concerning a crime alleged to have been committed in Venezuela does not amount to an admission of the crime.

³ *People v. Tielke*, 259 Ill. 88, 102 N. E. 229, where statement by sister of accused in his presence was admitted; *People v. Wilson*, 298 Ill. 257, 131 N. E. 609, where declaration by accomplice in presence of two defendants denied by one was held admissible as to the other.

⁴ *People v. Jordan*, 292 Ill. 514, 127 N. E. 117; *State v. Christ*, — Iowa, —, 177 N. W. 54.

⁵ *People v. Cascia*, 181 N. Y. Supp. 855, where testimony of 11 year old boy, which by statute was not sufficient to convict on charge of robbery,

was held to be supported and sustained by such an admission. But see *contra*, comment on above case, note in 34 Harvard L. Rev. 205.

⁶ *People v. Conrow*, 200 N. Y. 356, 93 N. E. 943; *People v. Pfanschmidt*, 262 Ill. 411, 104 N. E. 804, Ann. Cas. 1915A, 1171, holding such a statement inadmissible where accused remained silent on advise of counsel. *Contra*, *People v. Graney*, — Cal. App. —, 192 Pac. 460.

11. Records of one's society.

An entry by the secretary in the records of a society of which deceased was a member, stating his age, is not evidence of his declaration of his age, against one claiming under him, unless it be shown that the statement proceeded from the deceased, or that he acquiesced in it; and the fact that he afterward became secretary, and had custody of the book, is not enough to show acquiescence.¹

¹ *Connecticut Mut. Ins. Co. v. Schwenk*, 94 U. S. 593, 24 L. ed. 294.

See also KNOWLEDGE. As to whether it may be made evidence by calling the secretary, or by proving that the entry was made in the ordinary course of duty, and accounting for his absence, see ACCOUNTS.

12. Best and secondary.

The contents of a statement which was made in writing cannot be orally proved without accounting for nonproduction of the writing as a foundation for the secondary evidence.¹ But the mere fact that a document was present at the conversation may be proved without accounting for its nonproduction.²

¹ *Berrian v. Sanford*, 1 Hun, 626 (memorandum by the parties as to the value of property).

State v. De Wolf, 8 Conn. 93, 20 Am. Dec. 90. (Here it was held error to receive testimony of what a deaf mute wrote, where there was no proof of the loss of the paper, except the witness's statement that he did not know where it was.)

[In recent cases the courts have inclined to dispense with strict proof where the paper is one that in the usual course is destroyed or surrendered as soon as used. And this ought to be the rule with ordinary slips used in conversation with a deaf mute.]

² *Tatum v. State*, 82 Ala. 5, 2 So. 531.

13. Knowledge.

To render an admission competent against the party who

made it, it is not necessary that the facts should have been within his knowledge.¹

¹ *Chapman v. Chicago & N. W. R. Co.* 26 Wis. 295, 7 Am. Rep. 81.

But repetition of hearsay is not an admission of its truth. *Stephens v. Vroman*, 16 N. Y. 381, reversing 18 Barb. 250.

In an action against an employer for personal injuries to an employee, evidence that a foreman said that it was just like the assistant foreman to set plaintiff at work at a dangerous machine he knew nothing about is inadmissible, when the foreman's whole knowledge of the accident was derived from what he had been told by plaintiff. *Leistritz v. American Zylonite Co.* 154 Mass. 382, 28 N. E. 294.

14. Admissions pending compromise, privileged.

Offers made for the purpose of compromise or settlement are not ordinarily admissible either as admissions of liability or as admissions of the extent of damages claimed,¹ because in theory they are hypothetical,² and therefore not true admissions at all. Where, however, an absolute or unqualified statement is made in the offer, conceding one or more facts or the whole of the adversary's claim, it is admissible,³ unless specifically made "without prejudice," in which case it cannot be admitted no matter what the form of the statement.⁴

The rule of exclusion applied in civil cases is not, according to the weight of authority, applicable in criminal cases,⁵ although several jurisdictions have held that evidence of a compromise is not admissible even in a criminal case.⁶

¹ *Patrick v. Crowe*, 15 Colo. 543, 25 Pac. 985; *Montgomery v. Allen*, 84 Mich. 656, 48 N. W. 153; *Davey v. Lohrmann*, 39 N. Y. S. R. 207, 14 N. Y. Supp. 922; *Eldridge v. Hargreaves*, 30 Neb. 638, 46 N. W. 923; *Wright v. Morse*, 53 Neb. 3, 73 N. W. 214; *Darby v. Roberts*, 3 Tex. Civ. App. 427, 22 S. W. 529; *Feibelman v. Manchester F. Assur. Co.* 108 Ala. 180, 19 So. 540; *Denver, T. & G. R. Co. v. DeGraff*, 2 Colo. App. 42, 29 Pac. 664.

An offer to settle a claim or action based on fraud is not admissible. *Finlay Brewing Co. v. Prost*, 111 Mich. 635, 70 N. W. 137; *Boice v. Palmer*, 55 Neb. 389, 75 N. W. 849.

Nor an offer of compromise in an action for criminal conversation. *Smith v. Meyers*, 54 Neb. 1, 74 N. W. 277, affirming on rehearing, 52 Neb. 70, 71 N. W. 1006.

Letters containing offers of settlement are inadmissible in an action based

upon the controversy to which they refer. *Fisher v. Fidelity Mut. Life Asso.* 188 Pa. 1, 41 Atl. 467; *Gibbes v. McCraw*, 45 S. C. 184, 22 S. E. 790; *Fowles v. Allen*, 64 Conn. 350, 30 Atl. 144.

A portion of a letter containing no statement which can be separated from the offer of compromise and still convey the writer's idea is inadmissible. *Louisville, N. A. & C. R. Co. v. Wright*, 115 Ind. 378, 7 Am. St. Rep. 432, 16 N. E. 145, 17 N. E. 584.

So, too, a letter written after a controversy arises which contains an offer of compromise, if self-serving, and not relevant to any issue, is inadmissible. *Boehringer v. A. B. Richards Medicine Co.* 9 Tex. Civ. App. 284, 29 S. W. 508.

Testimony of plaintiff suing for personal injuries, that defendant stated to him he thought plaintiff could get a stated sum in compromise of his claim, and asked him how much he wanted, is inadmissible as being admissions made with a view to a compromise or amicable adjustment of the matter. *Collier v. Coggins*, 103 Ala. 281, 15 So. 578.

A party cannot testify to an offer of compromise made by him. *York v. Conde*, 66 Hun, 316, 20 N. Y. Supp. 961.

A defendant is not entitled to show what it has offered as a settlement of the claim sued upon, or its reasons for making the offer. *Galveston, H. & S. A. R. Co. v. Green*, — Tex. Civ. App. —, 35 S. W. 819.

2 Wigmore on Evidence, §§ 1061, 1062.

3 Admissions of independent and particular facts may be received in evidence. *Scofield v. Parlin & O. Co.* 10 C. C. A. 83, 18 U. S. App. 692, 61 Fed. 804; *Manistee Nat. Bank v. Seymour*, 64 Mich. 59, 31 N. W. 140; *Hess v. Van Auken*, 11 Misc. 422, 32 N. Y. Supp. 126; *Wright v. Gillespie*, 43 Mo. App. 244.

An admission of an independent fact, not connected with an offer of compromise of a legal controversy, although made during the negotiations, is competent evidence. *Louisville, N. A. & C. R. Co. v. Wright*, 115 Ind. 378, 7 Am. St. Rep. 432, 16 N. E. 145, 17 N. E. 584; *Binford v. Young*, 115 Ind. 174, 16 N. E. 142.

Offers of compromise or settlement of a debt sued on cannot be used in evidence against defendant, unless he admitted some fact or distinct liability. *Chaffe v. Mackenzie*, 43 La. Ann. 1062, 10 So. 369.

Evidence that, before a suit for damages for injuries inflicted by a vicious dog was brought, the defendant offered the party injured money, is admissible to show an admission of liability, if not made confidentially or for the sake of peace. *Brice v. Bauer*, 108 N. Y. 428, 2 Am. St. Rep. 454, 15 N. E. 695.

A conversation between the parties to an action shortly before the trial, in which defendant made admissions, is not rendered inadmissible by being brought about by the plaintiff through a proposition of settlement, where such admissions do not appear to have been made with any view to a compromise, and it is not shown that any terms of set-

tlement were mentioned or discussed. *Akers v. Kirke*, 91 Ga. 590, 18 S. E. 366.

Evidence of a demand by plaintiff for a less sum than that claimed in the action, with a statement that he should sue if not paid, is admissible, in the absence of proof that the same was made as a compromise offer, or while negotiating for a peaceful settlement, or in view of a compromise. *Swenson v. Kleinschmidt*, 10 Mont. 473, 26 Pac. 198.

Evidence of advice by one defendant to his codefendants, to settle a suit, is competent as an admission of liability, and is not within the rule excluding offers of compromise. *Smith v. Whittier*, 95 Cal. 279, 30 Pac. 529.

A party cannot render an admission incompetent by testifying that it was made to bring about a compromise, unless there is an honest controversy between the parties, and a treaty, pending or proposed, to settle it without litigation. *Steeg v. Walls*, 4 Ind. App. 18, 30 N. E. 312.

The only kind of an admission made during an attempt at compromise which can be received in evidence is where there was a distinct, unqualified admission of an independent fact made, not as a part of an attempted adjustment, but because it was a fact. *Roome v. Robinson*, 99 App. Div. 150, 90 N. Y. Supp. 1055.

Offers to compromise are not admissible unless accepted. *New York L. Ins. Co. v. Rankin*, 89 C. C. A. 103, 162 Fed. 103.

See also *Jones on Evidence*, § 291 and note in 13 *Columbia L. Rev.* 749.

⁴Inadmissible where expressly stated to have been made without prejudice or in confidence. *Miene v. People*, 37 Ill. App. 589; *Kutcher v. Love*, 19 Colo. 542, 36 Pac. 152; *White v. Old Dominion S. S. Co.* 102 N. Y. 660, 6 N. E. 289; *Bowers v. Hanna*, 101 Iowa, 660, 70 N. W. 745.

An agreement to compromise an action of replevin, which provided that if the compromise failed "the cause should proceed as though the agreement had never been made," is inadmissible upon further proceedings in the case. *Frick & Co. v. Wilson*, 36 S. C. 65, 15 S. E. 331; *Molyneaux v. Collier*, 13 Ga. 406.

⁵*State v. Soper*, 16 Me. 293, 33 Am. Dec. 665; *State v. De Berry*, 92 N. C. 800; *Scranton v. Hensen*, 151 Iowa, 221, 130 N. W. 1079; *State v. Richmond*, 138 Iowa, 494, 116 N. W. 609, 16 Ann. Cas. 457, distinguishing *State v. Lavin*, 80 Iowa, 555, 46 N. W. 553, as a civil suit though criminal in form and also distinguishing other Iowa cases where the proceedings themselves were criminal but the offer of compromise related to a civil suit.

An offer made by defendants in bastardy proceedings to the father of the prosecutrix, to contribute money for the purpose of sending the latter away, is admissible in evidence, as it is not an offer to compromise. *Robb v. Hewitt*, 39 Neb. 217, 58 N. W. 88.

⁶*State v. McLennan*, 82 Or. 621, 162 Pac. 838; *Wilson v. State*, 73 Ala. 527; see also note in 17 *Columbia L. Rev.* 559.

15. Contradicting.

The rule that the declarations of a party are provable for the purpose of showing their falsity¹ does not require that his attention be first called to the time and place, etc.²

¹ *English v. Steele*, 4 *Thomp. & C.* 211 (so held error though he had died since his direct examination).

See Criminal Trial Brief.

A party who is permitted to contradict the testimony of a witness respecting an alleged statement made by him to the witness should not be permitted to state what else he said at the time. *Fitzpatrick v. Bloomington City R. Co.* 73 *Ill. App.* 516.

A party who testifies that he had no conversation with a witness at the time the latter has stated cannot, without asking him the proper impeaching question, testify as to a conversation had with him at a subsequent date, giving the substance thereof, as that would be to make original evidence his own declarations made in distinct and different conversations. *Miller v. Cook*, 124 *Ind.* 101, 24 *N. E.* 577.

² *Abbott's Civil Jury Trial* (4th ed.) p. 265.

Declarations of a party to an action prejudicial to his interest are admissible in evidence without laying the predicate necessary to impeach an uninterested witness. *Eddings v. Boner*, 1 *Ind. Terr.* 173, 38 *S. W.* 1110.

16. Change of opinion.

A party whose admission of liability has been proved against him may testify in his own behalf, that on reflection he has changed his mind.¹

¹ *Stowe v. Bishop*, 58 *Vt.* 498, 56 *Am. Rep.* 569, 3 *Atl.* 494.

17. Entire statement or conversation.

Under the rule that a party whose admissions are proved has a right to have all that was said by the same person in the same conversation in any way qualifying or explaining the part adduced against him, or tending to destroy or modify the use sought to be made of it, but no more,¹ the burden is upon him to show affirmatively the simultaneousness of the qualifying parts he claims to prove.²

When a witness has related anything which he stated at a certain time and place and under a given state of facts, it is

competent to have him state all that he uttered on such occasion.³

¹ Rouse v. Whited, 25 N. Y. 170, 82 Am. Dec. 337, reversing 25 Barb. 279. Barnes v. Allen, 1 Abb. App. Dec. 111 (holding that, although the jury are not necessarily bound to give equal credit to all parts of an admission, it is not proper to instruct them, in effect, that they may arbitrarily believe the fact admitted, and disbelieve the reasons assigned for it).

Where an admission is made the foundation of a claim, the whole statement must be taken together. Perkins v. Lane, 82 Va. 59.

The rule that, when a party's declarations or admissions are given in evidence against him, the whole that was said at the time on the same subject must be taken together, does not render incompetent evidence of a conversation overheard between such party and another, although the witness did not hear the whole conversation. State v. Murphy, 48 S. C. 1, 25 S. E. 43.

A party is entitled to the whole of a conversation with a witness, where the opposite party on examination has brought out only a part of it. Lamwersick v. Boehmer, 77 Mo. App. 136.

In detailing a conversation with the accused, the witness is not to be restricted to what the accused said to him, but may give the entire conversation between them. State v. Travis, 39 La. Ann. 356, 1 So. 817.

A party who seeks to use an admission in his adversary's pleading must take the whole paragraph. Taylor v. Taylor, 173 N. Y. 266, 65 N. E. 1098, affirming 63 App. Div. 231, 71 N. Y. Supp. 411.

For other authorities, see Criminal Trial Brief.

² Downs v. New York C. R. Co. 47 N. Y. 83.

³ Watrous v. Cunningham, 71 Cal. 30, 11 Pac. 811.

18. Conduct against admissions.

When there is conflicting testimony as to the admissions of the parties, the law will trust to the inferences to be drawn from their conduct, rather than attempt to reconcile such conflict without regard to their conduct. Their acts, clearly shown, are more reliable than the recollection of words; and delay to sue is significant in this connection.¹

¹ Russell v. Miller, 26 Mich. 1.

In an equitable action by a partner to obtain an accounting where the alleged oral agreement of partnership is denied, every act or declaration of the parties preceding or following the alleged agreement, that can throw any light upon what really took place when it is claimed to have been made, is admissible. Sanger v. French, 157 N. Y. 213, 51 N. E. 979, 91 Hun, 599, 36 N. Y. Supp. 653.

19. Declarations by injured person to physician examining him in order to qualify as a witness.

Where a physician is called on, not for the purpose of treatment, but to enable him to give evidence in a pending or proposed suit, no such sanction of the truth of what the patient says to him exists as in the case of consultation for treatment; on the contrary, he is under a strong motive to deceive the physician, and, therefore, statements made under such circumstances are excluded as being self-serving in character.¹ The rule applies both to statements as to past sufferings,² and to statements made by the injured person as to his present sufferings at the time the physician examined him.³ Even natural expressions of present suffering, and exclamations of pain when being examined by the physician are excluded,⁴ and the expressions of pain excluded under this rule need not be vocal, but may be dumb indications thereof, such as flinching, twitching, wincing, writhing, etc.⁵ But statements of existing pain made to the examining physician have been held to be admissible, not for the purpose of establishing the truth of the statements, but as the basis upon which the opinion of the witness was founded.⁶ And it seems to be a well-established rule of law, that where the injured person has been examined by expert witnesses employed by the defendant, for the purpose of determining whether the plaintiff is suffering from disease or injury, and with a view to those witnesses testifying as to the results of such examination and giving their opinions thereon, the plaintiff has the right to have them take into consideration his statements made upon such examination, in making up their opinions as to his present condition, and that, therefore, such statements will be admissible in evidence.⁷

¹ *Pennsylvania Co. v. Files*, 65 Ohio St. 403, 62 N. E. 1047; *Consolidated Traction Co. v. Lambertson*, 60 N. J. L. 452, 38 Atl. 683.

² *Delaware, L. & W. R. Co. v. Roalefs*, 16 C. C. A. 601, 28 U. S. App. 569, 70 Fed. 21; *Rowland v. Philadelphia, W. & B. R. Co.* 63 Conn 415, 28 Atl. 102; *Illinois C. R. Co. v. Sutton*, 42 Ill. 438, 92 Am. Dec. 81; *Shaughnessy v. Holt*, 236 Ill. 485, 21 L.R.A. (N.S.) 826, 86 N. E. 256; *Atchison, T. & S. F. R. Co. v. Frazier*, 27 Kan. 463; *Rowell v. Lowell*, 11 Gray, 420; *Gibler v. Quincy, O. & K. C. R. Co.* 129 Mo. App. 93,

107 S. W. 1021; Davidson v. Cornell, 132 N. Y. 228, 30 N. E. 573; Lake Shore & M. S. R. Co. v. Yokes, 12 Ohio C. C. 499, 5 Ohio C. D. 599; Stewart v. Everts, 76 Wis. 35, 20 Am. St. Rep. 17, 44 N. W. 1092; Keller v. Gilman, 93 Wis. 9, 66 N. W. 800.

³ Martin v. Sherwood, 74 Conn. 482, 51 Atl. 526; Chicago & E. I. R. Co. v. Donworth, 203 Ill. 192, 67 N. E. 797; Chicago City R. Co. v. Bundy, 210 Ill. 39, 71 N. E. 28; Missouri, K. & T. R. Co. v. Johnson, 95 Tex. 409, 67 S. W. 768; St. Louis S. W. R. Co. v. Martin, 26 Tex. Civ. App. 231, 63 S. W. 1089; Abbot v. Heath, 84 Wis. 314, 54 N. W. 574; Kath v. Wisconsin C. R. Co. 121 Wis. 503, 99 N. W. 217.

⁴ Darrigan v. New York & N. E. R. Co. 52 Conn. 285, 52 Am. Rep. 590; Casey v. Chicago City R. Co. 237 Ill. 140, 86 N. E. 606; Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 537, 31 Am. Rep. 321; Heddle v. City Electric R. Co. 112 Mich. 547, 70 N. W. 1096; Jones v. Portland, 88 Mich. 598, 16 L.R.A. 437, 50 N. W. 731; Comstock v. Georgetown Twp. 137 Mich. 541, 100 N. W. 788; Norris v. Detroit United R. Co. 185 Mich. 264, 151 N. W. 747.

But see Atchison, T. & S. F. R. Co. v. Frazier, 27 Kan. 463, holding that the physician may testify to "such complaints, exclamations, and expressions of groans as usually and naturally accompany and furnish evidence of a present and existing pain or malady." And Consolidated Traction Co. v. Lambertson, 60 N. J. L. 452, 38 Atl. 683, holding that utterances made under such circumstances are themselves symptoms, and, while they may be feigned, are nevertheless competent testimony, of the honesty and weight of which the jury must judge.

Such statements were also admitted in Gibler v. Quincy, O. & K. C. R. Co. 129 Mo. App. 93, 107 S. W. 1021; and in Chicago, St. L. & P. R. Co. v. Spilker, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218 (the court saying that, while the fact that the physician was employed to make the examination with a view to his testifying at the trial might affect the credibility of his testimony, it did not make it incompetent); and in Matteson v. New York C. R. Co. 35 N. Y. 487, 91 Am. Dec. 67 (the court saying that the jury was to judge whether the representations were false or the testimony collusive).

⁵ Greinke v. Chicago City R. Co. 234 Ill. 564, 85 N. E. 327; McKormick v. West Bay City, 110 Mich. 265, 68 N. W. 148; Comstock v. Georgetown, 137 Mich. 541, 100 N. W. 788; Mosher v. Russell, 44 Hun, 12; Norris v. Detroit United R. Co. 185 Mich. 264, 151 N. W. 747; Hintz v. Wagner, 25 N. D. 110, 140 N. W. 729.

But in Jones v. Niagara Junction R. Co. 63 App. Div. 607, 71 N. Y. Supp. 647, it was held proper for the physician to testify as to certain indications of suffering shown by the injured person during the examination, such as changing of the features as the pain became worse, his inability to take off or put on his coat, and the absence of any indication that he was feigning.

So, in *Missouri, K. & T. R. Co. v. Johnson*, 95 Tex. 409, 67 S. W. 768, it was held that exclamations, shrinkings, and other expressions which appear to be the instinctive or spontaneous betrayal of pain are admissible. See also note in 28 Harvard L. Rev. 814, where after discussing principle involved, the view is expressed that such evidence should be admitted.

⁶ *Cleveland, C. C. & I. R. Co. v. Newell*, 104 Ind. 264, 54 Am. Rep. 312, 3 N. E. 836; *Cronin v. Fitchburg & L. Street R. Co.* 181 Mass. 202, 92 Am. St. Rep. 408, 63 N. E. 335.

⁷ *West Chicago Street R. Co. v. Carr*, 170 Ill. 478, 48 N. E. 992; *Chicago City R. Co. v. Bundy*, 210 Ill. 39, 71 N. E. 28; *Louisville, N. A. & C. R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; *Joslin v. Grand Rapids Ice & Coal Co.* 53 Mich. 322, 19 N. W. 17; *Quaife v. Chicago & N. W. R. Co.* 48 Wis. 513, 33 Am. Rep. 821, 4 N. W. 658.

20. Statements by assured outside of his application as evidence against beneficiary.

It may be laid down as a general rule that, where the defense in actions on life insurance policies is based upon the alleged falsity of statements contained in the application, admissions or declarations of the assured, whether made before or after the policy was issued, are not admissible against the beneficiary, unless they were made at a period not too remote in time from the making of the contract of insurance, and were of such nature as to be of real probative force in determining the truth or falsity of such statements.¹ But this principle does not seem to be accepted in its entirety by all the authorities, and declarations of the assured have, in some cases, been admitted though remote in time from the date of his application for insurance.² In those jurisdictions which recognize the general rule that such admissions are not admissible against the beneficiary unless they are so connected with the negotiations for the contract of insurance as to be of value in determining the issues raised in the suit, it follows, of course, that, if they are so connected, they will be admissible.³ And where the defense in actions upon insurance policies is based upon false and fraudulent statements in the insured's application as to the state of his health, his declarations have been held to be admissible to show knowledge on his part of his real condition,

where the facts in regard thereto have been proved by other competent evidence.⁴ Where the defense is based upon some matter not connected with the application, such as the nonpayment of premiums and the like, the reason as well as the weight of authority sustains the proposition that declarations or admissions of the assured are not admissible against the beneficiary.⁵ Where the defense is suicide, declarations of the assured tending to show that he took his own life are generally held to be admissible, if they are so closely connected with his death in point of time and sequence as to form part of the same transaction,⁶ but otherwise where the declarations were made at a period so remote in time as to throw no light upon the transaction.⁷

Some courts draw a distinction between ordinary life insurance, where the contract is held to be between the insurer and the beneficiary and a vested interest passes to the beneficiary, and contracts of mutual benefit insurance, where the contract is between the society and the member and the beneficiary has but an expectant interest, admitting the declarations in the latter case, while recognizing that they would be inadmissible in the former case.⁸

¹ *Penn Mut. L. Ins. Co. v. Wiler*, 100 Ind. 92, 50 Am. Rep. 769; *Henn v. Metropolitan L. Ins. Co.* 67 N. J. L. 310, 51 Atl. 689; *Union Cent. L. Ins. Co. v. Cheever*, 36 Ohio St. 201, 38 Am. Rep. 573; *Grangers L. Ins. Co. v. Brown*, 57 Miss. 308, 34 Am. Rep. 446; *Rawls v. American Mut. L. Ins. Co.* 27 N. Y. 282, 84 Am. Dec. 280, affirming 36 Barb. 357; *Fraternal Mut. L. Ins. Co. v. Applegate*, 7 Ohio St. 292; 4 Joyce, Ins. § 3819.

² *New Home Life Assn. v. Owen*, 39 Ill. App. 413; *Mutual L. Ins. Co. v. Blodgett*, 8 Tex. Civ. App. 45, 27 S. W. 286 (declarations as to age); *Co-operative Life Assn. v. Leflore*, 53 Miss. 1.

And in *Terwilliger v. Industrial Ben. Assn.* 83 Hun, 320, 31 N. Y. Supp. 938, while it was intimated that declarations made prior to the issuance of the policy would not be competent against the beneficiary if made at a period too remote in time from the transaction, it was stated that as to declarations as to age the rule was different, and that any declarations in regard thereto, made before the issuance of the policy, would be admissible against the beneficiary, inasmuch as a person could never change the date of his birth.

- ³ *Kelsey v. Universal L. Ins. Co.* 35 Conn. 225; *Asbury L. Ins. Co. v. Warren*, 66 Me. 523, 22 Am. Rep. 590; *Welch v. Union Cent. L. Ins. Co.* 108 Iowa, 224, 50 L.R.A. 774, 78 N. W. 853; *Singleton v. St. Louis Mut. Ins. Co.* 66 Mo. 63, 27 Am. Rep. 321; *Oahen v. Continental L. Ins. Co.* 9 Jones & S. 296; *Valley Mut. L. Ins. Co. v. Burke*, 12 Ins. L. J. 337; *Aveson v. Kinnaird*, 6 East, 188, 102 Eng. Reprint, 1258, 2 Smith, 286, 8 Revised Rep. 455.
- ⁴ *Haughton v. Aetna L. Ins. Co.* 165 Ind. 32, 73 N. E. 592, 74 N. E. 613; *Swift v. Massachusetts Mut. L. Ins. Co.* 63 N. Y. 186, 20 Am. Rep. 522; *Dilleber v. Home L. Ins. Co.* 69 N. Y. 256, 25 Am. Rep. 182; *Kipp v. Metropolitan L. Ins. Co.* 41 App. Div. 298, 58 N. Y. Supp. 494; *Union Cent. L. Ins. Co. v. Pollard*, 94 Va. 146, 36 L.R.A. 271, 64 Am. St. Rep. 715, 26 S. E. 421; *McGowan v. Supreme Court, I. O. F.* 104 Wis. 173, 80 N. W. 603; *Metropolitan L. Ins. Co. v. O'Grady*, 115 Va. 830, 80 S. E. 743.
- ⁵ *Lazensky v. Supreme Lodge K. H.* 31 Fed. 595; *Goodwin v. Provident Sav. Life Assur. Asso.* 97 Iowa, 226, 32 L.R.A. 473, 59 Am. St. Rep. 411, 66 N. W. 157; *Dial v. Valley Mut. Life Asso.* 29 S. C. 560, 8 S. E. 27; *Southern L. Ins. Co. v. Booker*, 9 Heisk. 606, 24 Am. Rep. 344. But see *Manhattan L. Ins. Co. v. Myers*, 109 Ky. 372, 59 S. W. 30.
- ⁶ *Sutcliffe v. Iowa State Traveling Men's Asso.* 119 Iowa, 220, 97 Am. St. Rep. 298, 93 N. W. 90; *Rens v. Northwestern Mut. Relief Asso.* 100 Wis. 266, 75 N. W. 991; *Smith v. National Ben. Soc.* 123 N. Y. 85, 9 L.R.A. 616, 25 N. E. 197, affirming 51 Hun, 575, 4 N. Y. Supp. 521. See also topic ACCIDENT, § 5, ante.
- ⁷ *Ross-Lewin v. Germania L. Ins. Co.* 20 Colo. App. 262, 78 Pac. 305; *Jenkin v. Pacific Mut. L. Ins. Co.* 131 Cal. 121, 63 Pac. 180; *Hale v. Life Indemnity & Invest. Co.* 65 Minn. 548, 68 N. W. 182; *Connecticut Mut. L. Ins. Co. v. McWhirter*, 19 C. C. A. 519, 44 U. S. App. 492, 73 Fed. 444.
- ⁸ *Supreme Conclave K. D. v. O'Connell*, 107 Ga. 97, 32 S. E. 946; *Van Frank v. United States Masonic Ben. Asso.* 158 Ill. 560, 41 N. E. 1005; *Callies v. Modern Woodmen*, 98 Mo. App. 521, 72 S. W. 713; *Steinhausen v. Preferred Mut. Acci. Asso.* 59 Hun, 336, 13 N. Y. Supp. 36; *Terwilliger v. Industrial Ben. Asso.* 83 Hun, 320, 31 N. Y. Supp. 938; *Foxhever v. Order of Red Cross*, 24 Ohio C. C. 56; *Fidelity Mut. L. Ins. Asso. v. Winn*, 96 Tenn. 224, 33 S. W. 1045; *Thomas v. Grand Lodge, A. O. U. W.* 12 Wash. 500, 41 Pac. 882; *Taylor v. Grand Lodge, A. O. U. W.* 101 Minn. 72, 11 L.R.A.(N.S.) 92, 118 Am. St. Rep. 606, 111 N. W. 919, 11 Ann. Cas. 260.

For a more extensive discussion of this question, with the citation of many additional authorities, see note in 11 L.R.A.(N.S.) 92. See also general note in 12 Mich. L. Rev. 485.

21. Proof against one person of declarations by another to show partnership.

A person not in fact a partner cannot be made liable to third persons on the ground of having been held out as a partner, except on the principle of equitable estoppel that he authorized himself to be so held out, and that credit was extended on the faith of such partnership,¹ and, therefore, the declarations of one party that another is his partner are not evidence to establish the partnership, where the declarations are not made in the presence of or with the knowledge of the alleged partner.² But such declarations are relevant to corroborate or rebut other evidence tending to prove the existence or nonexistence of a partnership.³ And the declarations of two that another is a partner with them are competent against the latter, where he seeks to prove by the declarations of the others that he was not a partner, since the same kind of evidence may be given against him as for him.⁴

¹ *Thompson v. First Nat. Bank*, 111 U. S. 529, 28 L. ed. 507, 4 Sup. Ct. Rep. 689.

² *Vanderhurst v. De Witt*, 95 Cal. 57, 20 L.R.A. 595, 30 Pac. 94; *Kirby v. Hewitt*, 26 Barb. 607; *Whitney v. Wardell*, 59 Hun, 95, 13 N. Y. Supp. 110; *Degan v. Singer*, 41 Ill. 28; *Montgomery v. Black*, 25 Ill. App. 22, 124 Ill. 57, 15 N. E. 28; *McNamara v. Eustis*, 46 Minn. 311, 48 N. W. 1123; *Tuttle v. Cooper*, 5 Pick. 414; *Ruhe v. Burnall*, 121 Mass. 450; *Rimel v. Hayes*, 83 Mo. 200; *Grafton Bank v. Moore*, 13 N. H. 99, 38 Am. Dec. 478; *Walker v. Tupper*, 152 Pa. 1, 25 Atl. 172; *Berry v. Barnes*, 23 Ark. 411; *Ford v. Kennedy*, 64 Ga. 537; *King v. Barbour*, 70 Ind. 35; *Johnston v. Clements*, 25 Kan. 376; *Donley v. Hall*, 5 Bush, 549; *Cowan v. Kinney*, 33 Ohio St. 422; *Noyes v. Cushman*, 25 Vt. 390; *Butte Hardware Co. v. Wallace*, 59 Conn. 336, 22 Atl. 330; *Edmandson v. Thompson*, 2 Fost. & F. 564, 8 Jur. N. S. 235, 31 L. J. Exch. N. S. 207, 5 L. T. N. S. 428, 10 Week. Rep. 300.

³ *Humes v. O'Bryan*, 74 Ala. 64; *Johnston v. Warden*, 3 Watts, 101; *McCutchin v. Bankston*, 2 Ga. 244.

⁴ *Nelson v. Lloyd*, 9 Watts, 22.

For other cases on this question, see note in 20 L.R.A. 595.

Reputation as proof of partnership is discussed in note in L.R.A. 1918D, 505.

22. Declarations against title by former owner whether he is available as a witness or not.

It is a well-settled general rule of law that the declarations against his own title of a former owner of property, whether real or personal, made while in the possession thereof, are admissible not only against himself, but also against those claiming under him, and, although there was formerly some doubt and confusion on the subject, such declarations are now held to be admissible even though the declarant is not dead, but is alive, capable of attending court, and within reach of its process.¹

Where, however, the derogatory statement of a grantor is made after parting with title, being hearsay, and not having the required guaranty of truth, it is not competent evidence against the transferee or those claiming under him, at least in the absence of fraud or collusion.² Nor is this rule affected by the character of the consideration, as where the title was passed without a monetary consideration.³

So it has been held generally and without specific discussion of the effect of a lack of consideration, that the declarations of a donor in disparagement of title, made subsequent to the full execution of a deed of gift, being mere hearsay and neither a part of the *res gestæ* nor declarations against a present interest, are not admissible to defeat the completed gift either against the donee or his privies, or in favor of the grantor or others claiming under him, it being held incompetent for him to affect or make evidence in reference to the title conferred.⁴

So declarations impugning the validity of a voluntary deed of trust which the declarant had previously executed are not admissible against one claiming under such deed.⁵ Similar rules have been laid down as to derogatory statements in cases of gift of personal property.⁶

¹ *Abbott v. Walker*, 204 Mass. 71, 26 L.R.A.(N.S.) 814, 90 N. E. 405; *Horton v. Smith*, 8 Ala. 73, 42 Am. Dec. 628; *Deming v. Carrington*, 12 Conn. 1, 30 Am. Dec. 591; *Sandifer v. Hoard*, 59 Ill. 246; *Holt v. Walker*, 26 Me. 107, 45 Am. Dec. 98; *Bridge v. Eggleston*, 14 Mass. 245, 7 Am. Dec. 209; *Austin v. Sawyer*, 9 Cow. 39; *Guy v. Hall*, 7 N. C. (3 Murph.) 150; *Gibblehouse v. Strong*, 3 Rawle, 437; *Snelgrove v. Martin*, 13 S. C. L. (2 M'Cord) 241; *Mulholland v. Elliot*.

son, 1 Coldw. 307, 78 Am. Dec. 495; *Montgomery v. Lipscomb*, 105 Tenn. 144, 58 S. W. 306; *Woolway v. Rowe*, 1 Ad. & El. 114, 110 Eng. Reprint, 1151, 3 Nev. & M. 849, 3 L. J. K. B. 121.

Contra: *Coit v. Howd*, 1 Gray, 547; *Stephen v. Gwenap*, 1 Moody & R. 120. If the maker of a note elects to call the indorser as a witness, he thereby waives his right to give in evidence his declarations against interest. *Merrick v. Parkman*, 18 Me. 407.

² Note in 1 A.L.R. 1240.

³ *Johnson v. Petersen*, 101 Neb. 504, 1 A.L.R. 1235, 163 N. W. 869.

⁴ *Bain v. Bain*, 150 Ala. 453, 43 So. 562; *Peters v. Priest*, 134 Ark. 161, 203 S. W. 1042; *Banks v. Bradwell*, 140 Ga. 640, 79 S. E. 572; *Butler v. Garrett*, 274 Ill. 178, 113 N. E. 32; *Pentico v. Hays*, 75 Kan. 76, 9 L.R.A.(N.S.) 224; 88 Pac. 738; *Bowman v. Baker*, 147 Ky. 437, 144 S. W. 383; *Duff v. Leary*, 146 Mass. 533, 16 N. E. 417; *Dickson v. Miller*, 124 Minn. 346, 145 N. W. 112; *Dunlap v. Griffith*, 146 Mo. 283, 47 S. W. 917; *Leary v. Corvin*, 63 App. Div. 151, 71 N. Y. Supp. 335; *Baldwin v. Stier*, 191 Pa. 432, 43 Atl. 326; *Henry v. Phillips*, 105 Tex. 459, 151 S. W. 533.

⁵ *Bollinger v. Bollinger*, 154 Cal. 695, 99 Pac. 196; *Ryder v. Ryder*, 244 Ill. 297, 91 N. E. 451; *Dixon v. Dixon*, 123 Md. 44, 90 Atl. 846, Ann. Cas. 1915D, 616; *Warren v. Carey*, 145 Mass. 78, 12 N. E. 999; *Whiteley v. Babcock*, — Mo. —, 202 S. W. 1091.

⁶ *Tierney v. Fitzpatrick*, 195 N. Y. 433, 88 N. E. 750; *Hilton v. Rahr*, 161 Wis. 619, 155 N. W. 116.

For other cases and a general discussion of the admissibility of statements derogatory to title made after parting with title without monetary consideration, see note in 1 A.L.R. 1240.

23. Declarations of one since deceased against his own marriage.

The courts are divided as to the admissibility of declarations by one since deceased against his or her own marriage, some courts admitting such declarations,¹ while others exclude them.²

¹ *Drawdy v. Hesters*, 130 Ga. 161, 15 L.R.A.(N.S.) 190, 60 S. E. 451; *Topper v. Perry*, 197 Mo. 531, 114 Am. St. Rep. 777, 95 S. W. 203; *Imboden v. St. Louis Union Trust Co.* 111 Mo. App. 220, 86 S. W. 263; *Craufurd v. Blackburn*, 17 Md. 49, 77 Am. Dec. 323; *Hubee's Succession*, 20 La. Ann. 97; *Barnum v. Barnum*, 42 Md. 251.

That a presumption of the existence of the marriage, arising from the conduct of the parties, will not be overturned, however, by the declarations of one party, denying the marriage, unless made under circumstances of peculiar seriousness and solemnity, is declared in *Henderson v. Cargill*, 31 Miss. 367.

And it was said in *Greenawalt v. McEnelley*, 85 Pa. 352, that a decedent's

ABB. FACTS—11.

denial of his marriage to a certain person, being a declaration in his own interest, was entitled to little weight in opposition to declarations made by him admitting such marriage.

² *Hill v. Hill*, 32 Pa. 511; *Hull v. Rawls*, 27 Miss. 471.

Declarations of one since deceased, against his marriage to a certain person, made in the latter's absence, were held inadmissible in *Thompson v. Nims*, 83 Wis. 261, 17 L.R.A. 847, 53 N. W. 502; and *Moore's Estate*, 9 Pa. Co. Ct. 338.

24. Declarations of testator.

a. To show undue influence.—Ante-testamentary declarations of a testator are not competent as direct and substantive evidence of undue influence, or to show that the will was procured thereby, but are admissible to show the mental condition of testator at the time of making the will and his susceptibility to influence.¹

¹ *Hobson v. Moorman*, 115 Tenn. 73, 3 L.R.A.(N.S.) 749, 90 S. W. 152; *Wall v. Dimmitt*, 114 Ky. 923, 72 S. W. 300; *Harring v. Allen*, 25 Mich. 505; *Waterman v. Whitney*, 11 N. Y. 157, 62 Am. Dec. 71; *Re Woodward*, 167 N. Y. 28, 60 N. E. 233; *Re Townsend*, 122 Iowa, 255, 97 N. W. 1108; *Zibble v. Zibble*, 131 Mich. 655, 92 N. W. 348.

For other cases on this subject, see note in 3 L.R.A.(N.S.) 749.

b. On issue of testator's intention in destroying will.—The authorities are all agreed that where it is shown that a testator has destroyed or otherwise canceled his will, the declarations made by him at the time are admissible as part of the *res gestæ* to show with what intent he destroyed the instrument.¹ And the weight of authority also supports the proposition that subsequent declarations by the testator are admissible to show his intent.²

¹ *Law v. Law*, 83 Ala. 432, 3 So. 752; *Olmsted v. Buss*, 122 Cal. 224; 54 Pac. 745; *Glass v. Scott*, 14 Colo. App. 377, 60 Pac. 186; *Spencer's Appeal*, 77 Conn. 638, 60 Atl. 289; *Patterson v. Hickey*, 32 Ga. 156; *Collagan v. Burns*, 57 Me. 449; *Pickens v. Davis*, 134 Mass. 252, 45 Am. Rep. 322; *Dan v. Brown*, 4 Cow. 483, 15 Am. Dec. 395; *Waterman v. Whitney*, 11 N. Y. 157, 62 Am. Dec. 71; *Thompson v. Updegraff*, 3 W. Va. 639; *Bibb ex dem. Mole v. Thomas*, 2 W. Bl. 1043, 96 Eng. Reprint, 613; *Doe ex dem. Perkes v. Perkes*, 3 Barn. & Ald. 489, 106 Eng. Reprint, 740, 22 Revised Rep. 458; *Doe ex dem.*

Reed v. Harris, 6 Ad. & El. 209, 112 Eng. Reprint, 79, 1 Nev. & P. 405, W. W. & D. 106, 6 L. J. K. B. 84; 3 Wignmore, Ev. § 1782.

² Boudinot v. Bradford, 2 Dall. 266, 1 L. ed. 375; Weeks v. McBeth, 14 Ala. 474; Lawyer v. Smith, 8 Mich. 411, 77 Am. Dec. 460; Behrens v. Behrens, 47 Ohio St. 323, 31 Am. St. Rep. 820, 25 N. E. 209; Coghlin v. Coghlin, 29 Ohio C. C. 251; Smiley v. Gambill, 2 Head. 163; Spencer's Appeal, 77 Conn. 638, 60 Atl. 289; Managle v. Parker, 75 N. H. 139, 24 L.R.A.(N.S.) 180, 71 Atl. 637; Patterson v. Hickey, 32 Ga. 156; Colvin v. Fraser, 2 Hagg. Eccl. Rep. 266, 162 Eng. Reprint, 856; Keen v. Keen, L. R. 3 Prob. & Div. 105, 42 L. J. Prob. N. S. 61, 29 L. T. N. S. 247; Burton v. Wylde, 261 Ill. 397, 103 N. E. 976.

Contra: Dan v. Brown, 4 Cow. 483, 15 Am. Dec. 395; Waterman v. Whitney, 11 N. Y. 157, 62 Am. Dec. 71.

And in Glass v. Scott, 14 Colo. App. 377, 60 Pac. 186, declarations long subsequent to the act of destruction were excluded.

c. To overcome or sustain presumption of revocation, where will cannot be found.—As to the admissibility in evidence of declarations of the testator to overcome or sustain the presumption of revocation arising from the inability to find a will which was in existence prior to the testator's death, there is some conflict among the authorities, some courts holding them admissible,¹ while others exclude them.² That such declarations alone are insufficient to overcome the presumption of revocation is generally recognized.

¹ Tucker v. Whitehead, 59 Miss. 594; Tynan v. Paschal, 27 Tex. 286; 84 Am. Dec. 619; Re Page, 118 Ill. 576, 59 Am. Rep. 395, 8 N. E. 852; Patterson v. Hickey, 32 Ga. 156; Behrens v. Behrens, 47 Ohio St. 323, 21 Am. St. Rep. 820, 25 N. E. 209; Johnson's Will, 40 Conn. 587; Bausett v. Keitt, 22 S. C. 187; Betts v. Jackson, 6 Wend. 173; Durant v. Ashmore, 31 S. C. L. (2 Rich.) 184; Lawyer v. Smith, 8 Mich. 411, 77 Am. Dec. 460; Youse v. Forman, 5 Bush, 337; Weeks v. McBeth, 14 Ala. 474; Whiteley v. King, 17 C. B. N. S. 756, 144 Eng. Reprint, 303, 10 Jur. N. S. 1079, 11 L. T. N. S. 342, 13 Week. Rep. 83; Southworth v. Adams, 11 Biss. 257, Fed. Cas. No. 13,194; Keen v. Keen, L. R. 3 Prob. & Div. 105, 42 L. J. Prob. N. S. 61, 29 L. T. N. S. 247; Aldrich v. Aldrich, 215 Mass. 164, 102 N. E. 487, Ann. Cas. 1914C, 906. Note in 12 Mich. L. Rev. 81.

² Waterman v. Whitney, 11 N. Y. 157, 62 Am. Dec. 71; Eighmy v. People, 79 N. Y. 546; Re Marsh, 45 Hun, 107.

For other cases on this subject, see note in 38 L.R.A. 436.

d. To prove existence or contents of lost or destroyed will.—While declarations of the testator are not of themselves alone sufficient to establish the execution of a lost or destroyed will, they are admissible in evidence in aid of other proof.¹ Nor can the contents of a lost will be established solely by the declarations of the testator, although such declarations are now deemed admissible for the purpose of corroboration.²

¹ *Ripley's Goods*, 4 Jur. N. S. 342, 1 Swabey & T. 68, 164 Eng. Reprint, 632, 6 Week. Rep. 460; *Re Russell*, 33 Hun, 271, affirmed in 98 N. Y. 633; *Collyer v. Collyer*, 4 Dem. 53, affirmed in 110 N. Y. 481; *Mercer v. Mackin*, 14 Bush, 434; *Clark v. Turner*, 50 Neb. 290, 38 L.R.A. 433, 69 N. W. 843; *Re Keene*, 189 Mich. 97, 155 N. W. 514, Ann. Cas. 1918E, 367.

See also note in 16 Columbia L. Rev. 435.

² *Clark v. Turner*, 50 Neb. 290, 38 L.R.A. 433, 69 N. W. 843; *Collyer v. Collyer*, 17 Abb. N. C. 328; *Chisholm v. Ben*, 7 B. Mon. 408; *Re Hope*, 48 Mich. 518, 12 N. W. 682; *Re Lambie*, 97 Mich. 49, 56 N. W. 223; *Re Page*, 118 Ill. 576, 59 Am. Rep. 395, 8 N. E. 852; *Morris v. Swaney*, 7 Heisk. 591; *Sugden v. St. Leonards*, L. R. 1 Prob. Div. 154, 45 L. J. Prob. N. S. 49, 34 L. T. N. S. 369, 24 Week. Rep. 479; *Woodward v. Goulstone*, L. R. 11 App. Cas. 469, 35 Week. Rep. 337, 56 L. J. Prob. N. S. 1, 55 L. T. N. S. 790, 51 J. P. 307; *Clark v. Morton*, 5 Rawle, 235, 28 Am. Dec. 667; *Re Marsh*, 45 Hun, 107.

25. Declarations of deceased subscribing witness to will.

The courts are not agreed upon the question of the admissibility of declarations of deceased subscribing witnesses to a will as to the testamentary capacity of the testator, some courts holding such declarations inadmissible,¹ while others hold them admissible.²

¹ *Speer v. Speer*, 146 Iowa, 6, 27 L.R.A. (N.S.) 294, 123 N. W. 176; *Sewall v. Robbins*, 139 Mass. 164, 29 N. E. 650; *Baxter v. Abbott*, 7 Gray, 71; *Boardman v. Woodman*, 47 N. H. 120; *Sellars v. Sellars*, 2 Heisk. 430; *Runyan v. Price*, 15 Ohio St. 1, 86 Am. Dec. 459; *Stacy v. Graham*, 14 N. Y. 499.

² *Colvin v. Warford*, 20 Md. 357; *Gaither v. Gaither*, 3 Md. Ch. 158; *Townshend v. Townshend*, 9 Gill. 506; *Black v. Ellis*, 3 Hill, L. 68; *Harden v. Hays*, 9 Pa. 151.

26. Admissibility of declarations of persons who would be incompetent as witnesses.

a. Declarations of infants too young to be sworn as witnesses.
—While one or two of the earlier English cases sustained the admissibility of declarations of an infant not competent to be sworn as a witness,¹ the rule is now well established, both in England and in America, that such declarations are inadmissible.² The rule seems to be otherwise in Kentucky, however,³ and the general rule seems not to exclude declarations against interest.⁴ So, too, an exception is made in favor of exclamations or statements of the infant made contemporaneously with the main transaction, these being held admissible as part of the *res gestæ*, if the child possesses sufficient intelligence to render his statements reliable.⁵ And that an injured child made recent complaint may be shown, though the details of the statement, or the name of the person accused, are inadmissible.⁶

¹ 1 Hale, P. C. 634; 1 East, P. C. 441; 4 Bl. Com. 214.

² Reg. v. Nicholas, 2 Car. & K. 246, 2 Cox, C. C. 139; 1 Phillipps, Ev. 11, citing Rex v. Tucker, 1808, MS.; Edwards v. Morrow, 12 La. Ann. 887; Smith v. State, 41 Tex. 352; People v. Graham, 21 Cal. 261; Weldon v. State, 32 Ind. 81; State v. Tom, 8 Or. 177.

³ Philpot v. Com. 5 Ky. L. Rep. 862.

⁴ Atchison, T. & S. F. R. Co. v. Potter, 60 Kan. 808, 72 Am. St. Rep. 385, 58 Pac. 471.

⁵ People v. Colletta, 65 App. Div. 570, 72 N. Y. Supp. 903, affirmed without opinion in 169 N. Y. 609, 62 N. E. 1099; Croomes v. State, 40 Tex. Crim. Rep. 672, 51 S. W. 924, 53 S. W. 882; Kenney v. State, — Tex. Crim. Rep. —, 65 L.R.A. 316, 79 S. W. 817; State v. Lasecki, 90 Ohio St. 10, L.R.A.1915E, 202, 106 N. E. 660, Ann. Cas. 1916C, 1182; Soto v. Territory, 12 Ariz. 36, 94 Pac. 1104; Hunter v. State, 54 Tex. Crim. Rep. 224, 130 Am. St. Rep. 887, 114 S. W. 124; Thomas v. State, 47 Tex. Crim. Rep. 534, 122 Am. St. Rep. 712, 84 S. W. 823; Beal-Doyle Dry Goods Co. v. Carr, 85 Ark. 479, 108 S. W. 1053, 14 Ann. Cas. 48; Grant v. State, 124 Ga. 757, 53 S. E. 334.

⁶ People v. Barney, 114 Cal. 554, 47 Pac. 41; Territory v. Godfrey, 6 Dak. 46, 50 N. W. 481; People v. Figueroa, 134 Cal. 159, 66 Pac. 202; State v. Jerome, 82 Iowa, 749, 48 N. W. 722.

Statements made to his father by a boy who came home wounded and crying are admissible as part of the *res gestæ* in a prosecution for assault and battery; but statements subsequently made to a third person sent for by the father are inadmissible, as well as the acts

and conduct of the boy in pointing out the scene of the assault and the stick claimed to be the one he was struck with. *Pool v. State*, — Tex. Crim. Rep. —, 23 S. W. 891.

And in a prosecution for assault with intent to rape testimony by the mother of the child assaulted, as to what the latter's three-year-old brother stated to the mother the next day about the transaction, is incompetent. *People v. Beech*, 129 Mich. 622, 89 N. W. 363.

For a fuller review of the cases, see notes in 65 L.R.A. 316, and L.R.A. 1915E, 202.

b. Declaration by husband and wife as res gestæ.—*Res gestæ* declarations of husband and wife are admissible for or against each other, although each may be incompetent to testify as a witness in the case.¹

¹ *Cook v. State*, 22 Tex. App. 511, 3 S. W. 749; *Robbins v. State*, 73 Tex. Crim. Rep. 367, 166 S. W. 528; *People v. Foley*, 64 Mich. 148, 31 N. W. 94; *Dunham v. State*, 8 Ga. App. 668, 70 S. E. 111; *Johnson v. Sherwin*, 3 Gray, 374; *Rudd v. Rounds*, 64 Vt. 432, 25 Atl. 438; *Cattison v. Cattison*, 22 Pa. 275; *Gilchrist v. Bale*, 8 Watts, 355, 34 Am. Dec. 469.

For a full review of the cases see note in L.R.A.1915E, 204.

c. Declarations by convicts and unpardoned felons as res gestæ.—The general rule is that a declaration may be admitted as part of the *res gestæ* even though the declarant is a convict or unpardoned felon.¹

¹ *Flores v. State*, — Tex. Crim. Rep. —, 79 S. W. 808; *Johnson v. State*, 183 Ala. 79, 63 So. 163. See also note in L.R.A.1915E, 205.

d. Declarations of insane persons.—Declarations of one who has since become insane are clearly admissible.¹ It has also been held that such declarations are admissible in spite of the fact that the declarant was insane when the statement was made,² but other courts have excluded such testimony because of the declarant's incompetency as a witness.³

¹ *Weber v. Chicago, R. I. & P. R. Co.* 175 Iowa, 358, L.R.A.1918A, 626, 151 N. W. 852. See also note in 15 Columbia L. Rev. 714.

² *Wilson v. State*, 49 Tex. Crim. Rep. 50, 90 S. W. 312.

³ *State v. Vaughn*, 223 Mo. 149, 122 S. W. 677. See also note in L.R.A. 1915E, 207.

27. Admissibility of statements in presence of party as affected by his mental or physical condition at the time.

One injured severely by a fall from a street car and suffering from shock occasioned thereby cannot be bound by statements made in her presence and undenied by her, as to how her injury occurred, where there is nothing to show that she heard the statements.¹ And evidence showing that the husband of the plaintiff, injured by being thrown from a carriage, made certain statements while they were still about the place of the accident, as to the cause of plaintiff's injuries, are properly excluded, it appearing that she took no part in the conversation at the time, and that she was then suffering from the injury received, and being assisted to a carriage.² So translation of statements made by an injured person, who did not understand the English language, to a doctor who was in attendance upon him, is not admissible as an undenied statement made in the presence of the injured person respecting the manner of his injury.³ Declarations made by one claiming a certain right of way, in the presence of the owner of the servient estate, but not heard by him by reason of deafness, are inadmissible in evidence against him, as undenied statements.⁴ A statement made in the presence of one charged with murder, that he was "shamming," when it appeared that at the time he was apparently unconscious, is not admissible against him.⁵ And a declaration or statement made in the presence of one unconscious from sleep or stupor cannot be admitted in evidence against him.⁶ So one rendered hysterical by an accident, who had been assisting in bringing to consciousness her companion, who was rendered unconscious by it, is not bound by a statement made by the latter, immediately on regaining consciousness, as to the cause of the accident, although she did not contradict it.⁷

¹ *Schilling v. Union R. Co.* 77 App. Div. 74, 78 N. Y. Supp. 1015.

² *Tinker v. New York, O. & W. R. Co.* 92 Hun, 269, 36 N. Y. Supp. 672, affirmed on other points in 157 N. Y. 312, 51 N. E. 1031.

³ *Parulo v. Philadelphia & R. R. Co.* 145 Fed. 664. See also cases cited under § 10 this topic, *supra*.

⁴ *Tufts v. Charlestown*, 4 Gray. 537.

⁵ *People v. Koerner*, 154 N. Y. 355, 48 N. E. 730.

⁶ *Lanergan v. People*, 39 N. Y. 39.

⁷ *McCord v. Seattle Electric Co.* 46 Wash. 145, 13 L.R.A.(N.S.) 349, 89 Pac. 491.

28. Reports by agent or employee to employer, to prove fact in issue.

Reports by an agent or employee to his employer are competent to affect the employer with notice of, and to establish as against him, relevant facts and existing conditions leading up to the cause of action, if the report was required of the employee, or made in the line of his duty.¹ Reports made for the conduct of the business, in the ordinary line of duty, before there is any accident or injury, or pending or contemplated litigation, or before the employee has knowledge of such accident, are generally admissible in behalf of the master.² But reports made after the cause of action has arisen are generally not admissible in behalf of the employer of the one making them.³ And reports which are mere narrations of past events cannot, as a general rule, be received in evidence as admissions of the employer.⁴

¹ *Vicksburg & M. R. Co. v. Putnam*, 118 U. S. 545, 30 L. ed. 257, 7 Sup. Ct. Rep. 1; *Brady v. North Jersey Street R. Co.* 76 N. J. L. 744, 71 Atl. 238; *La Abra Silver Min. Co. v. United States*, 175 U. S. 423, 44 L. ed. 223, 20 Sup. Ct. Rep. 168; *Rogers v. New York & B. Bridge*, 11 App. Div. 141, 42 N. Y. Supp. 1046, affirmed in 159 N. Y. 556, 54 N. E. 1094; *Virginia-Carolina Chemical Co. v. Knight*, 106 Va. 674, 56 S. E. 725; *Atchison, T. & S. F. R. Co. v. Burks*, 78 Kan. 515, 18 L.R.A.(N.S.) 231, 96 Pac. 950.

² *Callihan v. Washington Water Power Co.* 27 Wash. 154, 56 L.R.A. 772, 91 Am. St. Rep. 829, 67 Pac. 697; *Williams v. Walton & W. Co.* 9 Houst. (Del.) 322, 32 Atl. 726.

This is the rule generally laid down with reference to the admissibility of a train despatcher's record as to the movement of trains made up from telegraphic reports transmitted to him from stations along the road. See note to *Louisville & N. R. Co. v. Daniel*, 3 L.R.A. (N.S.) 1190, and the later case of *Hitchner Wall Paper Co. v. Pennsylvania R. Co.* 158 Fed. 1011.

³ *North Hudson County R. Co. v. May*, 48 N. J. L. 401, 5 Atl. 276; *San Antonio & A. P. R. Co. v. Manning*, 20 Tex. Civ. App. 504, 50 S. W. 177; *Insurance Co. of N. A. v. Guardiola*, 129 U. S. 642, 32 L. ed. 802, 9 Sup. Ct. Rep. 425.

A conductor's report of accident held inadmissible in favor of the com-

pany. *Connor v. Seattle R. & S. R. Co.* 56 Wash. 310, 25 L.R.A. (N.S.) 930, 134 Am. St. Rep. 1101, 105 Pac. 634. So, too, a motorman's report was held inadmissible in *Gardner v. Metropolitan Street R. Co.* 223 Mo. 389, 122 S. W. 1068, 18 Ann. Cas. 1166.

⁴*Carroll v. East Tennessee, V. & G. R. Co.* 82 Ga. 452, 6 L.R.A. 214, 10 S. E. 163; *Wabash R. Co. v. Farrell*, 79 Ill. App. 508; *Powell v. Northern P. R. Co.* 46 Minn. 249, 48 N. W. 907; *Cleveland, C. C. & St. L. R. Co. v. Ullom*, 20 Ohio C. C. 512, 11 Ohio C. D. 321.

Reports by employees concerning an accident cannot be received in evidence as admissions by the defendant of the facts stated in the reports, unless the reports have been adopted or promulgated in an authoritative way by some official having power to bind the corporation by admissions. *Atchison, T. & S. F. R. Co. v. Burks*, *supra*.

A report made by a street car conductor at the end of his run to his company concerning an accident to a passenger occurring during the trip held not to be admissible against the company as an admission. *Bell v. Milwaukee Electric R. & Light Co.* 169 Wis. 408, 172 N. W. 791.

So a report by a station agent made after a fire destroyed a private home near the railroad, stating that the fire was caused by sparks from a locomotive was not proper evidence against the company. *Warner v. Maine C. R. Co.* 111 Me. 149, 47 L.R.A. (N.S.) 830, 88 Atl. 403.

But a conductor's report stating that sparks from his train had set some building on fire and that a section gang should be sent out to put it out was admitted. *Lemen v. Kansas City Southern R. Co.* 151 Mo. App. 511, 132 S. W. 13.

So a similar report from a section foreman as to a fire was admitted in *Hilbert v. Spokane International R. Co.* 20 Idaho, 54, 116 Pac. 1116. See *contra*, note in 33 Harvard L. Rev. 113.

For other cases on this general subject see notes in 18 L.R.A. (N.S.) 231; 25 L.R.A. (N.S.) 930; 47 L.R.A. (N.S.) 830.

29. Declarations out of court by one whose name is charged to have been forged.

The decisions as to the admissibility, upon the question of forgery, of declarations out of court by persons whose names are charged to have been forged, are not entirely agreed. Some courts admit such declarations upon an issue as to forgery of a will, not as direct proof, but as corroborative of other testimony.¹ But such declarations are held by other decisions, both in cases of forgery of wills and of other instruments, to be inadmissible, on the ground of hearsay.²

¹*Hoppe v. Byers*, 60 Md. 381; *Taylor Will Case*, 10 Abb. Pr. N. S. 300;

Turner v. Hand, 3 Wall. Jr. 88, Fed. Cas. No. 14,257; *Johnson v. Brown*, 51 Tex. 65; *Gurley v. Armentraut*, 27 Ohio C. C. 199; *State v. Ready*, 78 N. J. L. 599, 28 L.R.A.(N.S.) 240, 75 Atl. 564; *Corbett v. State*, 3 Ohio C. D. 79; *Doe ex dem. Ellis v. Hardy*, 1 Moody & R. 525; *Re Thomas*, 155 Cal. 488, 101 Pac. 798.

² *Kennedy v. Upshaw*, 64 Tex. 411; *Boylan v. Meeker*, 28 N. J. L. 274; *Leslie v. McMurtry*, 60 Ark. 301, 30 S. W. 33; *People v. Driggs*, 12 Cal. App. 240, 108 Pac. 62, 64; *People v. Alderdice*, 120 App. Div. 368, 105 N. Y. Supp. 395; *People v. Landis*, 139 Cal. 426, 73 Pac. 153; *State v. Allen*, 56 S. C. 495, 35 S. E. 204.

30. Declarations as to pedigree.

Ordinarily before declarations to prove pedigree can be admitted there must be some other evidence that declarant was related by blood or marriage to the family referred to in the declaration.¹ Where, however, the question arises in an effort to reach the estate of the declarant himself, the declaration is admissible without such preliminary proof.² The better rule is that this exception admitting such declaration as to pedigree in evidence includes statements made to a bastard.³ This rule has been extended to include statements by the deceased declarant as to his own age.⁴

¹ *Fulkerson v. Holmes*, 117 U. S. 389, 29 L. ed. 915, 6 Sup. Ct. Rep. 780.

² *Nolan v. Barnes*, 294 Ill. 25, 128 N. E. 293; *Jarchow v. Grosse*, 257 Ill. 36, 100 N. E. 290, Ann. Cas. 1914A, 820; *Wise v. Wynn*, 59 Miss. 588, 42 Am. Rep. 381 and cases there cited.

³ *Coker v. Cooper's Estate*, — Tex. Civ. App. —, 176 S. W. 145. See also note in 15 Columbia L. Rev. 632.

⁴ *Landers v. Hayes*, 196 Ala. 533, 72 So. 106.

31. Declarations as to state of mind.

a. Declarations concerning the alienation of affections.—Declarations by a husband or wife as to alienation of affections are admissible in evidence as declarations indicating intention or a state of mind.¹

¹ *Ickes v. Ickes*, 237 Pa. 582, 44 L.R.A.(N.S.) 1118, 85 Atl. 885; *Willey v. Howell*, 159 Ky. 805, 169 S. W. 519; *Wigmore, Ev. § 1730*. See also note in 15 Columbia L. Rev. 190.

Contra, *Gilmore v. Gilmore*, 42 S. D. 236, 173 N. W. 865, but see comment on that case in note 33 Harvard L. Rev. 315.

b. Declarations of deceased parent as to paternity of child.
—Declarations of a deceased workman as to his paternity of an illegitimate child and as to the dependency of such child on the deceased have been admitted by an English court.¹

¹ *Lloyd v. Powell*, *Duffryn Steam Coal Co.* [1914] A. C. 733, 6 B. R. C. 827, 83 L. J. K. B. N. S. 1054, 111 L. T. N. S. 338, 30 Times L. R. 456, 58 Sol. Jo. 514, 7 B. W. C. C. 330, but see comment thereon in 28 Harvard L. Rev. 299.

32. Declarations of intention.

A declaration of an intention to do a specific act is relevant to show that the act was done, if showing a then present state of mind and if made naturally and under circumstances dispelling suspicion.¹ The better rule is that such declarations are original evidence, admissible as an exception to the hearsay rule,² but other courts admit them as part of the *res gestæ*³ or as verbal acts.⁴

¹ *State v. Farnum*, 82 Or. 211, 161 Pac. 417, Ann. Cas. 1918A, 318; Wigmore, Ev. § 1725.

Contra: *Foster v. Shepherd*, 258 Ill. 164, 45 L.R.A.(N.S.) 167, 101 N. E. 411, Ann. Cas. 1914B, 572, but see criticism of this opinion by Prof. Wigmore in note to 8 Ill. L. Rev. 203.

² *State v. Farnam*, *supra*; *Com. v. Trefethen*, 157 Mass. 180, 24 L.R.A. 235, 31 N. E. 961; *Com. v. Howard*, 205 Mass. 128, 91 N. E. 397; *Mutual L. Ins. Co. v. Hillmon*, 145 U. S. 285, 36 L. ed. 706, 12 Sup. Ct. Rep. 909; *State v. Mortensen*, 26 Utah, 312, 73 Pac. 562, 633; note in 17 Columbia L. Rev. 443.

³ *State v. Hunter*, 131 Minn. 252, L.R.A.1916C, 566, 154 N. W. 1083; *Greenacre v. Filby*, 276 Ill. 294, L.R.A.1918A, 234, 114 N. E. 536, reviewing the Illinois cases and holding that the declaration of intention must have been part of the *res gestæ* or have been accompanied by some act which it might serve to explain.

⁴ *People v. Atwood*, 188 Mich. 36, 51, 154 N. W. 112.

33. Declaration of deceased confessing a crime.

A confession of a deceased person that he committed the murder for which the defendant is on trial is not admissible.¹

¹ *Donnelly v. United States*, 228 U. S. 243, 57 L. ed. 820, 33 Sup. Ct. Rep. 449, Ann. Cas. 1913E, 710. Three judges dissented on the ground that the evidence comes within the exception to the hearsay rule admitting a declaration against interest even though such interest is not pecuniary.

For discussion of principle involved see notes in 26 *Harvard L. Rev.* 755 and 12 *Mich. L. Rev.* 141, and *Wigmore, Ev.* §§ 1476, 1477.

ADULTERY.

1. Circumstantial evidence; presumptions.
2. Cogency and relevancy of proof.

As to criminality of solicitations to crime (including adultery) which is not consummated, see note to *State v. Butler*, 25 L.R.A. 434.

1. Circumstantial evidence; presumptions.

The evidence to establish the fact of adultery need not be direct, but it may be established by proof of circumstances, etc., from which the jury may reasonably infer guilt;¹ but, if circumstantial, the evidence must be such as would lead the guarded discretion of a just mind to the conclusion of the truth of the charge.²

Occupying the same sleeping apartment is presumptive evidence of guilt.³

¹ *Stiles v. Stiles*, 167 Ill. 576, 47 N. E. 867. And see cases in succeeding note.

Adultery may be proved by the inferences arising from the acts of the parties, although not directly shown. *Dunham v. Dunham*, 162 Ill. 589, 35 L.R.A. 70, 44 N. E. 841.

Defendant's admissions or specific facts furnishing links in the chain of

circumstantial evidence are admissible, even though they do not constitute the offense charged or any part of it. *Till v. State*, 132 Wis. 242, 111 N. W. 1109.

2 *Aitchison v. Aitchison*, 99 Iowa, 93, 68 N. W. 573; *State v. Dukes*, 119 N. C. 782, 25 S. E. 786; *Stackhouse v. Stackhouse*, — N. J. Eq. —; 36 Atl. 884; *Phillips v. Phillips*, 24 Misc. 334, 52 N. Y. Supp. 489 (fact to be established, not only by fair inference, but as a necessary conclusion; appearances indicating guilt, but still not inconsistent with innocence, not enough); *Carlisle v. Carlisle*, 99 Iowa, 247, 68 N. W. 681; *Shufeldt v. Shufeldt*, 86 Md. 519, 39 Atl. 416; *Cooke v. Cooke*, 152 Ill. 286, 38 N. E. 1027 (that person was seen in house of assignation holding an inmate on his lap, and that he remained in the house all night and until nine o'clock the following day, sufficient;) *Com. v. Mosier*, 135 Pa. 221, 19 Atl. 943 (proof that man and woman, not husband and wife, occupy same room and bed, undressed, in the nighttime, sufficient;) *Van Name v. Van Name*, 49 Hun, 264, 2 N. Y. Supp. 77 (entering house of ill-fame and remaining for a time, if unexplained, sufficient); *Cornelius v. Hambay*, 150 Pa. 359, 24 Atl. 515 (proof that man and woman, not husband and wife, visited hotel late at night and remained several hours, sufficient).

See also *State v. La Mora*, 53 Or. 261, 99 Pac. 417.

3 *United States v. Griego*, 11 N. M. 392, 72 Pac. 20. See also *State v. Eggleston*, 45 Or. 346, 77 Pac. 738.

2. Cogency and relevancy of proof.

The law does not require a different kind of evidence in criminal prosecutions for adultery from that required in civil actions, but the degree of proof differs. In criminal the fact is required to be established beyond a reasonable doubt, as in the case of other criminal prosecutions;¹ while in civil suits it is required to be established by preponderance of the evidence.²

In some states a divorce based on adultery will not be granted either on the uncorroborated testimony of the petitioner,³ or on the uncorroborated confession of the defendant.⁴ Nor will mutual corroboration ordinarily suffice,⁵ but where the defendant's confession is made in open court the lessened danger of collusion should make the petitioner's corroboration sufficient.⁶

Statements by a man when stopped on his way from the room of a married woman at night are not admissible as part of the *res gestæ* upon the question of the woman's adultery.⁷

In North Carolina, under a statute authorizing a prosecution for criminal elopement with a wife who since her marriage has been innocent and virtuous, the state may show her general character for virtue and innocence.⁸

¹ State v. Brink, 68 Vt. 659, 35 Atl. 492.

Under the Georgia Code of 1895, the state was held bound to prove that both parties were married. *Zackery v. State*, 6 Ga. App. 104, 64 S. E. 281. This code provision is still in force. See Park's Ann. Code of Ga. 1914, § 372, vol. 6, p. 247.

The uncorroborated testimony of the complainant is not sufficient to sustain a conviction. *Blue v. State*, 86 Neb. 189, 125 N. W. 136.

Under the New York Penal Law, § 108, a conviction for adultery cannot be had on the uncorroborated testimony of the person with whom the offense is charged to have been committed. (See 2d ed. Birdseye, Cummings & Gilbert's Consol. Laws of N. Y. Ann. 1919, vol. 5, p. 5608.)

For discussion of what constitutes open and notorious adultery, see note L.R.A.1918F, 595.

² *Lenning v. Lenning*, 176 Ill. 180, 52 N. E. 46; *Stiles v. Stiles*, 167 Ill. 576, 47 N. E. 867; *Lindley v. Lindley*, 68 Vt. 421, 35 Atl. 349. And see Abbott, Trial Ev. 2d ed. 948.

If the defendant's confession is relied on as the basis of the judgment, it must be sufficient to preclude all suspicion of collusion, and usually the confession should be corroborated by other evidence. *Diederichs v. Diederichs*, 44 Misc. 591, 90 N. Y. Supp. 131.

³ *Grover v. Grover*, 63 N. J. Eq. 771, 50 Atl. 1051. See also Minn. Gen. Stat. 1913, § 8465 and Wigmore, Ev. § 2046. *Contra*, *Baker v. Baker*, 195 Pa. 407, 46 Atl. 96.

⁴ *Kloman v. Kloman*, 62 N. J. Eq. 153, 49 Atl. 810.

⁵ *Garrett v. Garrett*, 86 N. J. Eq. 293, 98 Atl. 848.

⁶ Note 30 Harvard L. Rev. 520.

⁷ *State v. Bradnack*, 69 Conn. 212, 43 L.R.A. 620, 37 Atl. 492.

⁸ *State v. Connor*, 142 N. C. 700, 55 S. E. 787. (See Consol. Stats. of N. C. 1919, § 4225, vol. 1, p. 4224.)

ADVERSE POSSESSION.

1. Burden of proof.
2. Presumptions.
3. Conclusion.
4. Declarations—hearsay.
5. Relevancy.
6. Weight, effect, and sufficiency.

Upon rights acquired as against the public by adverse possession of highway or city street, see note to *Meyer v. Graham*, 18 L.R.A. 146.

Adverse possession against remaindermen and owners of future estates, see note to *Gindrat v. Western Railway of Alabama*, 19 L.R.A. 839.

Adverse possession due to ignorance or mistake as to boundary, see note to *Preble v. Maine C. R. Co.* 21 L.R.A. 829.

Adverse possession by donee under parol gift, see note to *Schafer v. Hauser*, 35 L.R.A. 835.

1. Burden of proof.

The burden of establishing adverse possession is upon the party who asserts a title based thereon against the holder of the legal title.¹

¹ *Davidson v. Alabama Iron & S. Co.* 109 Ala. 383, 19 So. 390; *Beasley v. Howell*, 117 Ala. 499, 22 So. 989; *McConnell v. Day*, 61 Ark. 464, 33 S. W. 731; *F. A. Hihn Co. v. Fleckner*, 106 Cal. 95, 39 Pac. 214; *Bussey v. Jackson*, 104 Ga. 151, 30 S. E. 646; *Thomson v. Thomson*, 93 Ky. 435, 20 S. W. 373; *Wohlwend v. Weingardner*, 19 Ky. L. Rep. 429, 40 S. W. 928; *Griffin v. Mulley*, 167 Pa. 339, 31 Atl. 664; *Drumright v. Hite*, 2 Va. Dec. 465, 26 S. E. 583.

One who sets up against the legal title to land only title by adverse occupancy must prove all the facts requisite to give title by adverse possession, including a continuous, unbroken, notorious, actual, and adverse possession under claim of right for the full statutory period, together with the limits, location, and extent of the occupancy. *Wilkins v. Pensacola City Co.* 36 Fla. 36, 18 So. 20.

But one claiming by adverse possession is not bound to establish his right to every part of the land in controversy, but may recover any portion of the premises to which he substantiates his claim. *Jacob Tome Inst. v. Davis*, 87 Md. 591, 41 Atl. 166.

Plaintiff in ejectment, who adduces a chain of title from a source acknowledged to be genuine, need not show possession in each of his intermediate grantors, but such possession is presumed, and the burden cast on defendant to establish an adverse possession. *Arents v. Long Island R. Co.* 89 Hun, 126, 34 N. Y. Supp. 1085.

The burden of showing that the possession of a vendee of land under a contract providing for a conveyance of the title on payment of the purchase price was adverse rests upon the party alleging it. *Bradsher v. Hightower*, 118 N. C. 399, 24 S. E. 120.

The burden of showing title by adverse possession rests upon the state or its agencies, where the public claims title by user to an easement in a public highway. *State v. Fisher*, 117 N. C. 733, 23 S. E. 158.

A claimant of land under a parol gift has the burden of proof as to improvements and other acts of ownership. *Raleigh v. Wells*, 29 Utah, 217, 81 Pac. 908, 110 Am. St. Rep. 689.

2. Presumptions.

Every presumption is in favor of a possession in subordination to the title of the true owner, and an adverse possession against such owner must be established by clear and positive proof.¹

The evidentiary facts essential to adverse possession cannot be established by mere inference, but from the unexplained fact of open, continuous, and exclusive possession of land, a hostile entry as to all the world may be inferred, as well as that the possession continued adverse in its character.²

A grant will be presumed upon proof of an adverse, exclusive, and uninterrupted possession for the statutory period.³

And open, notorious, uninterrupted, and peaceable possession of land under a claim of right will be presumed to have been adverse from its inception as to the holder of the legal title, though not in its character hostile.⁴

And one who has been ousted from possession of his real estate by an open, visible, and exclusive possession in another, which has continued uninterruptedly for the limitation period, will be presumed to have had knowledge of it.⁵

It will be presumed that one in possession under a deed claimed up to the boundaries described therein, when such boundaries are located.⁶

¹ *Barrs v. Brace*, 38 Fla. 265, 20 So. 991; *Lampman v. Van Alstyne*, 94 Wis. 417, 69 N. W. 171; *Wilson v. Johnson*, 51 Fla. 370, 41 So. 395; *Horn v. Metzger*, 234 Ill. 240, 84 N. E. 893.

A grantee's possession is presumed to be under his deed. *McBride v. Caldwell*, 142 Iowa, 228, 119 N. W. 741.

Adverse possession as a defense to an action of ejectment will not be presumed to have continued for the statutory period under claim or color of title, from the mere fact of possession not shown to have been under such color or claim, and to have been continuous. *Atkinson v. Smith*, 2 Va. Dec. 373, 24 S. E. 901.

A stranger to the will, who, after the death of one to whom a life estate is devised, continues to occupy the premises without any evidence that his holding is permissive, or in subordination to the rights of others under the will, will be presumed to have possessed it adversely. *Satcher v. Grice*, 53 S. C. 126, 31 S. E. 3.

² *Meyer v. Hope*, 101 Wis. 123, 77 N. W. 720.

Possession of land will be presumed to have been adverse unless the contrary is shown. *Alexander v. Gibbon*, 118 N. C. 796, 54 Am. St. Rep. 757, 24 S. E. 748.

Possession is presumed to be adverse if accompanied by the usual acts of ownership, but such possession may be shown to be subservient to the title of another. *Criswell v. Noble*, 61 Misc. 483, 113 N. Y. Supp. 954, affirmed in 134 App. Div. 994, 119 N. Y. Supp. 1122.

One claiming property by adverse possession is presumed to act in good faith. *Baxley v. Baxley*, 117 Ga. 60, 43 S. E. 436.

No presumption arises that an adverse possession of land shown to have existed for a time continues for a sufficient time to give title by adverse possession. *Woods v. Hull*, 90 Tex. 228, 38 S. W. 165.

³ *United States v. Chaves*, 159 U. S. 452, 40 L. ed. 215, 16 Sup. Ct. Rep. 57.

A presumption of a grant arises from the peaceable, continued, adverse, and exclusive possession of lots for twenty-one years, accompanied by the payment of taxes and street improvements, and the exercise of such other and further acts of ownership as the character of the lots warranted. *Hasson v. Klee*, 181 Pa. 117, 37 Atl. 184.

So, an unmolested possession of land for thirty years will authorize the presumption of a grant. *Barclay v. Howell*, 6 Pet. 498, 8 L. ed. 477; *Philadelphia & R. R. Co. v. Obert*, 109 Pa. 193, 1 Atl. 398.

And adverse possession of over eighty years will not be disturbed. *Moore v. Greene*, 19 How. 69, 15 L. ed. 533.

Every permissible presumption should be indulged in support of a claim of forty years' duration, undisputed by those adversely interested. *Logan v. Pierce*, 66 Tex. 126, 18 S. W. 343; *Hasbrouck v. Burhans*, 42 Hun, 376.

⁴ *Toltec Ranch Co. v. Babcock*, 24 Utah, 183, 66 Pac. 876, affirmed in 191 U. S. 542, 48 L. ed. 294, 24 Sup. Ct. Rep. 169.

⁵ *Carney v. Hennessey*, 74 Conn. 107, 53 L.R.A. 699, 92 Am. St. Rep. 199, 49 Atl. 910.

⁶ *Lewis v. John L. Roper Lumber Co.* 113 N. C. 55, 18 S. E. 52.

In the absence of contrary evidence, the presumption is that the possession of adjoining owners is coextensive with their legal title. *Kurz v. Miller*, 89 Wis. 426, 62 N. W. 182.

3. Conclusion.

It is not competent for a witness, upon the question as to adverse possession, to testify as to his conclusion in respect to the question; but he must state the facts upon which such conclusion rests.¹

¹ *Arents v. Long Island R. Co.* 156 N. Y. 1, 50 N. E. 422, affirming 89 Hun, 126, 34 N. Y. Supp. 1085.

But see *Metz v. Metz*, 48 S. C. 472, 26 S. E. 787, which holds that a witness on the issue of adverse possession may state as a fact that one had possession at a certain time, received the rents and paid the taxes, where he has knowledge of the facts.

4. Declarations—hearsay.

Declarations made by persons in possession of lands, as to the character of their possession, are admissible upon the question whether such possession was adverse,¹ and it is immaterial whether such declaration is in the form of a narrative of a past event or is explanatory of a present occurrence.²

Evidence that by reputation and general understanding in the neighborhood the title to land was in one claiming adverse possession is inadmissible to establish title by adverse possession.³

¹ *Ward v. Cochran*, 18 C. C. A. 1, 36 U. S. App. 307, 71 Fed. 127; *Casey v. Casey*, 107 Iowa, 192, 70 Am. St. Rep. 190, 77 N. W. 844; *High v. Pancake*, 42 W. Va. 602, 26 S. E. 536; *Lewis v. Watson*, 98 Ala. 479, 22 L.R.A. 297, 39 Am. St. Rep. 82, 13 So. 570.

It is competent in support of a plea of title by adverse possession to a strip on the boundary between two tracts of land to prove a declaration by the grantor of the party asserting such possession, to a prospective purchaser, that there had never been any question about the division fence being upon the boundary line, notwithstanding that it was in his own favor, as it serves to characterize the nature of his possession. *Burr v. Smith*, 152 Ind. 469, 53 N. E. 469.

² *McConnell v. Hannah*, 96 Ind. 102; *Wilkerson v. Bottoms*, 174 Ala. 122, 56 So. 948; *Whitaker v. Whitaker*, 157 Mo. 342, 58 S. W. 5; *Rockwell v. Taylor*, 41 Conn. 55; *Carter v. Buchannon*, 3 Ga. 513; *Com. v. Hackett*, 2 Allen (Mass.) 136; *Sorenson v. Dundas*, 42 Wis. 642. See also note in 29 Harvard L. Rev. 224.

³ *Goodson v. Brothers*, 111 Ala. 589, 20 So. 443; *Whittaker v. Thayer*, 48 Tex. Civ. App. 508, 110 S. W. 787.

5. Relevancy.

In determining adverse possession all open acts of ownership

may be considered, such as sale of the land without accounting for the proceeds, payment of taxes, erection of improvements under a claim of right, and acts or declarations tending to show a claim of sole ownership.¹

¹ Doe ex dem. *Pepper v. Roe*, 2 Marv. (Del.) 221, 43 Atl. 90.

It is competent on the question of adverse character of the possession of a tract of land inclosed with other tracts as a pasture, to show that the person exercising such possession stated that he claimed no land in the pasture other than that which he had bought, and none by limitation; that during such possession he purchased other tracts included in the pasture; that he pronounced a list of his land not included in such tract satisfactory; that such tract was not included in lists of lands for taxes rendered by him; and that there was no deed for that tract to him on record. *Waller v. Leonard*, 89 Tex. 507, 35 S. W. 1045, reversing — Tex. Civ. App. —, 34 S. W. 799.

Evidence that the owner of a lot used a strip of land east of his fence as a pathway during part of the time which the adjoining lot owner on the east claims to have been in adverse possession up to the fence is admissible in the former's favor. *Beecher v. Ferris*, 110 Mich. 537, 68 N. W. 269.

A claim of seisin by plaintiff in ejectment may be disproved by showing that the instruments under which such claim was made violated the New York statutes declaring all grants of land held adversely by another void. *Hughes v. Hughes*, 14 Misc. 631, 35 N. Y. Supp. 679.

Proof of the payment of taxes is admissible on the question of ownership of land by adverse possession. *Wren v. Parker*, 57 Conn. 529, 6 L.R.A. 80, 14 Am. St. Rep. 127, 18 Atl. 790; *Merwin v. Backer*, 80 Conn. 338, 68 Atl. 373; *Clark v. Dunn*, 161 Ala. 633, 50 So. 93.

Evidence that a given defendant in partition proceedings, who claims in his answer to be the sole owner of the land, entered into possession under a contract with the heirs to pay the taxes and care for the property, is admissible to show title in the heirs by adverse possession through him as tenant. *Alexander v. Gibbon*, 118 N. C. 796, 54 Am. St. Rep. 757, 24 S. E. 748.

An acknowledgment by a disseisor of the record of a paper title to land, as by the acceptance of a lease from the owner of such title, is in the nature of an admission that the disseisor had no title, and is competent evidence to show that his possession was not adverse. *Sage v. Rudnick*, 67 Minn. 362, 69 N. W. 1096.

Evidence of the possession for ten years of 320 acres of land is inadmissible to show title by adverse possession under the Texas statute of limitations for ten years, allowing 160 acres of land to a naked possessor for that time. *Crumbley v. Busse*, 11 Tex. Civ. App. 319, 32 S. W. 438.

Notoriety of claim. The claimant of land by adverse possession may show

that it was generally understood in the vicinity that he claimed the land. This is competent on the question of notoriety of claim, though not as actual evidence of title. *Doe ex dem. Anniston City Land Co. v. Edmondson*, 145 Ala. 557, 40 So. 505; *Lusk v. Pelter*, 101 Va. 790, 45 S. E. 333.

One occupying real estate at a certain time may testify as to who made use of adjoining land up to the division fence, as tending to show adverse possession in him, and that the owner of the land occupied by witness was only in possession as far as the fence when he conveyed the property to a third person, and as to the construction which had been put by the adjoining owners upon their title deeds. *Carney v. Hennessey*, 74 Conn. 107, 53 L.R.A. 699, 92 Am. St. Rep. 199, 49 Atl. 910.

In ejectment for land which plaintiff claims by adverse possession, evidence is admissible for the purpose of showing that the possession has not been continuous, that within the limitation period defendant recovered it in ejectment against plaintiff and was placed in possession. *Lewis v. Watson*, 98 Ala. 479, 22 L.R.A. 297, 39 Am. St. Rep. 82, 13 So. 570.

6. Weight, effect, and sufficiency.

Much more evidence is required to establish an ouster of a tenant in common by a cotenant who takes possession of the property than in cases where such relation does not exist.¹

The possession relied on to establish adverse possession must be proved to have been continuous,² and hostile to, and not acquiesced in by, the owner.³ Uninterrupted, open, and exclusive possession for the statutory period, if unexplained, establishes the fact of adverse possession from the beginning.⁴

Clear and unequivocal acts or admissions within the statutory period of limitation are necessary to show that title to land by adverse possession has not been acquired.⁵

Payment of taxes by a person not in actual occupation of land is not, of itself, evidence of adverse possession.⁶

¹ *Wheeler v. Taylor*, 32 Or. 421, 67 Am. St. Rep. 540, 52 Pac. 183.

² *Thomas v. Dempsey*, 53 S. C. 216, 31 S. E. 231.

A finding that one holding title to uninclosed lands has been in the adverse, open, and notorious possession thereof for over twenty years is sustained by evidence that he visited the land nearly every week, pastured horses thereon, set out trees, directed the erection of a small house, dug a well, and for more than twenty years mowed the land or let it to others to mow, and that it was recognized and spoken of as his land. *Sullivan v. Eddy*, 164 Ill. 391, 45 N. E. 837.

Evidence by the wife of a tenant in common of land, that her claim by adverse possession is based upon her continuous possession from the time of her marriage, is sufficient to establish title by adverse possession, where there is nothing in such testimony inconsistent with the theory that her possession was the same as her husband's, and that both were in possession as tenants in common. *Fenton v. Miller*, 108 Mich. 246, 65 N. W. 966.

³ *Ruess v. Ewen*, 34 App. Div. 484, 54 N. Y. Supp. 357.

Evidence that a line of railroad was surveyed and located over real property more than three years before the commencement of an action of ejectment is insufficient to show that an entry was then made under a claim adverse to the rights of the owner. *Nashville, C. & St. L. R. Co. v. Hobbs*, 120 Ala. 600, 24 So. 933.

⁴ *Wollman v. Ruehle*, 100 Wis. 31, 75 N. W. 425.

⁵ *Hedges v. Pollard*, 149 Mo. 216, 50 S. W. 889.

⁶ *Whitman v. Shaw*, 166 Mass. 451, 44 N. E. 333.

Tax receipts which do not identify the land do not establish a claim of ownership or show an exercise of dominion essential to a title by adverse possession. *Harms v. Kransz*, 167 Ill. 421, 47 N. E. 746.

Evidence of the payment of taxes on land for a number of years by a person in adverse possession thereof, in connection with an admission that the state is making no claim to the land, is sufficient to support a finding, essential to the existence of a title by adverse possession, that the state has parted with its title. *Busby v. Florida C. & P. R. Co.* 45 S. C. 312, 23 S. E. 50.

Slight evidence is sufficient to overcome title by prescription. *Betjemann v. Brooklyn Union Elev. R. Co.* 127 App. Div. 83, 111 N. Y. Supp. 567.

Building a house on the property and living in it, cultivating the land with exclusive possession, are sufficient evidence of a claim of title. *Cornelius v. Hall*, 32 Misc. 663, 66 N. Y. Supp. 451.

Parol evidence is competent to show continuity of possession of several claimants of land. *Nauman v. Burch*, 91 Ill. App. 48.

Evidence. A party claiming by adverse possession must, as against a patentee, show not only actual and uninterrupted possession, but possession to a well-defined boundary. *Kountze v. Hatfield*, 30 Ky. L. Rep. 589, 99 S. W. 262.

AFFINITY.

As to what constitutes affinity, and the mode of computing it, see Criminal Trial Brief; and as to mode of proof, Abbott, Trial Ev. (3d ed.) pp. 282 et seq.

AGE.

1. **Presumption.**
2. **Records and inscriptions.**
3. **Direct testimony.**
4. **Hearsay.**
5. **Opinion.**
6. **Cross-examining witness as to capacity to judge.**
7. **Inspection.**
8. **Age of document.**
9. **Age of horse.**

Judicial notice as to age of attorneys, see **JUDICIAL NOTICE**.

See also **BIRTH; CHARACTER; KNOWLEDGE.**

1. **Presumption.**

Where nothing appears to the contrary, persons entering into an agreement are presumed adults and competent to contract.¹

The declaration of age, made by an applicant for membership in a beneficial society, will be presumed correct until the contrary is proved.²

¹ Foltz v. Wert, 103 Ind. 404, 2 N. E. 950 (so held on the question of the validity of a contract by heirs, affecting their rights on distribution).
Garber v. State, 94 Ind. 219.

² Supreme Council, G. S. F. v. Conklin, 60 N. J. L. 565, 41 L.R.A. 449, 38 Atl. 659.

2. **Records and inscriptions.**

The statement of the age of the parties in a marriage certificate is no evidence of such fact.¹

Certificates of birth are made competent evidence by statute in some states.²

A baptismal certificate is inadmissible to show the age of a person.³

An entry in a Bible is not competent proof of the age of a person where it is not shown when and by whom the entry was made, or the writer's means of knowledge, or that those whom it concerned had ever acknowledged it to be an authentic family record.⁴

'A leaf taken from a private record book,⁵ or evidence, as the figures upon a birthday cake,⁶ or concerning an inscription on a tombstone,⁷ may be admissible upon the question of age.

Certified copies of census returns are admissible in evidence upon the question of the age of a citizen.⁸

¹ *Passmore v. Passmore*, 60 Mich. 463, 27 N. W. 601.

² A certificate of birth is competent, under Mass. Gen. Laws 1921, chap. 46, § 19, vol. 1, p. 384 (formerly chap. 32, § 11), to show the age of the person referred to therein. *Com. v. Hollis*, 170 Mass. 433, 49 N. E. 632; *Shamlan v. Equitable Acci. Co.* 226 Mass. 67, 115 N. E. 46.

Foreign acts of marriage and registries of births, properly authenticated by Federal representatives abroad, are admissible in evidence in the Louisiana courts, under La. act 38 of 1837. *Jerman v. Tenneas*, 44 La. Ann. 620, 11 So. 80. (See Marr's Ann. Stats. of La. § 3086, vol. 2, p. 1067.)

The certificate of an attending physician to the bureau of vital statistics of the city is not admissible on the question of the age of the deceased patient, where no general law requiring such certificate, and no ordinance of the city requiring the age of the deceased to be stated in the certificate, were put in evidence. *Deutscher Frauen Kranken Verein v. Berger*, 35 Ill. App. 112.

³ *State v. Snover*, 63 N. J. L. 382, 43 Atl. 1059, 11 Am. Crim. Rep. 655 (inadmissible to show age of prosecutrix upon a trial for the carnal knowledge of a woman under the age of consent). See also *Meehan v. Supreme Council*, C. B. L. 95 App. Div. 142, 88 N. Y. Supp. 821.

Not admissible to show the age of a voter. *Berry v. Hull*, 6 N. M. 643, 30 Pac. 936.

A record of baptism of the granddaughter of an insured is inadmissible upon an issue as to whether the latter made false representations as to her age in the application for the policy. *McQuirk v. Mutual Benefit Life Co.* 48 N. Y. S. R. 799, 20 N. Y. Supp. 908.

A church register of baptisms, even when kept under circumstances rendering it admissible as evidence, is proof only of the fact of baptism, and not of age, unless the age is at the same time duly recorded in the register. *Supreme Assembly, R. S. G. F. v. McDonald*, 59 N. J. L. 248, 35 Atl. 1061.

Certificates of baptism and marriage purporting to be based upon entries in books, but not copies of the entries themselves, are inadmissible to show the age of a person. *Tessmann v. Supreme Commandery*, U. F. 103 Mich. 185, 61 N. W. 261.

Under Wis. Rev. Stat. § 4172, making official certificates of birth issued

in foreign countries presumptive evidence of the facts when authenticated, a certificate of baptism is inadmissible to prove the age of the person certified to have been baptized. *Lavin v. Mutual Aid Soc.* 74 Wis. 349, 43 N. W. 143. (See Wis. Stats. 1921, § 4172, vol. 2, p. 2184.)

⁴ *Supreme Council, G. S. F. v. Conklin*, 60 N. J. L. 565, 41 L.R.A. 449, 38 Atl. 659, with note on entries in family Bible or other religious book as evidence, in 41 L.R.A. 449.

A family Bible containing a record of the family births is admissible to show the age of one whose name is entered therein, without proof of the handwriting or authorship of the entries. *People v. Ratz*, 115 Cal. 132, 46 Pac. 915.

The family Bible of the maternal grandfather of a testator is inadmissible to show his age. *Turner v. King*, 98 Ky. 253, 32 S. W. 941, rehearing denied in 98 Ky. 260, 33 S. W. 405.

The family Bible is admissible to show the age of a given person, although the condition of the entry of her birth may require explanation. *People v. Slater*, 119 Cal. 620, 51 Pac. 957.

The family record is inadmissible to prove the age of the alleged infant, where the father and mother are both in court. *Smith v. Geer*, 10 Tex. Civ. App. 252, 30 S. W. 1108.

An entry in a family Bible is admissible to prove age even, if the entry was not contemporaneous with the birth. *Swift v. Rennard*, 119 Ill. App. 173, see also to the same effect, *Hall v. Cardell*, 111 Iowa, 206, 82 N. W. 503, where the record was copied from another Bible. See also *Wren v. Howland*, 33 Tex. Civ. App. 87, 75 S. W. 894, as to admissibility of family Bible to prove relationship.

⁵ *Hunt v. Supreme Council, O. C. F.* 64 Mich. 671, 8 Am. St. Rep. 852, 31 N. W. 576 (leaf taken from deceased soldier's private record book, required to be kept by soldiers in the British service, containing names and ages of his children, admissible to prove their ages).

⁶ Evidence that one whose age at a certain time is in issue had a birthday party before such time, at which there was a cake having certain figures upon it indicating her age, is admissible for the purpose of showing that at the time in question she was older than the age indicated by the figures on the cake. *Parkhurst v. Krellinger*, 69 Vt. 375, 38 Atl. 67.

⁷ *Smith v. Patterson*, 95 Mo. 525, 8 S. W. 567.

⁸ *Priddy v. Boice*, 201 Mo. 309, 9 L.R.A.(N.S.) 718, 99 S. W. 1055; *Flora v. Anderson*, 75 Fed. 217; *Bertram v. Witherspoon*, 138 Ky. 116, 127 S. W. 533.

Jefferson v. State, 85 Tex. Crim. Rep. 614, 214 S. W. 981, where a school census report was admitted in evidence to prove age in a criminal prosecution in which the defendant pleaded that he was under the statutory age.

But see *Campbell v. Everhart*, 139 N. C. 503, 52 S. E. 201, holding that, while census reports are competent to prove facts of a public nature, they are incompetent to prove the age of a particular person, or that a particular person was not *in esse* at a given time, and citing *Wigmore, Ev. § 1671*. See also note in 33 *Harvard L. Rev.* 865.

And in *Edwards v. Logan*, 114 Ky. 312, 70 S. W. 852, 75 S. W. 257, it was held that, for other than school purposes, a school census was not evidence of the date of birth of a person named therein.

In *Battles v. Tallman*, 96 Ala. 403, 11 So. 247, it was held that a census enumerator, when called as a witness, could refresh his memory by an examination of the census book, and, if, when his memory had been refreshed, he could state the particulars from recollection, such statement was the better evidence and the party who called him was not entitled to the admission of the census book; but that, if the witness, being unable to recall the matter so that he could remember what occurred, yet testified that, at or about the time the memorandum was made, he knew its contents and knew them to be true, then the census itself would be admissible in connection with his testimony.

3. Direct testimony.

Age may be proved by the testimony of the person whose age is in question,¹ or that of any other person having proper sources of knowledge,² but not by opinion of a witness from appearances, unaccompanied by the facts on which that opinion is founded.

¹ *Abbott, Trial Ev. (3d ed.) p. 271.*

Com. v. Stevenson, 142 Mass. 466, 8 N. E. 341 (*Holmes, J.*)..

And his testimony is not rendered incompetent by his further statement, given as the reason for it, "that his mother told him so, and that it was written down in a book, which his father had in his pocket, in the courthouse." *Cherry v. State*, 68 Ala. 29.

The prosecutrix on a trial for rape may testify as to her own age. *People v. Ratz*, 115 Cal. 132, 46 Pac. 915; *Com. v. Phillips*, 162 Mass. 504, 39 N. E. 109; *Dodge v. State*, 100 Wis. 294, 75 N. W. 954.

So may the prosecuting witness on a trial for selling intoxicating liquor to a minor. *Reed v. State*, — Tex. Crim. Rep. —, 29 S. W. 1074.

A minor is competent to testify to his own age according to the reputation in the family. *State v. Best*, 108 N. C. 747, 12 S. E. 907.

The prosecutor is properly permitted to state that he was about eighteen years old at the time he was shot, in a prosecution for assault with intent to commit murder, to show the relative condition of the parties

at the time of the assault. *Gunter v. State*, 111 Ala. 23, 56 Am. St. Rep. 17, 20 So. 632.

² *Com. v. O'Brien*, 134 Mass. 198.

A witness may testify as to the age of a brother a few years younger, although, independently of the statement of his father and what had been talked and understood in the family, he is unable to recollect the year of his birth, where he remembers him from infancy, knows his own age, and grew up with the brother. *Hogan v. Mutual Aid & Acci. Asso.* 75 Hun, 271, 26 N. Y. Supp. 1081.

4. Hearsay.

Age may be proved by hearsay, when in question as a fact of pedigree.¹ But not where the case is not one of pedigree, as, for instance, where the object is to establish infancy as a defense,² or as an element in the crime of abduction,³ or generally where age is in question.⁴

¹ Per *Ld. Brougham*, *Monkton v. Atty. Gen.* 2 Russ. & M. 147, 39 Epg. Reprint, 350; *Abbott*, *Trial Ev.* (3d ed.) pp. 301 et seq.

Green v. Norment, 5 Mackey, 80.

A question of pedigree is one which involves a question of parentage or descent.

² *Haines v. Guthrie*, L. R. 13 Q. B. Div. 818; *Kobbe v. Price*, 14 Hun, 55 (family record and passport excluded).

To same effect, *Connecticut Mut. L. Ins. Co. v. Schwenk*, 94 U. S. 593, 24 L. ed. 294 (excluding hearsay on the question of the age of the insured in a life policy).

³ *People v. Sheppard*, 44 Hun, 565.

By N. Y. Penal Laws, § 817, the age of a child may be proved, in any legal proceedings in which a determination of age is necessary, by record of baptism, record of birth in any bureau of vital statistics or board of health, or entry in family Bible.

⁴ Testimony of one person as to the age of another, upon information from the latter's sister, is inadmissible where it is not shown that the sister is dead. *State v. Parker*, 106 N. C. 711, 11 S. E. 517.

Upon the issue as to whether the grantor in a deed was an infant at the time of its execution, testimony of a witness that he heard the grantor's mother say that he was an infant is inadmissible, unless it is first affirmatively shown that the declaration was made *ante litem motam*, and that the declarant is dead. *Hodges v. Hodges*, 106 N. C. 374, 11 S. E. 364.

On an issue as to the age of one suing for personal injuries, testimony of

his brother and the husband of his sister that each knows the family reputation as to his age, and that he was under twenty-one when he is alleged to have made a compromise with defendant, is inadmissible as hearsay. *Rogers v. De Bardeleben Coal & I. Co.* 97 Ala. 154, 12 So. 81.

The minority or majority of the one to whom beer was sold cannot be proved on a prosecution for selling beer to a minor, by evidence of general reputation as to such fact. *Peterson v. State*, 83 Md. 194, 34 Atl. 834.

But the declarations of the father may be shown to establish the age of a child in a prosecution for selling liquor to him as a minor. In this case the father had testified to the age of the child and the declarations were admitted to impeach his testimony. *People v. Werner*, 174 N. Y. 132, 66 N. E. 667, reversing 52 App. Div. 635.

5. Opinion.

An ordinary witness, having testified to the appearance of a person, may state his opinion as to the person's age.¹

¹ *Robinson v. Blakely*, 38 S. C. L. (4 Rich.) 586, 55 Am. Dec. 703; *People v. Bond*, 13 Cal. App. 175, 109 Pac. 150, *Lawson*, Opinion Ev. 493, citing *Benson v. McFadden*, 50 Ind. 431; *Morse v. State*, 6 Conn. 9; *Marshall v. State*, 49 Ala. 21. And see BIRTH.

A witness may testify that from the appearance of a child when he saw her he knew her to be four or five months old. *Bice v. State*, 37 Tex. Crim. Rep. 38, 38 S. W. 803.

An opinion as to the age of an absent witness is admissible after a full statement, as far as practicable, of the means of knowledge, and the basis of the opinion. *State v. Grubb*, 55 Kan. 678, 41 Pac. 951.

The opinion of a witness as to the age of prosecutrix, who is present at the trial, from her size, appearance, and development, is inadmissible. *State v. Robinson*, 32 Or. 43, 48 Pac. 357.

That the parents of a prosecutrix for rape have testified to her age does not render the opinions of others as to her age incompetent. *State v. Grubb*, 55 Kan. 678, 41 Pac. 951.

A physician well acquainted with the prosecutrix on a trial for rape of a girl under fifteen years of age may testify that at the time of the alleged intercourse he knew her physical appearance with reference to size and development, and that judging therefrom she was seventeen or eighteen years old. *Bice v. State*, 37 Tex. Crim. Rep. 38, 38 S. W. 803.

The age of the minor, for selling liquor to whom a person is on trial, may be proved by witnesses first describing his appearance and then

giving their opinion as to his age. *State v. Douglass*, 48 Mo. App. 39; *Jones v. State*, 32 Tex. Crim. Rep. 108, 22 S. W. 149.

In a prosecution for selling liquors to minors, testimony of a witness as to the effect their physical appearance produced on the mind of the witness as to the ages of the minors is admissible, being the impression made upon the mind of the witness himself, and not his opinion as to the impressions made upon the minds of others. *Garner v. State*, 28 Tex. App. 561, 13 S. W. 1004.

Witness may testify he believed from the appearance of certain persons to whom defendant sold intoxicating liquors that they were minors, although he does not know their ages,—especially where they lack several years of their majority. *State v. Bernstein*, 99 Iowa, 5, 68 N. W. 442.

Poulter v. State, 70 Tex. Crim. Rep. 197, 157 S. W. 166. For additional cases and full discussion see note in L.R.A.1918A, 685.

Contra: *State v. Koettgen*, 89 N. J. L. 678, 99 Atl. 400; *Valley Mut. Life Asso. v. Teewalt*, 79 Va. 421.

6. Cross-examining witness as to capacity to judge.

A witness who has given his opinion as to the age of a person may be asked on cross-examination to give his opinion as to the age of a bystander, and the bystander may be called to testify to his own age in rebuttal, to show that the opinion of the first witness is of little value.¹

¹ *Louisville, N. A. & C. R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389, 397, 4 N. E. 908. The contrary principle applies in case of an opinion on a subject wholly a matter of opinion, such as the value of land; where the capacity of one witness cannot be impugned by contradicting his opinion as to the value of another parcel, not within the issue.

7. Inspection.

Age is determinable by inspection, by court or jury;¹ and by examination by experts, and receiving their opinions as witnesses.²

¹ *People ex rel. Ziegler v. Special Sessions Ct. Justices*, 10 Hun, 224; N. Y. Penal Code § 817; amended by Laws 1888, chap. 145 (2d ed. Birdseye, Cummings & Gilbert's Consol. Laws of N. Y. Ann. 1918, §

817; vol. 5, p. 5765); (inspection to determine age of child). See also Criminal Trial Brief.

In *Com. v. Emmons*, 98 Mass. 6, it was held competent for the jury to take into consideration, on the question of the age of a witness and whether he was a minor, his appearance on the stand. Bigelow, Ch. J., adds: "There are cases where such an inspection would be satisfactory evidence of the fact." This case was followed in *Keith v. New Haven & N. Co.* 140 Mass. 175, 3 N. E. 28, and in *Com. v. Hollis*, 170 Mass. 433, 49 N. E. 632.

State v. Thomson, 155 Mo. 300, 56 S. W. 1013.

In *People v. Kielczewski*, 269 Ill. 293, 109 N. E. 981, it was held that an inference by the jury as to the age of the accused from his appearance in court, in the absence of other proof of age, was reversible error. But see criticism of this decision by Prof. Wigmore, 10 Ill. L. Rev. 510.

In *Bird v. State*, 104 Ind. 384, 3 N. E. 827, the court held, but with some hesitation, on the authority of *Ihinger v. State*, 53 Ind. 251, that the appearance of the person in question as seen by the jury, and as manifested while testifying as a witness, was not competent evidence for the jury on the question whether one dealing with or entertaining him acted in good faith believing him to be of age.

2 N. Y. Penal Law, § 817 (2d ed. Birdseye, Cummings & Gilbert's Consol. Laws of N. Y. Anno. 1918, § 817, vol. 5, p. 5765.)

A nonexpert cannot give his opinion on the question of age. *Martin v. State*, 90 Ala. 602, 24 Am. St. Rep. 844, 8 So. 858.

8. Age of document.

To qualify a witness to express an opinion as an expert upon the age of handwriting, it is not enough that he has had long experience in passing upon the genuineness of writings old and new.¹

¹ *Clark v. Bruce*, 12 Hun, 271, approved in *Cheney v. Dunlap*, 20 Neb. 265, 57 Am. Rep. 828, 29 N. W. 925. Compare *People v. Brotherton*, 47 Cal. 388, 395.

Williams v. Clark, 47 Minn. 53, 49 N. W. 398.

Contra, *Putnam, Aldrich & Putman v. McCormick*, 159 Iowa, 702, L.R.A. 1918B, 433, 140 N. W. 886, Ann. Cas. 1915D, 31.

And see HANDWRITING.

See also *Eisfield v. Dill*, 71 Iowa, 442, 32 N. W. 420, where it was held that a witness who had been a county auditor; another who had been a

teacher of penmanship for twenty-five or thirty years; and others who were attorneys, one of them of long practice; and all of whom stated that they were familiar with old papers and writings, and thought they were capable of giving an opinion upon the question,—were competent; and that it was not necessary that such a witness should have chemical knowledge.

All indorsements made upon a deed, and all certificates attached thereto, which in any manner indicate its age, are proper for consideration in determining whether it is an ancient instrument. *Bell v. Hutchings*, — Tex. Civ. App. —, 41 S. W. 200.

For additional cases and full discussion see notes in L.R.A.1918B, 437, and L.R.A.1918D, 643.

9. Age of horse.

An impression or cast of the mouth of the horse, proved by the person who took it, is admissible in evidence as to its age.¹

¹ *Earl v. Lefler*, 46 Hun, 9. (It is classed with diagrams, photographs, etc.)

AGENCY.

I. PROVING AGENCY OR AUTHORITY.

1. Reputation.
2. Direct testimony.
 - a. In general.
 - b. By agent; implied authority.
3. Necessity of written authority.
 - a. In general.
 - b. Of sealed authority.
4. Best and secondary evidence of authority.
5. Conditions precedent.

I.—cont'd.

6. Admissions of principal.
7. Admissions and declarations of agent.
 - a. In general.
 - b. In connection with evidence of ratification.
8. Appearing to be in charge of business.
9. Ownership and use.
10. Form of commercial documents.
11. Charging a commission.
12. Opinion as to powers.
13. Course of dealing.
 - a. In general.
 - b. Transactions with other persons.
 - c. Similarity of transactions.
 - d. Single transaction not enough.
14. Unauthorized signing of name without indication of agency.
15. Unauthorized acts of wife or child.
16. Relationship of husband and wife or parent and child as affecting proof of agency.
 - a. Agency of a husband for his wife.
 - b. Agency of a wife for a husband.
 - c. Agency of parent for child or child for parent.
17. Joint interest.
18. Presumption of continuance.
19. Scope of authority.
 - a. Local or trade usage.
 - b. To indorse check.
 - c. To take note payable to himself.
 - d. To cancel contract.
 - e. To receive payment of price.
 - f. To receive payment of negotiable paper.
 - g. To receive payment of bond and mortgage.
20. Ratification.

II. DISPROVING AGENCY OR AUTHORITY.

21. General reputation.
22. Separation of husband and wife.
23. Revocation.
 - a. In general.
 - b. By death or incapacity.

See also CONTRADICTION; CORROBORATION; RATIFICATION.

I. PROVING AGENCY OR AUTHORITY.

1. Reputation.

Evidence that one alleged to be agent for the defendant is

reputed to be such agent is incompetent, unless as part of evidence of holding out to the world as agent.¹

¹ Perkins v. Stebbins, 29 Barb. 523. Otherwise of revocation, see § 23, *infra*, of this title. Evidence of general reputation is inadmissible to establish agency. Trowbridge v. Wheeler, 1 Allen, 162.

General reputation is not sufficient to establish the fact of agency. Dyer v. Winston, 33 Tex. Civ. App. 412, 77 S. W. 227.

An advertisement stating that certain persons are agents for another is inadmissible to prove the agency. Joseph Schlitz Brewing Co. v. Barlow, 107 Iowa, 252, 77 N. W. 1031.

Reputation as proof of partnership is discussed in note in L.R.A.1918D, 505.

2. Direct testimony.

a. In general.—Testimony by an assumed principal that a person was acting as agent not objectionable as involving only legal conclusions.¹ And a witness who has knowledge of the fact may testify that a third person was defendant's agent.²

But a witness cannot testify that a person was acting as agent for third persons, where it is not shown that he had any personal knowledge of the alleged agency, since agency in such case would not be a fact, but a mere opinion or deduction of the witness, unsupported by facts.³

¹ Knapp v. Smith, 27 N. Y. 277.

S. P. Re New York C. & H. R. R. Co. 33 Hun, 274 (testimony that he was acting under instructions from the president, presumptive evidence of agency for company).

² Blowers v. Southern R. Co. 74 S. C. 221, 54 S. E. 368.

If a railroad company sells tickets as the agent of another company, the fact of such agency may be proved by the testimony of its general passenger agent. Chiles v. Southern R. Co. 69 S. C. 327, 48 S. E. 252.

³ Guy v. Lee, 81 Ala. 163, 2 So. 273.

b. By agent; implied authority.—The fact of agency may be proved by the testimony of the agent himself.¹ But a sub-agent's testimony has been held not sufficient to establish his relation as agent of the principal.²

When the alleged agent is examined as a witness on a question of implied authority, he should be required to state the facts relied on as raising implied authority, and should not be asked whether or not he had authority to do the act in question, for this is asking for a conclusion.³

¹ *Fritz v. Chicago Grain & Elevator Co.* 136 Iowa, 689, 114 N. W. 193; *O'Neill v. Wilcox*, 115 Iowa, 15, 87 N. W. 742; *Beckman Lumber Co. v. Kittrell*, 80 Ark. 228, 98 S. W. 988; *Smith v. Delaware & A. Teleg. & Teleph. Co.* 64 N. J., Eq. 770, 53 Atl. 818; *Kean v. Landrum*, 72 S. C. 556, 52 S. E. 421.

An alleged agent may testify to the actual transactions between himself and the alleged principal, tending to establish the agency. *Brown v. Cone*, 80 App. Div. 413, 81 N. Y. Supp. 89.

² *Lucas v. Rader*, 29 Ind. App. 287, 64 N. E. 488.

³ *Abbott*, Trial Ev. (3d ed.) p. 142, citing *Providence Tool Co. v. United States Mfg. Co.* 120 Mass. 35 (action on a promissory note of a corporation signed "G. F., treasurer." Error to allow the defendant to ask G. F. whether or not he had authority to make the note in question).
s. p. *Short Mountain Coal Co. v. Hardy*, 114 Mass. 197 (action for overpayment of goods; no error to exclude question).

3. Necessity of written authority.

a. In general.—A statute requiring an act to be done in writing, but not requiring a seal, does not by implication require that the authority of an agent to do the act in the name of his principal be also in writing; and oral authority is not incompetent, even though a seal was unnecessarily used by the agent.¹

¹ *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330 (executory contract for sale of land).

s. p. *McWhorter v. McMahon*, 10 Paige, 386, affirming *Clarke*, Ch. 400 (executory contract to convey lands signed by one partner in firm's name).

Merritt v. Clason, 12 Johns. 102, 7 Am. Dec. 206, affirmed in 14 Johns. 484 (broker's note binding both parties under statute of frauds).

s. p. *Dykers v. Townsend*, 24 N. Y. 57.

First Nat. Bank v. Ballou, 49 N. Y. 155 (authority to make new promise in writing which will take debt out of statute of limitations). Distinguished in *McMullen v. Rafferty*, 24 Hun, 363, 366.

b. Of sealed authority.—A statute requiring an act to be done under seal, by implication requires that the authority of

an agent to do the act in the name of his principal be also under seal.

If the statute only requires the act to be in writing, the fact that a seal is used does not require that the authority to execute it be under seal.¹

¹ Worrall v. Munn, 5 N. Y. 229, 55 Am. Dec. 330 (holding that the common-law rule, that the authority to execute a deed must always be by deed, is to this extent relaxed under American authorities).

4. Best and secondary evidence of authority.

Where there is no general evidence of agency or of holding out as agent, and the party seeking to prove agency relies on specific authority for a particular act, such authority, if in writing, cannot be proved by oral evidence, unless a foundation for secondary evidence is first laid.¹

¹ United States v. Boyd, 5 How. 29, 12 L. ed. 36. (Sureties seeking to show concealment on the part of the government of defalcation existing when their bond was taken, cannot prove that an examination of the officer's accounts was made by one presenting a letter as written authority to make the examination, without producing the letter, or accounting for its absence.)

When agency was constituted by writing, and is directly in issue, it cannot be proved orally, until a foundation for secondary evidence has been laid. De Baril v. Campoy y Pardo, — Pa. —, 20 W. N. C. 65, 8 Atl. 876.

Nor varied by oral evidence. Bowman v. Tagg, 5 Sadler (Pa.) 74, 19 W. N. C. 147, 8 Atl. 384 (power of attorney).

Oral evidence by an agent as to the nature and extent of his authority is inadmissible, where his authority was conferred by a written instrument, unless the failure to produce such instrument is sufficiently accounted for. Wicktorwitz v. Farmers' Ins. Co. 31 Or. 569, 51 Pac. 75.

Evidence of waiver of proofs of loss by an alleged special agent of an insurance company is not inadmissible on the ground that the agency has not been established, where the alleged agent has testified to facts tending to show agency, although it afterwards appears that his contract of employment is in writing, where he testifies that his duties were to go to such places, and do such work, as he was instructed from the office of the manager to do, justifying an inference that the written contract does not specify his duties. O'Leary v. German-American Ins. Co. 100 Iowa, 390, 69 N. W. 686.

5. Conditions precedent.

Where conditions precedent, imposed upon the existence of an agency, must be performed before the delegated authority exists at all, the burden is on the party claiming to bind the principal by the agent's acts, to show that such conditions have been fulfilled.¹

¹ *Parker v. Saratoga County*, 106 N. Y. 398, 13 N. E. 308.

There is a distinction between a conditional authority, where the condition precedent must be performed before the exercise of the authority, and an absolute authority within certain limitations peculiarly within the agent's knowledge, where the representations of the agent that his act is within such limitations are binding upon the principal. *Merchants' Bank v. Griswold*, 72 N. Y. 472, 28 Am. Rep. 159, affirming 9 Hun, 561, and citing cases.

6. Admissions of principal.

The admission of the principal as to the fact or scope of agency, whether such admission be express or implied, is competent against the principal,¹ unless the act authorized is required by law to be under seal, or the authority is required by law to be in writing.²

¹ *Doyle v. St. James' Church*, 7 Wend. 179 (holding an express admission of the authority of the agent sufficient to support referee's finding of money paid by defendant).

Johnson v. Ward, 6 Esp. 47 (holding agent's affidavit used upon a motion for adjournment, put in by defendant, the principal,—admissible to prove the fact of agency).

American Exp. Co. v. Lankford, 2 Ind. Terr. 18, 46 S. W. 183. (The admissions of the principal are competent evidence to establish the agency.)

Freet v. American Electric Supply Co. 257 Ill. 248, 100 N. E. 933 (holding admissible a letter from plaintiff to third person not a party to suit in which admission was made of authority of plaintiff's agent.)

² *Blood v. Goodrich*, 9 Wend. 68; 24 Am. Dec. 121, and again, after new trial, 12 Wend. 525, 27 Am. Dec. 152 (applying this rule to exclude evidence that the principle had orally admitted the existence of written authority, until a foundation for secondary evidence had been laid.)
S. P., ADMISSIONS AND DECLARATIONS, § 5.

7. Admissions and declarations of agent.

a. *In general.*—Although the admissions and declarations of a person, even if made at the time of the act, are not evidence (except as against himself) of the fact of his agency,¹ nor of its scope,² unless connection with the alleged principal is shown,

yet slight evidence is sufficient to show connection;³ and when any competent evidence of the fact has been received the declarations of the alleged agent as to the fact of his agency,⁴ or its scope,⁵ made in the course of the transaction in question, are competent.

¹ Howard v. Norton, 65 Barb. 161.

Sax v. Davis, 71 Iowa, 406, 32 N. W. 403; Memphis & V. R. Co. v. Cocke, 64 Miss. 713, 2 So. 495.

Stringham v. St. Nicholas Ins. Co. 4 Abb. App. Dec. 315, 320 (entries in a policy book kept by a local insurance agent not admissible to show the power of the agent to assent to an assignment of the policy).

Marvin v. Universal L. Ins. Co. 85 N. Y. 278, 282, 39 Am. Rep. 657 (signing receipt as "general agent" insufficient in absence of any evidence showing knowledge on the part of the principal of the agent's assumption of such title of authority).

Deck v. Johnson, 1 Abb. App. Dec. 497 (declarations of husband to bind wife's separate estate).

Brigham v. Peters, 1 Gray, 139, 145; Proctor v. Tows, 115 Ill. 138, 3 N. E. 569; French v. Wade, 35 Kan. 391, 11 Pac. 138; Combs v. Hodge, 21 How. 397, 16 L. ed. 115 (holding agent's letter insufficient to prove that he had the power of attorney mentioned in it).

Russell v. State, 71 Ala. 348 (criminal case).

Agency cannot be proved by the declarations of the alleged agent. Coleman v. Colgate, 69 Tex. 88, 6 S. W. 553; Page v. Cortez, — Tex. Civ. App. —, 31 S. W. 1071; Johnson v. Park, 18 Ky. L. Rep. 437, 17 S. W. 273; Missouri P. R. Co. v. Johnson, 55 Kan. 344, 40 Pac. 641; St. Louis & S. F. R. Co. v. Kinman, 49 Kan. 627, 31 Pac. 126; National Bank of Commerce v. Morris, 125 Mo. 343, 28 S. W. 602; Santa Cruz Butchers' Union v. I. X. Lime Co. — Cal. —, 46 Pac. 382; State v. Harris, 51 La. Ann. 1105, 26 So. 64; Halverson v. Chicago, M. & St. P. R. Co. 57 Minn. 142, 58 N. W. 871; Fleming v. Ryan, 9 Misc. 496, 30 N. Y. Supp. 224; Forbes v. Haas, 32 N. Y. S. R. 107, 11 N. Y. Supp. 47; Lyon v. Brown, 31 App. Div. 67, 52 N. Y. Supp. 531; Foster v. Bookwalter, 78 Hun, 352, 29 N. Y. Supp. 116; Alger v. Turner, 105 Ga. 178, 31 S. E. 423; Abel v. Jarratt, 100 Ga. 732, 28 S. E. 453; Taylor v. Hunt, 118 N. C. 168, 24 S. E. 359; Pepper v. Cairns, 133 Pa. 114, 7 L.R.A. 750, 19 Am. St. Rep. 625, 19 Atl. 336; Heusinkveld v. St. Paul F. & M. Ins. Co. 106 Iowa, 229, 70 N. W. 696; North v. Metz, 57 Mich. 612, 24 N. W. 759; Wait v. Baldwin, 60 Mich. 622, 1 Am. St. Rep. 551, 27 N. W. 697; Curran v. Pullman Palace Car Co. 27 Ill. App. 572; Cleveland, C. C. & St. L. R. Co. v. Jenkins, 75 Ill. App. 17; Hoge v. Turner, 96 Va. 624, 32 S. E. 291; Barstow v. Pine Bluff, M. & N. O. R. Co. 57 Ark. 334, 21 S. W. 652; Anheuser-Busch Brewing Assn. v. Murray, 47 Neb. 627, 66 N. W. 635; Norberg v. Plummer, 58 Neb. 410, 78 N. W. 708; Gregory v. Loose, 19 Wash.

599, 54 Pac. 33; *Martin v. Johnson*, 54 Fla. 487, 44 So. 949; *Beekman Lumber Co. v. Kittrell*, 80 Ark. 228, 96 S. W. 988; *Edmiston v. Hurley*, 30 Ky. L. Rep. 557, 99 S. W. 259.

Nor by the declarations of another agent of the same principal, unless he was authorized by the principal to make the declaration, or unless it was made as part of the *res gestæ* in the performance of some duty appertaining to his agency. *Hirsch v. Oliver*, 91 Ga. 554, 18 S. E. 354.

And the declarations of a husband are inadmissible to prove that he was the agent of his wife. *O'Callaghan v. Barrett*, 50 N. Y. S. R. 166, 21 N. Y. Supp. 368; *Wolfe v. Benedict*, 48 N. Y. S. R. 195, 20 N. Y. Supp. 585; *Donaldson v. Everhart*, 50 Kan. 718, 32 Pac. 405.

In an action by the principal to enforce a contract made by the agent the latter's declarations made as part of the *res gestæ* are admissible to prove the agency. *Williamson v. Tyson*, 105 Ala. 644, 17 So. 336. So, too, the alleged agent's declarations are admissible to show that he held himself out as such agent. *Parker v. Bond*, 121 Ala. 529, 25 So. 898; *White v. Elgin Creamery Co.* 108 Iowa, 522, 79 N. W. 283.

And to show the understanding upon the subject of one dealing with him. *Gore v. Canada Life Assur. Co.* 119 Mich. 136, 77 N. W. 650.

As that he dealt with the other as an agent. *Bergtholdt v. Porter Bros. Co.* 114 Cal. 681, 46 Pac. 738. Or to impeach the agent's testimony. *McPherson v. Pinch*, 119 Mich. 36, 77 N. W. 321.

The rule that agency cannot be proved by the acts and declarations of the agent is modified where the principal is an artificial individual, all of the acts of which must be done through agents. *Missouri P. R. Co. v. Simons*, 6 Tex. Civ. App. 621, 25 S. W. 996.

Nor does the rule exclude testimony by an alleged agent as to the fact of agency. *Nyhart v. Pennington*, 20 Mont. 158, 50 Pac. 413; *O'Leary v. German-American Ins. Co.* 100 Iowa, 390, 69 N. W. 686; *Van Sickle v. Keith*, 88 Iowa, 9, 55 N. W. 42; *Fisher v. Denver Nat. Bank*, 22 Colo. 373, 45 Pac. 440; *Ream v. McElhone*, 50 Kan. 409, 31 Pac. 1075.

He cannot be restricted in his evidence to the mere words of the principal by which the agency was conferred. *Lawall v. Groman*, 180 Pa. 532, 57 Am. St. Rep. 662, 37 Atl. 98.

The authority of an agent may be proved by himself as a basis for qualifying himself to give testimony for his principal. *Roberts v. Northwestern Nat. Ins. Co.* 90 Wis. 210, 62 N. W. 1048.

Agent's admissions not competent to prove agency. *Sax v. Davis*, 81 Iowa, 692, 47 N. W. 990; *Mullanphy Sav. Bank v. Schott*, 135 Ill. 655, 25 Am. St. Rep. 401, 26 N. E. 640; *Three Rivers Nat. Bank v. Gilchrist*, 83 Mich. 253, 47 N. W. 104; *Henning v. Western U. Teleg. Co.* 43 Fed. 131; *Salmon Falls Bank v. Leysér*, 116 Mo. 51, 22 S. W. 504.

Admissions of the agent, of the agency as evidence against him is discussed in note in 35 L.R.A.(N.S.) 165.

² *Dowden v. Cryder*, 55 N. J. L. 329, 26 Atl. 941.

The scope of an agent's authority cannot be shown by his unauthorized

declarations or acts. *Alt v. Groschlose*, 61 Mo. App. 409. Unless such declarations were known to, acquiesced in, or ratified by, the principal. *Lakeside Press & Photo-Engraving Co. v. Campbell*, 39 Fla. 523, 22 Sp. 878; *Q. W. Loverin-Browne Co. v. Bank of Buffalo*, 7 N. D. 569, 75 N. W. 923.

An agent may testify as to the nature and extent of his authority where it rests in parol, although his declarations to third persons are not competent to prove the fact of agency. *Wicktorwitz v. Farmers' Ins. Co.*, 31 Or. 569, 51 Pac. 75; *Howe Mach. Co. v. Clark*, 15 Kan. 494.

⁸ See following §§ 8-13, this title.

The acts and declarations of an alleged agent are inadmissible to prove the alleged agency, unless the principal is in some way connected therewith. *Mills v. Berla*, — Tex. Civ. App. —, 23 S. W. 910; *Nostrom v. Halliday*, 39 Neb. 828, 58 N. W. 429.

⁴ *Corning v. Walker*, 14 N. Y. Week. Dig. 314 (holding that after another witness had testified that the alleged agent was general manager evidence of the declaration of the latter to the same effect became competent. Reversal for exclusion).

If the agency is otherwise presumptively established, the agent's declarations may be received in corroboration. *Ham v. Brown Bros.* 2 Ga. App. 71, 58 S. E. 316.

And it makes no difference that the agent did not disclose the fact that he was acting as agent. *Ferguson v. Hamilton*, 35 Barb. 427, 441, 442.

Evidence of the acts of an alleged agent pertaining to his business as such, and of his declaration that he was acting as agent in the particular transaction, is admissible where there is independent evidence tending to prove the agency. *Worth v. Ollis*, 1 Mo. App. Rep. 674.

Where evidence has been adduced tending to prove the existence of an agency or to make out a *prima facie* case thereof, it is competent to prove all the facts and declarations of the alleged agent in and about the business, including his declaration that he was a general agent for the alleged principal. *Gibson v. Snow Hardware Co.* 94 Ala. 346, 10 So. 304.

The principle that the declarations of the agent are admissible as part of the *res gestæ* in corroboration of other evidence was approved in *Frank v. Wright*, 140 Tenn. 535, 205 S. W. 434, although the court there held the statement of the driver of the auto truck, made 15 minutes after the accident in response to questions, was not part of the *res gestæ*. See also note in 32 Harvard L. Rev. 291.

⁵ Where an agent has authority to draw drafts if necessary, his representations in negotiating one, as to its necessity and purpose, are part of the *res gestæ*. *Merchants' Bank v. Griswold*, 72 N. Y. 472, 28 Am. Rep. 159, affirming 9 Hun, 561.

b. In connection with evidence of ratification.—Evidence that the alleged agent said that he was agent is competent in

connection with an offer to prove ratification of his act, or with other evidence tending to show a holding out.¹

¹ Howard v. Norton, 65 Barb. 161, 165.

Adoption by alleged principal of agreement made in his behalf by an alleged agent is sufficient proof of agency to admit of the introduction of declarations of the alleged agent. Barbee v. Spivey, — Tex. Civ. App. —, 32 S. W. 345.

The declarations of an alleged agent at the time of a transaction, that he was acting for the alleged principal, are competent as part of the *res gestæ* when followed by subsequent acts of ratification by the alleged principal, although not admissible to establish the agency. Snyder v. Gardner, 13 Misc. 626, 34 N. Y. Supp. 936.

8. Appearing to be in charge of business.

To sustain an inference that a person had authority to represent a party in the ordinary incidents of business, it is sufficient to show that, at the time of the transaction in question, such as making a demand or offer or giving a notice, he was apparently in charge of the business at the proper place in the party's place of business.¹

So, after proving that the principal acted through an agent, conversation with a person representing himself to be such agent, without further identification, is competent.²

But the mere fact of being employed about the principal's place is not enough.³

¹ Leslie v. Knickerbocker L. Ins. Co. 63 N. Y. 27 (holding in an action in an insurance policy that the jury could well find, in the absence of any evidence to the contrary, that the person who stood behind the cashier's desk in the company's office was authorized to bind the company by a promise to give the assignee of the policy notice of the time when the premiums were payable).

Curtis v. Murphy, 63 Wis. 4, 53 Am. Rep. 242, 22 N. W. 825 (night clerk in charge of hotel office assigning rooms presumed to have authority to take charge of money of a guest for safe-keeping).

Clifford v. Burton, 1 Bing. 199 (wife shown to have been seen in husband's store on more than one occasion apparently conducting the business in his absence, presumed to have authority to offer to settle for a bill of goods delivered there).

Dunn v. Star F. Ins. Co. 19 N. Y. Week. Dig. 531 (person apparently in charge of the defendant's office for the transfer of stock on the defendant's books presumed, in the absence of evidence to the contrary, to

have authority to represent the company for purpose of transferring stock).

Indiana, B. & W. R. Co. v. Adamson, 114 Ind. 282, 15 N. E. 5; *Bush v. Brooks*, 70 Mich. 446, 38 N. W. 562 (openly acting as chief engineer of a railroad in supervising its work).

A finding that a certain person had authority to bind a fire insurance company by the issuance of binders is justified by the evidence that he occupied an office leased by the company, which had supplied him with stationery, upon which his name appeared as agent, and that it thereafter received premiums and issued policies to take the place of some of the binders. *Schlesinger v. Columbian F. Ins. Co.* 37 App. Div. 531, 56 N. Y. Supp. 37.

No other proof of agency is necessary to show authority to issue a bill of lading of shipper's receipt than the fact that the agent acted as such in the proper place for receiving goods for the carrier, and was in possession of the company's stamp to be used on such receipts, and that the company took possession of the goods and caused them to be shipped, with knowledge of the receipt, which it must be presumed the company had before they were shipped. *Hansen v. Flint & P. M. R. Co.* 73 Wis. 346, 9 Am. St. Rep. 791, 41 N. W. 529.

² *Titus v. Glens Falls Ins. Co.* 8 Abb. N. C. 315, s. c., 81 N. Y. 410.

That a person who acted in behalf of an insurance company, and denied liability, was of the same name as the person whom the company had in a letter said it would send, is sufficient to go to the jury upon the question of his agency. *Roe v. Dwelling House Ins. Co.* 149 Pa. 94, 34 Am. St. Rep. 595, 23 Atl. 718.

³ *Larter v. American Female Guardian Soc.* 1 Robt. 598.

9. Ownership and use.

To sustain an inference in favor of a third person, that a person in charge of property was the agent or servant of a party, it is sufficient to show that the property belonged to such party.¹

¹ *Norris v. Kohler*, 41 N. Y. 42. (Evidence that a runaway team which injured plaintiff belonged to defendant is sufficient to submit to the jury the question whether the driver was defendant's servant.)

10. Form of commercial documents.

The form of invoices or similar communications passing between the alleged principal and agent is competent evidence as against either, as tending to show the fact¹ and character² of the agency.

¹ *Armstrong v. Stokes*, L. R. 7 Q. B. 598, 3 Moak, Eng. Rep. 217 (form of

bill of invoice from agent to principal, as showing agency, to sustain action against an undisclosed principal).

The form of the invoice is not conclusive. *Beebe v. Mead*, 33 N. Y. 587.

Compare *Sutton v. Crosby*, 54 Barb. 80, where a bill of items was held evidence of a sale.

Agency may be established, in the absence of better evidence, by facts tending to show recognition by the principal of the alleged agent's authority,—such as communications between the principal and agent in which the latter's authority is expressed or impliedly admitted. *Arthur v. Gard*, 3 Colo. App. 134, 32 Pac. 343.

¹*Whitaker v. Chapman*, 3 Lans. 155, 157 (holding that in an action brought by a principal against factors for proceeds of goods consigned, where defendants denied that they acted in a fiduciary capacity, their circular delivered to plaintiff before their dealings commenced, soliciting consignments, and a bill of invoice and stencil plate with their firm name, were admissible as tending to show the character in which they acted.

11. Charging a commission.

The charging by the alleged agent of a commission is evidence of the relation of principal and agent, if there is some evidence to connect the principal therewith.¹

¹*Armstrong v. Stokes*, L. R. 7 Q. B. 598, 3 Moak, Eng. Rep. 217. (Here the connection was shown by evidence that such charge was in accordance with the usual course of business between them in filling other orders.)

Compare *Greenwood v. Schumacker*, 82 N. Y. 614, where making a profit was held some evidence of a sale. But compare *Clough v. Whitcomb*, 105 Mass. 482, where it was error to instruct the jury that the allowance of a commission to one who solicits orders for sales effected through such orders proves that he was an agent to make a sale binding the principal.

A jury may find that one who made false representations as to land was an agent of the vendor, from the fact that he was paid by the vendor, and that the contract was sent to him to be delivered to the purchaser. *Dodge v. Tullock*, 110 Mich. 480, 68 N. W. 239.

Where there is a dispute whether a certain person who was brought to purchase goods by a broker was the agent of the person who actually bought the goods, evidence is admissible to show that he received a commission on the sale from the seller, as in some sense inconsistent with the theory that he was the buyer, and as showing what relation he bore to the transaction, *Masterson v. Masterson*, 121 Pa. 605, 15 Atl. 652,

12. Opinion as to powers.

A question which in effect calls for the opinion of a witness as to the extent of the agent's powers, without showing the source of his knowledge on the subject, is incompetent.¹

¹ *Benninghoff v. Agricultural Ins. Co.* 93 N. Y. 495, 500 (holding, in an action on an insurance policy issued by an alleged agent, that a question addressed by the defendant's counsel to its secretary as to "what was J's authority as agent of the company," was properly excluded). It was said there that the proper way to prove his authority was by the production of the power of attorney issued to him, or by resolution of the board of directors.

Green v. Boston & L. R. R. Co. 128 Mass. 221, 35 Am. Rep. 370 (holding that an agent shown to have been held out, etc., cannot be asked on cross-examination if he had any authority to do the act in question).

13. Course of dealing.

a. In general.—The acts of an alleged agent are themselves competent evidence of agency if they are of such character and so continued as to justify a reasonable inference that the principal had knowledge of them, and would not have permitted them if unauthorized.¹

Very slight evidence of this kind is sufficient to go to the jury against the alleged principal; as the latter has power to show the contrary at once, if the fact were otherwise, and that the acts of the agent were without his knowledge or authority.²

¹ *Barnett v. Gluting*, 3 Ind. App. 419, 29 N. E. 154, 927.

Reynolds v. Collins, 78 Ala. 94 (continuous acting of a person as bank cashier and proof of dealings with him by various persons in that capacity).

Evidence that one had acted for one or two years as an agent for a corporation, settling its obligations, is sufficient to establish *prima facie* the fact of an authorized agency. *Neibles v. Minneapolis & St. L. R. Co.* 37 Minn. 151, 33 N. W. 332.

Agent's authority may be inferred from the prior course of dealing between the parties. *Wilson v. Wyandance Springs Improv. Co.* 4 Misc. 605, 24 N. Y. Supp. 557; *Hoppe v. Saylor*, 53 Mo. App. 4.

Or from a long course of dealing by the agent for his principal, who has never repudiated or disputed the agent's acts. *Wheeler v. Benton*, 67 Minn. 293, 69 N. W. 927; *Oberne v. Burke*, 50 Neb. 764, 70 N. W. 387.

While agency cannot be established by evidence of the acts or declarations of the alleged agent, not brought home to the principal, *Richardson & B. Co. v. School Dist. Co. No. 11*, 45 Neb. 777, 64 N. W. 218.

Yet where such acts are of such a character and so continued as to justify a reasonable inference that the principal had knowledge of them, and would not have permitted them if unauthorized, they are competent evidence of agency. *Fowlds v. Evans*, 52 Minn. 551, 54 N. W. 743.

² *Flynn v. Equitable L. Ins. Co.* 78 N. Y. 568, 34 Am. Rep. 561 (holding in an action on an insurance policy procured through an alleged subagent of one who the company denied had power to appoint a subagent, that the production of a letter from the agent to the subagent, bearing a printed direction to the postmaster thereon to return it to the company if not called for, and another envelope on the back of which was the agent's name lithographed, describing him as a general agent, and letters addressed to him at such office, thus tending to show that he transacted business there, were sufficient to cast upon the company the onus of showing the real truth of its relations to the agent).

Evidence that a printed annual statement of an insurance company contained among the list of its officers the name of a certain person who was designated as "manager for Iowa," and that such person countersigned as such manager receipts for premiums on policies issued by the company, sufficiently establishes the fact that such person was the general agent of the company for such state. *Van Werden v. Equitable Life Assur. Soc.* 99 Iowa, 621, 68 N. W. 892.

But the mere fact that the name of a designated person appears on the printed heading of a paper as the "general western manager" of a designated company is not of itself sufficient to prove that in the transaction in which such paper was used he was acting as the agent of such company. *Gaynor v. Pease Furnace Co.* 51 Ill. App. 292.

Testimony of a witness that he had been acting as the agent of defendant for a number of years in making sales of flour, and that his contracts as such had always been carried out by defendant, which was corroborated by the testimony of plaintiff, that he had bought flour of the agent for three years, and that the contracts had been promptly complied with, is sufficient to make a prima facie case of agency. *Haubelt Bros. v. Rea & P. Mill Co.* 77 Mo. App. 672.

But evidence that a person was formerly in another's employ, shared the same office with him after the employment terminated, and sometimes attended to the other's business during periods of the latter's insanity, is not of itself sufficient to establish the fiduciary relation of principal and agent between them. *Stanford v. Mann*, 167 Ill. 79, 47 N. E. 314.

Western Transp. Co. v. Hawley, 1 Daly, 327 (where, in an action by a carrier for extra lighterage for the removal of a cargo consigned to the defendant from one pier to another, the only evidence of a direc-

tion for the removal was a request signed in their name by the person who appeared by the bill of lading to have been the agent who shipped the cargo, and who had been seen in and about their office, it being further shown that the defendants received the goods at the pier to which they were accordingly removed).

Platner v. Platner, 78 N. Y. 90 (repeated acts of husband, on behalf of his wife, competent, in a conflict of testimony, as showing his agency for her in another act).

But a husband's authority to make a loan for his wife will not be presumed from the fact that he has acted for her in other matters. *Three Rivers Nat. Bank v. Gilchrist*, 83 Mich. 253, 47 N. W. 104.

Marine Bank v. Clements, 31 N. Y. 33, affirming 6 Bosw. 166 (uniform practice of corporation to raise money on paper indorsed by its president, competent as showing his authority to indorse another note).

Compare *Bunten v. Orient Mut. Ins. Co.* 4 Bosw. 254; and see further decision in 8 Bosw. 448, that, to justify a jury in finding that an agent was allowed by his principal to transcend the limitations of his expressed authority, evidence must show, if not a succession of cases, at least several, in which the agent had done acts similar to those for which authority is claimed, and the subsequent acquiescence of the principal therein, upon their coming to his knowledge.

As against the alleged agent, evidence that he acted as agent in former transactions may be incompetent. In *Richards v. Millard*, 56 N. Y. 574, an action by the principal to call the alleged agent to account, a charge that the jury might consider the previous relations as bearing on the probability of the existence of agency in the transactions in question was held erroneous.

b. Transactions with other persons.—Evidence of transactions similar to the one in question, sufficient to establish a habit or course of dealing, is admissible, whether such transactions are between the parties,¹ or the alleged principal and third persons.²

¹ *Gallinger v. Lake Shore Traffic Co.* 67 Wis. 529, 30 N. W. 790.

² *Barnett v. Gluting*, 3 Ind. App. 419, 29 N. E. 154, 927.

Beattie v. Delaware, L. & W. R. Co. 90 N. Y. 643 (holding in an action against a corporation for stone sold and delivered to an alleged agent that his authority to buy may be established by proof of a similar purchase by the agent and payment by the defendant therefor).

Wood v. Auburn & R. R. Co. 8 N. Y. 160 (authority of agent to submit to arbitration inferred from evidence of principal's acquiescence in similar submissions).

Evidence that bank president had received deposits in its name is admissible to establish his agency to receive one which the bank denies he received for it—at least to the extent of showing knowledge and acquiescence on the part of the bank. *Jumper v. Commercial Bank*, 48 S. C. 430, 26 S. E. 725.

Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 604, 19 L. ed. 1008 (presumption of the authority of a bank cashier to buy gold, from the usual buying of exchange).

Hill v. Nation Trust Co. 108 Pa. 1, 56 Am. Rep. 189 (authority of an assistant bank teller to certify checks as "good," shown by evidence of a course of dealing as between himself, his principals, and the bank customers).

Chrysler v. Gray, 17 N. Y. Week. Dig. 446 (holding that where a seminary student arranged with the principal of the school to pay his board due the plaintiff, with services to the principal as teacher, testimony of another student going to show that he had made his arrangements for board with the principal of the school, and took his receipts from him with the knowledge of the plaintiff, was admissible).

Hammond v. Varian, 54 N. Y. 398 (holding that in an action against a father and son upon a promissory note, purporting to be executed by them as joint makers, which was given in the business of the latter and was unquestioned by him, but which was disputed by the former, he claiming that his signature thereto was a forgery, evidence tending to prove that he had recognized the validity of, and his liability upon, other similar notes which he himself had not signed after full knowledge that the signature was not his handwriting, was properly received in conjunction with evidence that the signature was, in fact, made by the son, as tending to show authority in the latter to sign).

Compare with the last case, Shisler v. Vandike, 92 Pa. 447, 37 Am. Rep. 702 (holding that a forged indorsement cannot be ratified by the person whose name is forged, as the act is criminal and against public policy. Following *McHugh v. Schuylkill County*, 67 Pa. 391, 5 Am. Rep. 445).

s. p. Workman v. Wright, 33 Ohio St. 405, 31 Am. Rep. 546.

The distinction between a void and voidable act, so far as it is susceptible of ratification by the principal, seems to be this: Where the fraud is of such character as to involve a crime, the ratification of the act from which it springs is opposed to public policy, and hence cannot be permitted. But where the transaction is contrary only to good faith and fair dealing, where it affects individual interests only, ratification is allowable. *Shisler v. Vandike*, 92 Pa. 447, 37 Am. Rep. 702.

But see People v. Bank of North America, 75 N. Y. 547 (holding that where a clerk had been generally prohibited from indorsing drafts,

and specially forbidden on several occasions, the fact that he did indorse them in a few instances without disapproval is immaterial upon the question of his actual authority, and insufficient under the circumstances to justify an inference of his implied authority). Testimony as to transactions which the witnesses had with a certain agent is competent as tending to show the manner in which he was held out by his principal as agent, and the apparent scope of his authority. *Hardwick v. State Ins. Co.* 23 Or. 290, 31 Pac. 656.

c. Similarity of transactions.—As a general rule the fact of agency cannot be established by proof of the acts of the professed agent, in the absence of evidence tending to show the principal's knowledge of such acts or assent to them; yet whether the acts are of such character and so continuous as to justify a reasonable inference that the principal had knowledge of them and would not have permitted them if unauthorized, the acts themselves are competent evidence of agency.¹

One who seeks to support a transaction with an agent, had in the agent's name instead of that of the principal, by a previous course of dealing implying authority, should show that the form of the previous transactions was such as to justify reliance on the agent's authority.²

Agency may be shown by proof of similar acts ratified by the alleged principal.³

¹ *Reynolds v. Collins*, 78 Ala. 94; *Watson v. Race*, 46 Mo. App. 546; *Forsyth v. Day*, 41 Me. 382.

² *Hogart v. Wherley*, L. R. 10 C. P. 630, 14 Moak, Eng. Rep. 474, where it was held that an agent of a firm, who took a draft from their debtor payable to "my order" instead of to "our order," is not presumed to have been authorized, from mere proof that he had previously taken drafts in the course of his agency, unless the form of the previous drafts is shown.

³ Evidence that an alleged agent engaged in other transactions of a character similar to that in controversy, which were acted upon and carried out by the alleged principals, is admissible to show his agency in the latter transaction; but it must be confined to acts of that description occurring prior thereto. *Mills v. Berla*, — Tex. Civ. App. —, 23 S. W. 910.

The authority of an agent to do a particular act may, in the absence of special instructions given him by the principal, be inferred from proof

that the principal had authorized or ratified similar acts in connection with past transactions of the same character. *First Nat. Bank v. Ridpath*, 47 Neb. 96, 66 N. W. 37.

Proof of similar previous acts of an agent done with the approval of his principal is insufficient to prove his authority, in the absence of evidence that the person dealing with him had knowledge of such previous acts, and relied upon them. *Peter Schoenhofen Brewing Co. v. Wengler*, 57 Ill. App. 184.

See also *Abbott, Tr. Ev.* (3d ed.) p. 1020; and note in 17 L.R.A. (N.S.) 219.

d. Single transaction not enough.—Evidence of a single isolated transaction of a similar kind is not alone admissible for the purpose of showing agency.¹

¹ *Morris v. Bethell*, L. R. 4 C. P. 765, 38 L. J. C. P. N. S. 377, 17 Week. Rep. 736, and L. R. 5 C. P. 47, 21 L. T. N. S. 330, 18 Week. Rep. 137; *Bartley v. Rhodes*, — Tex. Civ. App. —, 33 S. W. 604; *Woods v. Francklyn*, 46 N. Y. S. R. 396, 19 N. Y. Supp. 377; *North v. Metz*, 57 Mich. 612, 24 N. W. 759.

But see *Wilcox v. Chicago, M. & St. P. R. Co.* 24 Minn. 269, where it is said: "A single act of the agent, and a recognition of it by the principal, may be so unequivocal and of so positive and comprehensive a character as to place the authority of the agent to do similar acts for the principal beyond any question." But the point does not seem to have been much considered. For other cases see note in 17 L.R.A. (N.S.) 219.

14. Unauthorized signing of name without indication of agency.

Where relations such as tend to show agency appear, evidence that the assumed agent had previously signed the name of the other party in similar transactions, and that the latter, with knowledge that his name had been used, recognized the signatures as his, is competent as tending to show an implied authority to sign his name.¹

¹ *Hammond v. Varian*, 54 N. Y. 398; *Abeel v. Seymour*, 6 Hun, 656. Whether reliance thereon must be shown, see *Weed v. Carpenter*, 4 Wend. 219; *Morris v. Bethell*, L. R. 5 C. P. 47, 21 L. T. N. S. 323, 18 Week. Rep. 137, L. R. 4 C. P. 765, 38 L. J. C. P. N. S. 377, 17 Week. Rep. 736.

15. Unauthorized acts of wife or child.

The payment or other ratification of obligation incurred

without authority, by a wife or child, does not necessarily imply authority to incur similar obligations.¹

¹ *Green v. Disbrow*, 56 N. Y. 334, holding it error to receive in evidence that the father paid other debts of his son to other persons as tending to show that the son acted as agent for the father in contracting the debt sued for.

[Distinguished in *Wallis v. Randall*, 81 N. Y. 164, 168, affirming 16 Hun, 33.]

And see *Butts v. Newton*, 29 Wis. 632 (where there was no pretense in the evidence that the alleged principal had authorized his wife to act as his agent at any time before she did the acts complained of by him, and it was held that the ratification of one or more of these unauthorized acts was not evidence tending to show her authority to do others, or tending to ratify them).

Cited in *Gallinger v. Lake Shore Traffic Co.* 67 Wis. 529, 30 N. W. 790.

16. Relationship of husband and wife or parent and child as affecting proof of agency.

a. Agency of a husband for his wife.—A husband cannot be presumed to be his wife's agent from the mere existence of the marital relation.¹ With regard to the quality of the evidence which must be produced to prove the husband's agency, the authorities are in conflict. It has been laid down that "where all the consideration of a debt reaches a wife as an accession to her separate estate, and she retains and enjoys it, only slight evidence of the husband's agency in contracting the debt is required to charge her."² Other courts have held that the question of the husband's agency "is to be decided like all other questions of fact in a civil suit by a fair preponderance of the evidence."³ Some courts hold that the wife's consent to or approval of her husband's acts warrant the inference of the husband's agency⁴ while others hold this evidence is not enough.⁵ The doctrine is now established that where the wife gives directions regarding the work on a building, the husband's agency to contract for such work may be inferred.⁶

¹ *Fechheimer v. Peirce*, 70 Mich. 440, 38 N. W. 325; *American Mortg. Co. v. Owens*, 64 Fed. 249.

² *Akers v. Kirke*, 91 Ga. 590, 18 S. E. 366; *Cattell v. Ferguson*, 3 Wash. 541, 28 Pac. 750.

³ Kuenzel v. Stevens, 155 Mo. 280, 56 S. W. 1076.

Agency of husband for his wife may be proved, as in other cases, by acts and words of wife which show previous authorization or subsequent ratification of his acts as her agent, though it cannot be presumed from the marital relation. Elliott v. Bodine, 59 N. J. L. 567, 36 Atl. 1038.

The existence of the marital relation may be considered as a circumstance tending to prove a husband's agency in a transaction in respect to his wife's property. Barnett v. Gluting, 3 Ind. App. 419, 3 N. E. 927, affirming on rehearing 3 Ind. App. 415, 29 N. E. 154.

⁴ Wheeler Lumber, Bridge & Supply Co. v. White, 164 Iowa, 495, 145 N. W. 917; Jobe v. Hunter, 165 Pa. 5, 44 Am. St. Rep. 639, 30 Atl. 452.

⁵ Hoffman v. McFadden, 58 Ark. 217, 35 Am. St. Rep. 101, 19 S. W. 753; Lauer v. Bandow, 48 Wis. 556, 28 Am. Rep. 571.

⁶ Milligan v. Alexander, 72 W. Va. 615, 4 A.L.R. 1022, 79 S. E. 665; Inter-State Bldg. & L. Asso. v. Ayers, 177 Ill. 9, 52 N. E. 342.

For a full discussion of the principles involved in the question of a husband's agency for his wife and citation of additional authorities see note in 4 A.L.R. 1086.

b. Agency of a wife for a husband.—It will be presumed that purchases by a wife of groceries necessary for the family use were made by her as her husband's agent, and that he alone is liable in the absence of any evidence to the contrary.¹ But this presumption is overcome by proof that credit was given to her.²

¹ Lindholm v. Kane, 92 Hun, 369, 36 N. Y. Supp. 665.

² Ehrich v. Bucki, 7 Misc. 118, 27 N. Y. Supp. 247.

Diamond earrings are not such articles as a wife is presumed, from the mere relation of husband and wife, to have authority from her husband to purchase. Bergh v. Warner, 47 Minn. 250, 28 Am. St. Rep. 362, 50 N. W. 77.

Authority of a wife to accept surrender of premises leased by her husband will not be presumed. Alschuler v. Schiff, 59 Ill. App. 51.

c. Agency of parent for child or child for parent.—The mere relationship of father and child will not sustain an inference of agency.¹

¹ Le Count v. Greenley, 6 N. Y. S. R. 91 (act of father of defendant, without any authority, in employing plaintiff, a real estate broker, to sell defendant's real estate). S. P.; McNamara v. McNamara, 62 Ga. 200.

17. Joint interest.

Proof of joint interest or joint liability is not alone usually sufficient to raise a presumption of agency.¹

- ¹ Wallis v. Randall, 81 N. Y. 164, reversing 16 Hun, 33, and citing cases. *Contra*: Stephen's Dig. Law of Ev. art. 17. And see Black v. Lamb, 12 N. J. Eq. 108, 122; Cady v. Shepherd, 11 Pick. 400, 22 Am. Dec. 379; Lowe v. Boteler, 4 Harr. & McH. 346, 1 Am. Dec. 410. See the principle stated in Abbott, Tr. Ev. (3d ed.) pp. 535 et seq.

18. Presumption of continuance.

Agency once established is presumed to continue throughout the transaction,¹ and the burden of proof is on the party alleging a change.²

The rule that agency proved once to have existed is presumed, in the absence of evidence to the contrary, to have continued,³ does not apply to a special agent of such class that a person dealing with him is bound to ascertain the limits of his authority,⁴ nor as between principal and agent where no general agency has been shown, but only a succession of transactions.⁵

- ¹ Parker v. Crilly, 113 Ill. App. 309; Cheshire Provident Inst. v. Feusner, 63 Neb. 682, 88 N. W. 849.

- ² Bergner v. Bergner, 219 Pa. 113, 67 Atl. 999.

- ³ Link v. Page, 72 Tex. 592, 10 S. W. 699; Fassin v. Hubbard, 55 N. Y. 465 (holding that one shown to have been general agent of a dissolved firm in liquidation in 1860-61 would be presumed to have been such agent in 1862, unless the contrary be shown). See also Friend v. Ward, 1 L.R.A. (N.S.) 891, and cases on note thereto.

- ⁴ Crane v. Evans, 1 N. Y. S. R. 216.

- ⁵ Richards v. Millard, 56 N. Y. 574. (holding a charge that the jury had a right to look into the pre-existing relations as bearing upon the probabilities of agency in a later transaction erroneous).

19. Scope of authority.

a. Local or trade usage.—On a question of implied authority, evidence of custom or usage in a particular trade or business is admissible to prove or disprove the scope of the agent's authority.¹

And usage in a particular trade is admissible for the purpose of showing the scope of the agent's authority, whether this usage be known to the principal or not, it being assumed that

the parties must have contracted subject to, or with reference to, such usage.²

But neither express authority nor authority implied by law as an incident of the relation between the parties can be varied or enlarged by evidence of a local usage in the particular trade.³

¹ *Compare* Commercial Mut. M. Ins. Co. v. Union Mut. Ins. Co. 19 How. 318, 15 L. ed. 636 (proof that presidents of insurance companies in a city had been accustomed to contract orally for issuing policies held evidence of their authority).

Turner v. Keller, 46 N. Y. 66 (custom to give notes for goods).

Authority. Proof of a custom to deliver goods on the agent's order that goods were not and could not be delivered except on such an order was held sufficient to justify the submission to the jury of the question of the agent's authority. *Sloss Iron & Steel Co. v. Jackson Architectural Iron Works*, 103 App. Div. 316, 92 N. Y. Supp. 1056.

² *Browne, Law of Usage & Customs*, 90, 91, citing *Bayliffe v. Butterworth*, 1 Exch. 425, and other cases.

Apparent authority of an agent to perform a particular act for his principal may be shown, not only by proof of general custom, or that such agent had previously performed similar acts to the principal's knowledge, but also by evidence of the nature of business usages, not amounting to general custom, and the fact, if it exists, that the principal is at a great distance, and the agent in the entire charge of the business. *Johnston v. Milwaukee & W. Invest. Co.* 46 Neb. 480, 64 N. W. 1100.

³ Proof of usage among like agents is inadmissible to show authority of the agent authorized to do certain things by a written contract to do other things not mentioned in the contract. *Graham v. Sadler*, 165 Ill. 95, 46 N. E. 221, affirming 60 Ill. App. 522.

Evidence of usage or custom in a particular business is inadmissible for the purpose of enlarging the powers of an agent. *Dellecella v. Harmonic Club*, 34 Mo. App. 179. *Contra*: *Pardridge v. Bailey*, 20 Ill. App. 351.

Higgins v. Moore, 34 N. Y. 417 (usage in New York allowing brokers to receive payment for grain sold by them when the seller resides out of the city, incompetent).

Wheeler v. Newbould, 16 N. Y. 392 (local custom in New York city to sell commercial paper, pledged as security for a loan, at private sale and for the best price obtainable).

Dykers v. Allen, 7 Hill, 497, 42 Am. Dec. 87 (usage among brokers to hypothecate or dispose of stock at pleasure, which had been pledged with them, and on payment of the debt to return an equal number of shares of the same kind).

But see *Lamson v. Sims*, 16 Jones & S. 281 (holding that the facts that

an agent was authorized by his principal to sell certain real estate, and that it was the custom of the locality to make such sales through brokers, are sufficient to authorize a finding of authority in the agent to employ a broker to negotiate the sale).

See also cases cited under topic *USAGE*, *infra*.

b. To indorse check.—Authority to collect does not imply authority to indorse with the principal's name a check taken in collection and expressed to be payable to the principal or his order.¹

¹ *Robinson v. Chemical Nat. Bank*, 86 N. Y. 404, affirming 10 N. Y. *Week. Dig.* 315. (action against bank for conversion).

Note in 12 A.L.R. 111 at page 120.

c. To take note payable to himself.—Although an agent is a general agent, with general power to sell or collect, or both, and take payment either in cash or credit, yet such general power gives him no authority to substitute himself as creditor in place of his principal, or transfer a debt of his principal to himself, by taking in payment thereof a note payable to himself.¹

¹ *Scott v. Gilkey*, 159 Ill. 168, 39 N. E. 265; *Everts v. Lawther*, 165 Ill. 487, 46 N. E. 233; *Corning v. Strong*, 1 Ind. 329; *Summers v. Hutson*, 48 Ind. 228; *Robinson v. Anderson*, 106 Ind. 152, 6 N. E. 12; *Franklin Sav. Bank v. Colby*, 105 Iowa, 424, 75 N. W. 346; *Baldwin v. Tucker*, 112 Ky. 282, 57 L.R.A. 451, 65 S. W. 841; *McCulloch v. McKee*, 16 Pa. 289; *Hoffman v. John Hancock Mut. L. Ins. Co.* 92 U. S. 161, 23 L. ed. 539.

But in *Galbraith v. Weber*, 58 Wash. 132, 28 L.R.A.(N.S.) 341, 107 Pac. 1050, it was held that the jury must determine whether or not the authority of an agent in possession of a horse for purposes of sale includes apparent authority to take notes payable to himself for the purchase price, where there is nothing to show that he might not have taken cash in payment.

And this decision apparently finds support in the case of *Schleicher v. Armstrong*, — Tex. Civ. App. —; 32 S. W. 327, holding that where an agent was in the lawful possession of an engine under authority to sell it, the fact that in making the sale he took purchase-money notes payable to himself did not invalidate the purchaser's title to the engine.

See also on this question note in 28 L.R.A.(N.S.) 341.

d. To cancel contract.—Authority to make a contract for another is not evidence of authority to cancel or surrender it.¹ But a general express authority to make contracts in the course

of a business implies authority to cancel or surrender contracts made thereunder.²

¹ *Stilwell v. Mutual L. Ins. Co.* 72 N. Y. 385, 392 (holding, in an action by a wife to have restored a policy of insurance taken out by her husband on the latter's life, as her agent, which had been surrendered by him to the company, that the trial judge was justified in finding that the surrender was made without her knowledge or consent).

Indianapolis Rolling Mill v. St. Louis, Ft. S. & W. R. Co. 120 U. S. 256, 30 L. ed. 639, 7 Sup. Ct. Rep. 542, affirming 26 Fed. 140 (president and superintendent, having authority to bind the company by unsealed contracts, has implied authority, in good faith, to release any such contracts he has made).

² *Anderson v. Coonley*, 21 Wend. 279 (holding that a general agent to buy, though in a particular business only, is presumed to have had power to rescind).

Otherwise in case of implied authority arising from course of dealing.

Harrison v. Burlingame, 48 Hun, 212. (Here the surrender of a valuable security was without consideration.)

An agent may testify as to whether he was authorized by his principal to change the latter's contract, where his authority was conferred by parol. *Joseph v. Struller*, 25 Misc. 173, 54 N. Y. Supp. 162.

The implied power of agent to assent to rescission of contract is discussed in note in 37 L.R.A.(N.S.) 91.

e. To receive payment of price.—One selling for a known principal is not presumed, from that fact alone, to have authority to receive payment.¹

¹ *Higgins v. Moore*, 34 N. Y. 417 (sale, by broker, of grain to be shipped by principal known to buyer).

The authority of a selling agent to collect pay for goods sold may be inferred from circumstances. *Luckie v. Johnston*, 89 Ga. 321, 15 S. E. 459.

Finding that defendant was justified in making payment for piano to plaintiff's agent, who presented a receipt in plaintiff's name signed by himself as agent, is sustained by evidence that she purchased the piano from such agent, and was told by plaintiff, when she asked him if she should pay such agent, that he preferred to have payment made at the office, but would send an agent to collect it, without intimating that she was not to pay the particular agent, although he understood that she knew no difference in the authority of such agent and the only other one she knew. *Warren v. Halley*, 107 Mich. 120, 64 N. W. 1058.

There is no presumption that an agent with authority to sell and accept payment for his principal is authorized to receive in payment notes of which he is maker; nor can he be presumed to have authority to

accept the notes of third persons in payment of purchase money due his principal. *Runyon v. Snell*, 116 Ind. 164, 9 Am. St. Rep. 839, 18 N. E. 522.

The authority of a traveling salesman to collect payment is discussed in note in 18 L.R.A. 663.

The authority of a sales agent who is authorized to collect the whole or a part of the purchase price upon making the sale, to receive payments afterwards is discussed in note in 38 L.R.A. (N.S.) 700.

f. To receive payment of negotiable paper.—Mere possession, by the alleged agent, of negotiable paper so expressed or indorsed as to be payable to another person, is not alone any evidence of authority to receive payment for that other.¹

One who relies on a payment made upon a promissory note to a third person must show the latter's authority to collect the note.²

¹ *Doubleday v. Kress*, 50 N. Y. 410, 10 Am. Rep. 502, reversing 60 Barb. 181 (promissory note payable to order of payee, and not indorsed by him).

S. P. Wardrop v. Dunlop, 1 Hun, 325, affirmed without opinion in 59 N. Y. 634.

One having a note in his possession may be presumed to be entitled to receive payment, unless the payer has notice to the contrary. *Chaplelear v. Martin*, 45 Ohio St. 126, 12 N. E. 448.

(Here the payer knew that the principal was dead.)

That one to whom money due third person is paid is not in possession of an instrument evidencing indebtedness, is not conclusive of his lack of authority to collect the money, but is merely a circumstance or fact to be considered in the determination of such question. *Phoenix Ins. Co. v. Walter*, 51 Neb. 182, 70 N. W. 938.

² The burden is upon the maker of a negotiable promissory note, in an action, by the holder thereof, to show authority from the latter to a third person to collect the note; where he relies on a payment to such third person. *Bank of University v. Tuck*, 101 Ga. 104, 28 S. E. 168; *Richards v. Waller*, 49 Neb. 639, 68 N. W. 1053; *Chandler v. Pyott*, 53 Neb. 786, 74 N. W. 263.

g. To receive payment of bond and mortgage.—Under the rule that the possession of a bond and mortgage by the attorney of the mortgagee, to whom, as such attorney, the interest had been paid, is sufficient evidence of his authority to receive the principal,¹ the person relying on such authority must show that on each occasion in respect to which it is relied on the securities were in the attorney's possession.²

Authority of an attorney to receive the principal of a bond and mortgage not in his possession cannot be inferred from the facts that the loan was made through him, that he drew the securities, and that he had authority to collect interest.³

The party making the payment has the burden of showing the alleged agent's authority to receive it.⁴

¹ Williams v. Walker, 2 Sandf. Ch. 325; Followed in Megary v. Funtis, 5 Sandf. 376; and Approved in Smith v. Kidd, 68 N. Y. 130, 23 Am. Rep. 157; Brewster v. Carnes, 103 N. Y. 556, 9 N. E. 323; Stiger v. Bent, 111 Ill. 328; Haines v. Pohlmann, 25 N. J. Eq. 179; Adams v. Humphreys, 54 Ga. 496. This presumption terminates with the principal's death. Megary v. Funtis, 5 Sandf. 376.

² Williams v. Walker, 2 Sandf. Ch. 325; Quoted with approval in Smith v. Kidd, 68 N. Y. 130, 23 Am. Rep. 157.

³ Smith v. Kidd, 68 N. Y. 130, 23 Am. Rep. 157.

Finding by court that a given person was authorized to receive the principal and interest due on a particular mortgage is sustained by evidence that the mortgagee placed such sums in his hands from time to time to loan when opportunity offered, and that he collected the interest and principal, obtaining discharges of the mortgage from time to time as they were paid, crediting the amount to the mortgagee and re-investing the same for him. Ziegan v. Stricker, 110 Mich. 282, 68 N. W. 122.

Authority to receive payment of the principal note and an interest coupon note before maturity, by one who had not the possession thereof, is not established by the mere fact that the maker had been accustomed to pay the amount of coupon notes to him before maturity, and that he had paid the same to the holder of the coupons, or even advanced the amount of the coupons to the latter before maturity. Chandler v. Pyott, 53 Neb. 786, 74 N. W. 263.

⁴ Frank v. Tuozzo, 26 App. Div. 447, 50 N. Y. Supp. 71; City Missionary Soc. v. Reams, 51 Neb. 225, 70 N. W. 972.

20. Ratification.

The authority of an agent to do the act in question may be shown by evidence that the principal, with full knowledge of the transaction, ratified it; and this ratification may be either express,¹ or implied from his acts,² or from silent acquiescence³ in the thing done.

¹ First Nat. Bank v. Ballou, 49 N. Y. 155, 158 (where the receipt for part payment of a note given by the agent was shown to the principal, and he approved of it).

Assuming that an agent had authority to make a sale is supported by proof that the principal subsequently ratified it. *Kraft v. Wilson*, — Cal. —, 37 Pac. 790.

In an action against heirs to charge the land in their possession with a judgment recovered against the estate and arising from the decedent's liability for exceeding his authority as agent, it is competent for the defendants to show that the principal ratified the transaction complained of with full knowledge. *Paul v. Grimm*, 183 Pa. 330, 38 Atl. 1017.

Evidence that the alleged principal adopted acts by his purported agent similar, but more than a year subsequent, to the one in question, is inadmissible upon the issue of authority *vel non* for the latter act, as the former transactions are too remote. *Bartley v. Rhodes*, — Tex. Civ. App. —, 33 S. W. 604.

² *Union Gold-Min. Co. v. Rocky Mountain Nat. Bank*, 96 U. S. 640, 24 L. ed. 648, 1 Mor. Min. Rep. 432 (holding that if an agent without authority borrows money in the principal's name, who, when it has been applied to his use and payment is demanded of him, fails within a reasonable time to disavow the act, the jury may consider him as assenting to the act).

Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 604, 19 L. ed. 1008 (retention of money received through agent, after demand, sufficient proof of ratification).

Hankins v. Baker, 46 N. Y. 666 (where the party denying the agency received from the broker a warehouse order, retained it, and authorized an effort to sell the goods).

S. P. Thompson v. Gardiner, L. R. 1 C. P. Div. 777, 18 Moak, Eng. Rep. 328 (evidence that the broker sent a note of the bargain to the buyer, who kept it without objection until called on to fulfil the contract, when he objected merely on the ground that the broker did not sign it). See also *Abbott*, Trial Ev. (3d ed.) p. 852.

Diedrick v. Richley, 2 Hill, 271 (authority of agent to submit to arbitration conclusively proved by evidence that the principal appeared and proceeded before the arbitrator).

Ratification by principal of unauthorized act of agent may be inferred from conduct on his part inconsistent with any intention other than a purpose to adopt the agent's act as his own. *Oberne v. Burke*, 50 Neb. 764, 70 N. W. 387.

Agency may be proved by acts ratified or acquiesced in by the principal, by the latter's holding the person out as agent, and by the circumstances and conduct of the parties toward each other; but a single act of ratification is not necessarily sufficient proof of agency. *Tennessee River Transp. Co. v. Kavanaugh Bros.* 101 Ala. 1, 13 So. 283.

Evidence of acts and conduct of a person alleged to be the agent of a corporation, and of ratification thereof by the corporation, is admissible as tending to prove the agency. *Tennessee R. Transp. Co. v. Kavanaugh Bros.* 93 Ala. 324, 9 So. 395.

If the principal accepts an order for goods obtained by his agent, he is bound by the transaction, even if the agent exceeds his authority. *Western Mfg. Co. v. Cotton*, 126 Ky. 749, 12 L.R.A. (N.S.) 427, 104 S. W. 758.

So if a person accepts the benefit of a contract made for him, even if there is no proof of agency. *Black Lick Lumber Co. v. Camp Constr. Co.* 63 W. Va. 477, 60 S. E. 409.

³ *Weed v. Carpenter*, 10 Wend. 404. (Silence of indorser after receiving notice of protest, and failure to appear before default, and even then not until after the maker had absconded, is competent to show ratification.)

Ratification by a principal of his agent's unauthorized act may be inferred from evidence tending to show that the principal had knowledge of such unauthorized act, and failed to object thereto. *Oberne v. Burke*, 50 Neb. 764, 70 N. W. 387.

Nature and extent of the authority of an agent may be implied or inferred upon the conduct or acquiescence of the principal. *Hooper v. Bradbury*, 69 Mo. App. 632.

Subsequent ratification by a principal of an unauthorized contract of an agent will be presumed from the principal's subsequent silence and acquiescence therein, and his adoption of the fruits of the contract. *Keim v. Lindley*, — N. J. Eq. —, 30 Atl. 1063.

The burden of proof is upon one seeking to show a ratification of an unauthorized act of an agent by the acquiescence of the principal, to show that such acquiescence was with knowledge of the facts connected with the transaction. *Moore v. Ensley*, 112 Ala. 228, 20 So. 744.

Ratification may be proved, even by a person who dealt with notice that the alleged agent was without authority.¹

For ratification is an adoption of the act, and not merely presumptive evidence of the authority.²

Parol evidence is admissible to show that a corporation adopted and ratified a contract under seal executed by the corporate officers individually.³

¹ *Commercial Bank v. Warren*, 15 N. Y. 577.

² *Brisbane v. Adams*, 3 N. Y. 129; *Commercial Bank v. Warren*, 15 N. Y. 577. But compare *Gorham v. Gale*, 7 Cow. 739.

Contra in case of an unauthorized act not done for the principal's benefit. *Craighead v. Peterson*, 72 N. Y. 279, 28 Am. Rep. 150.

Compare *Meehan v. Forrester*, 52 N. Y. 277, to the effect that blind acceptance of the benefit may be deemed an adoption of the agent's act.

Therefore ratification after suit brought is not competent, as in a common-law action showing adoption, but, if at all, only as evidence tending to show original authority.

³ *Williams v. Uncompahgre Canal Co.* 13 Colo. 469, 22 Pac. 806.

II. DISPROVING AGENCY OR AUTHORITY.

21. General reputation.

General reputation of revocation of agency may be competent as tending to show notice of it.¹

¹ *Baker v. Barney*, 8 Johns. 72, 5 Am. Dec. 326 (repute of husband and wife living under separation articles competent to terminate presumption of her agency for him).

22. Separation of husband and wife.

Notice that husband and wife have separated, and a suit for separation and alimony is pending, implies notice that the husband is no longer agent for his wife in matters in which he has been accustomed previously to act for her.¹

No presumption of the wife's agency to bind the husband, as, for instance, for domestic supplies, exists after she has left him voluntarily and without cause.²

¹ *Whitehead v. New York L. Ins. Co.* 102 N. Y. 143, 55 Am. Rep. 787, 6 N. E. 267, modifying 33 Hun, 425, and holding that thereafter forfeiture of a policy on his life for her benefit, on his failure to pay premiums without notice to her, could not be sustained.

² *Johnston v. Sumner*, 3 Hurlst. & N. 261, 27 L. J. Exch. N. S. 341, 4 Jur. N. S. 462, 6 Week. Rep. 574; *Biffin v. Bignell*, 7 Hurlst. & N. 877, 31 L. J. Exch. N. S. 189, 8 Jur. N. S. 647, 6 L. T. N. S. 248, 10 Week. Rep. 322; *Abbott*, Tr. Ev. 221.

In an action against a husband's estate for medical services rendered to a wife living apart from her husband, the presumption is against her authority to bind her husband by contract; and the plaintiff, although ignorant of their separation, must show affirmatively the responsibility of the husband. *Vusler v. Cox*, 53 N. J. L. 516, 22 Atl. 347.

The fact that a husband permitted his wife to order goods after their voluntary separation, for which he paid, is evidence that he continued the agency which originally arose from the marital relation for the purchase of necessities by her. *Raymond v. Cowdrey*, 19 Misc. 34, 42 N. Y. Supp. 557.

23. Revocation.

a. In general.—A general or continuing agency having been shown, he who relies on the principal's revocation must show notice given thereof; and, as against persons theretofore accus-

tomed to deal with the agent as such, notice must be brought home to them.¹

¹*Clafin v. Lenheim*, 66 N. Y. 301, 305 (holding it error to submit to the jury the question of constructive notice, in the absence of any evidence tending to show actual notice. The rule is the same as in case of partnership).

Compare *McNeilly v. Continental L. Ins. Co.* 66 N. Y. 23, 28 (holding, in action on an insurance policy, that evidence that after the insured had for a number of years paid the premiums to a local agent the mailing to the insured of a postal card, with the words "Remit direct to home office," was not sufficient proof of notice of revocation to warrant the trial judge to direct a nonsuit).

Story, Agency, § 470.

b. By death or incapacity.—Death¹ or incapacity² of agent or principal, or of one of a firm of agents, or of one of a firm of principals, is an instant revocation, irrespective of notice.³

A power coupled with an interest is not revoked by the death of the principal, nor by that of the agent.⁴

¹*Martine v. International L. Ins. Soc.* 53 N. Y. 339, 342, 13 Am. Rep. 529 (holding that the surviving partner of a firm of insurance agents could not bind the company by receipt of premium).

²*Salisbury v. Brisbane*, 61 N. Y. 617 (incapacity of one of the firm of agents).

³*Marlett v. Jackman*, 3 Allen, 287, 295.

⁴*Grapel v. Hodges*, 49 Hun, 107, 1 N. Y. Supp. 823.

Contra: *McKee v. Cochrane*, 7 Mackey, 446.

ALTERATIONS.

1. Allegation.
2. Presumptions and burden of proof.
3. Effect of alteration on competency as evidence.
4. What is material.
5. Inspection.
6. Signature and body.
7. Effect of call for explanation.
8. Effect of failure to explain.
9. Effect of attempted explanation.
10. Effect of alteration on validity.
11. Competency of witness to explain.
12. Description.
13. Explaining, as immaterial.
 - a. In general.
 - b. As made by third person.
 - c. As made by consent.
14. Extrinsic evidence to supply obliteration.
15. Abstract or memorandum corroborating the testimony.
16. Official document; ancient instrument.
17. Certified copy.

See also ACCOUNTS; AGE; GENUINENESS; HANDWRITING; INTENT; OPINIONS.

1. Allegation.

If the allegation follows the original instrument only, production of the altered instrument may be a variance.¹ If the allegation follows the alteration, and not the original, then, if the allegation is not put in issue, the altered instrument is admissible, and evidence of the alteration is not admissible;² but if the allegation is put in issue, even by a general denial, objection to evidence of a material alteration is not available.³

¹ And if the alteration is by the holder, in his own favor, it destroys the effect of the instrument as evidence (see § 10. this title). and in that case, even if such matter must, according to *Hirschman v. Budd*, L. R. 8 Exch. 171, 5 Moak, Eng. Rep. 361, 42 L. J. Exch. N. S. 113, 28 L. T. N. S. 602, 21 Week. Rep. 582, be specially pleaded, amendment ought to be allowed when the alteration is first disclosed at the trial. But the declaration must be so framed as to seek recovery on an instrument in its original form to render it admissible in evidence, where it has been materially and unauthorizedly altered after execution un-

der circumstances that do not avoid its obligatory force and effect in its original form. *Orlando v. Gooding*, 34 Fla. 244, 15 So. 770.

² *Smedberg v. Whittlesey*, 3 Sandf. Ch. 320.

A bond altered in a material part, and declared on as altered, is admissible in evidence without explaining the alteration, unless denied under oath. *Thompson v. Gowen*, 79 Ga. 70, 3 S. E. 910.

³ *Schwarz v. Oppold*, 74 N. Y. 307, affirming 7 Daly, 121 (note sued on); *Wriges v. Beauverle*, 5 N. Y. Week. Dig. 363 (contract sued on, and counterclaim thereon alleged by defendant; and altered contract produced by defendant in support of his counterclaim); *J. I. Case Threshing Mach. Co. v. Peterson*, 51 Kan. 713, 33 Pac. 470; *Walton Plow Co. v. Campbell*, 35 Neb. 175, 16 L.R.A. 468, 52 N. W. 883. Evidence that a provision in regard to notes had been inserted in the contract sued on after it was signed by defendant is admissible under an answer containing a general denial and an allegation that it was expressly agreed at the time the contract was entered into that no notes were to be given by defendant. *National Cash Register Co. v. Riggs*, 22 Misc. 716, 50 N. Y. Supp. 35.

Under a paragraph of an answer denying the execution of a note, it may be proved that the note was altered after it had been signed, as well as that it had not been delivered. *Palmer v. Poor*, 121 Ind. 135, 6 L.R.A. 469, 22 N. E. 984. And evidence that the words "with interest" were not contained in a note at the time of its execution is admissible under a general denial of the execution of the note as set out in the complaint. *Boomer v. Koon*, 6 Hun, 645. A material alteration of an official bond set up as a defense by the sureties may be proved under a denial of each and every allegation as to the execution and delivery of the bond. *Fairhaven v. Cowgill*, 8 Wash. 686, 36 Pac. 1093. So, the incumbent in an election contest is not required to allege an alteration of the ballots in order to introduce evidence thereof. *Ferguson v. Henry*, 95 Iowa, 439, 64 N. W. 292. But evidence that after execution of a written lease an alteration was made which makes no change in the construction nor in the rights or obligations of either party under it, but only affects the nature and kind of evidence required to prove its execution, is inadmissible under a mere denial of the execution of the instrument. *Roberts v. Nelson*, 65 Minn. 240, 68 N. W. 14. And it seems that to render evidence of a material alteration in a promissory note admissible under a denial of its execution and delivery, such alteration must have been made before delivery, or before the attaching of any liability. *National Bank v. Nickell*, 34 Mo. App. 295.

2. Presumptions and burden of proof.

Where the instrument itself discloses no evidence of alteration, the burden of establishing the fact of alteration rests upon

the party asserting it.¹ After the fact of alteration has been established, as well as that it was made after execution, the party claiming under the instrument as altered has the burden of showing that the alteration was made with the knowledge and consent of the other party.² Where the alteration is apparent on the face of the instrument, the cases are conflicting.³

¹ *Montgomery v. Crossthwait*, 90 Ala. 563, 12 L.R.A. 140, 24 Am. St. Rep. 832, 8 So. 498; *Thacker v. Booth*, 9 Ky. L. Rep. 745, 6 S. W. 460; *McClintock v. State Bank*, 52 Neb. 130, 71 N. W. 978; *Conable v. Keeney*, 40 N. Y. S. R. 939, 16 N. Y. Supp. 719; *Smith v. Parker*, — Tenn. —, 49 S. W. 285; *Duggar v. Dempsey*, 13 Wash. 396, 43 Pac. 357; *Riley v. Riley*, 9 N. D. 580, 84 N. W. 347.

² *Shroeder v. Webster*, 88 Iowa, 627, 55 N. W. 569; *Martin v. Buffaloe*, 121 N. C. 34, 27 S. E. 995; *State ex rel, Howell County v. Findley*, 101 Mo. 368, 14 S. W. 111.

³ I. Authorities holding that there is no presumption either way, but that the paper should go to the jury with the evidence as a question solely for them. *Printup v. Mitchell*, 17 Ga. 558, 63 Am. Dec. 258; *Hunt v. Gray*, 35 N. J. L. 227, 10 Am. Rep. 232; *Hayden v. Goodnow*, 39 Conn. 164; *Ely v. Ely*, 6 Gray, 439; *Catlin Coal Co. v. Lloyd*, 180 Ill. 398, 54 N. E. 214; *De Long v. Soucie*, 45 Ill. App. 234; *Hagan v. Merchants' & B. Ins. Co.* 81 Iowa, 321, 25 Am. St. Rep. 493, 46 N. W. 1114; *McGee v. Allison*, 94 Iowa, 527, 63 N. W. 322; *Neil v. Case*, 25 Kan. 510, 37 Am. Rep. 259; *Wolferman v. Bell*, 6 Wash. 84, 36 Am. St. Rep. 126, 32 Pac. 1017; *Goodin v. Plugge*, 47 Neb. 284, 66 N. W. 407; *Hutchison v. Kelly*, 276 Ill. 438, 114 N. E. 1012; *Böhles v. Duffy*, 35 N. D. 181, 159 N. W. 838; *Dodge v. Haskell*, 69 Me. 429.

II. Authorities holding that there is a presumption that an alteration in a deed was made before execution. *Little v. Herndon*, 10 Wall. 26, 19 L. ed. 878; *Long v. Patton*, 154 U. S. 573, and 19 L. ed. 881, 14 Sup. Ct. Rep. 1167; *White v. Hass*, 32 Ala. 430, 70 Am. Dec. 548; *Paramore v. Lindsey*, 63 Mo. 63; *Hanrick v. Patrick*, 119 U. S. 156, 172, 30 L. ed. 396, 405, 7 Sup. Ct. Rep. 147; *Kendrick v. Latham*, 25 Fla. 819, 6 So. 871; *Dorsey v. Conrad*, 49 Neb. 443, 68 N. W. 645; *Rodriguez v. Haynes*, 76 Tex. 225, 13 S. W. 296; *Gunkel v. Seiberth*, 27 Ky. L. Rep. 455, 85 N. W. 733. *Contra*: *Ely v. Ely*, 6 Gray, 439, holding it error so to charge, and that the burden is always on the party producing the instrument; but the appearance of the paper may be enough to sustain a finding that the alteration was made before execution.

This rule has been extended to other instruments. *Wilson v. Hayes*, 40 Minn. 531, 4 L.R.A. 196, 12 Am. St. Rep. 754, 42 N. W. 467 (promissory note); *Yakima Nat. Bank v. Knipe*, 6 Wash. 348, 33 Pac. 834 (promissory note); *Kleeb v. Bard*, 12 Wash. 140, 40 Pac. 733 (bond);

Franklin v. Baker, 48 Ohio St. 296, 29 Am. St. Rep. 547, 27 N. E. 550 (promissory note); Cross v. Aby, 55 Fla. 311, 45 So. 820.

The presumption is not destroyed by the suspicious character of the alteration, even though it may furnish strong evidence against the presumption (Grimes v. Whitesides, 65 Mo. App. 1), or may be so suspicious as of itself to authorize a finding contrary to the presumption. Noah v. German Ins. Co. 69 Mo. App. 332. *Contra*: Collins v. Ball, 82 Tex. 259, 27 Am. St. Rep. 877, 17 S. W. 614, which holds that the rule that interlineations in a deed are presumed to have been made before signing does not apply unless the deed and surrounding circumstances are free from suspicion.

Alterations in an instrument will be presumed to have been made before its execution where they serve to render the instrument consistent with itself. Westmoreland v. Westmoreland, 92 Ga. 233, 17 S. E. 1033. Interlineations in a deed in the handwriting of the officer who actually attested it are presumed to have been made at or before its execution. Bedgood v. McLain, 89 Ga. 793, 15 S. E. 670. So, alterations in the entry of the levy upon an execution will, in the absence of evidence to the contrary, be presumed to have been made by or under the direction of the officer at the time the entry was made. Collins v. Boring, 96 Ga. 360, 23 S. E. 401. And, in the absence of a statutory affidavit denying its genuineness, the law will presume that a duly registered deed, which by statute is admissible in evidence without further proof, was executed as offered in evidence; and, if alterations appear to have been made therein, that they were made at or before its execution. *Ibid.*; Norton v. Conner, — Tex. —, 14 S. W. 193. But where the genuineness of a promissory note is denied under oath, the burden of explaining a material alteration apparent on its face rests on the party claiming under it. Winkles v. Guenther, 98 Ga. 472, 25 S. E. 527.

Where a contract prepared by the use of a typewriter and made in duplicate appears to have been changed after the first impression is made, the presumption is that such change was made before execution and delivery. Barber v. Stromberg-Carlson Teleph Mfg. Co. 81 Neb. 517, 18 L.R.A.(N.S.) 680, 129 Am. St. Rep. 703, 116 N. W. 157. For a discussion of the question of presumption as to alteration of typewritten instrument made in duplicate, see note to this case in 18 L.R.A.(N.S.) 680.

III. That the burden is on the party offering it to explain. Jackson ex dem. Gibbs v. Osborn, 2 Wend. 555, 20. Dec. 649 (reversing for error in charging the contrary); Evans v. Deming, 20 N. Y. Week. Dig. 71; O'Donnell v. Harmon, 3 Daly, 424; Benjamin's Chalmers' Bills & Notes, chap. 259, art. 250 (so laid down as to one suing on altered instrument); McHale v. McDonnell, 175 Pa. 632, 34. Atl. 966 (assignment); Nesbitt v. Turner, 155 Pa. 429, 26 Atl. 750 (bond); Harris v. Bank of Jacksonville, 22 Fla. 501, 1 Am. St. Rep.

201, 1 So. 140 (bill of exchange); *Gowdey v. Robbins*, 3 App. Div. 353, 38 N. Y. Supp. 280 (promissory note); *Winters v. Mowrer*, 1 Pa. Super. Ct. 47 (promissory note); *Slater v. Moore*, 86 Va. 26, 9 S. E. 419 (check); *Elgin v. Hall*, 82 Va. 680 (receipt); *Sneed v. Sabinal Min. & Mill. Co.* 20 C. C. A. 230, 34 U. S. App. 688, 73 Fed. 925 (promissory note); *Grand Lodge, A. O. U. W. v. Young*, 123 Ill. App. 628; *Kauffman v. Logan*, 187 Iowa, 670, 174 N. W. 366.

But the burden of explaining an alteration does not rest on the bona fide purchaser of bonds, in an action brought to cancel the bonds upon that ground, where they were not necessarily invalidated by the alteration, treating it as material. *Solon v. Williamsburgh Sav. Bank*, 114 N. Y. 123, 21 N. E. 168.

This rule is usually adopted where the alteration is of a suspicious character, such as one in different handwriting and different ink. *Glover v. Gentry*, 104 Ala. 222, 16 So. 38 (promissory note); *Wilde v. Armsby*, 6 Cush. 314 (guaranty); *Peugh v. Mitchell*, 3 App. D. C. 321 (deed); *Orlando v. Gooding*, 34 Fla. 244, 15 So. 770 (bond).

It will be noticed that in many of the cases cited in support of this rule a negotiable instrument was the subject of the alteration; and an attempt has been made to distinguish these cases on that ground. *Nagle's Estate*, 134 Pa. 31, 19 Am. St. Rep. 669, 19 Atl. 434; *Simpson v. Stackhouse*, 9 Pa. 186, 49 Am. Dec. 554. But this distinction has been disregarded by many courts. *Wilson v. Hayes*, 40 Minn. 531, 4 L.R.A. 196, 12 Am. St. Rep. 754, 42 N. W. 467; *Franklin v. Baker*, 48 Ohio St. 296, 29 Am. St. Rep. 547, 27 N. E. 550. And see cases cited in support of I. and II. supra.

The proponent of a will has the burden of proving that alterations therein were made before execution. *Re Lawson*, 25 N. S. 454; *Re Carver*, 3 Misc. 567, 23 N. Y. Supp. 753; *Re Philp*, 46 N. Y. S. R. 356, 19 N. Y. Supp. 13. But interlineations in a will, fair upon their face, will be presumed to have been made before execution (*Re Wood*, 32 N. Y. S. R. 236, 11 N. Y. Supp. 157), especially where the interlineations were noted at the bottom of the instrument before the attestation clause. *Crossman v. Crossman*, 95 N. Y. 145. And interlineations or erasures in a will in the handwriting of testatrix will be presumed to have been made by her in the preparation of the will and prior to its execution, where she was her own scrivener and custodian of the will. *Re Potter*, 33 N. Y. S. R. 936, 12 N. Y. Supp. 105.

For other cases as to burden of explaining erasures or alterations appearing on face of will, see note in 17 L.R.A.(N.S.) 184.

IV. That, if the alteration is not suspicious, the burden is on the objector. *Insurance Co. of N. A. v. Brim*, 111 Ind. 281, 12 N. E. 315; *Brand v. Johnrowe*, 60 Mich. 210, 26 N. W. 883; *Wilson v. Hotchkiss*, 81 Mich. 172, 45 N. W. 838; *Gettysburg Nat. Bank v. Gage*, 4 Pa. Super. Ct.

50; *Parker's Estate*, 6 Pa. Dist. R. 519. This rule is criticised in *Wilson v. Hayes*, 40 Minn. 531, 4 L.R.A. 196, 12 Am. St. Rep. 754, 42 N. W. 467, in which the court says that such a rule amounts to nothing more than saying that in some cases the intrinsic evidence furnished by an inspection of the instrument itself "may tend to prove that the alteration was made after delivery, and therefore throw the preponderance on that side, unless the holder of the instrument produces extrinsic rebutting evidence. Thus construed we would find no special fault with the rule. But it is incorrect to call this a presumption of law; it is simply an inference of fact drawn from evidence in the case."

The conflict of authority is said to be more apparent than real in *Cox v. Palmer*, 1 McCrary, 431, 3 Fed. 16, in which the court says that one rule governs in all cases. "If the interlineation is in itself suspicious, as, if it appears to be contrary to the probable meaning of the instrument as it stood before the insertion of the interlined words; or if it is in a handwriting different from the body of the instrument, or appears to have been written with different ink,—in all such cases, if the court considers the interlineation suspicious on its face, the presumption will be that it was an unauthorized alteration after execution. On the other hand, if the interlineation appears in the same handwriting with the original instrument, and bears no evidence on its face of having been made subsequent to the execution of the instrument, and especially if it only makes clear what was the evident intention of the parties, the law will presume that it was made in good faith and before execution."

3. Effect of alteration on competency as evidence.

An instrument offered in evidence is not to be absolutely excluded merely because of a material alteration, even if appearing on its face.¹

¹*Pringle v. Chambers*, 1 Abb. Pr. 58 (disapproving the noted ruling in Warren's "Ten Thousand a Year"); *Maybee v. Sniffen*, 2 E. D. Smith, 1 (well-considered *dictum* by Woodruff, J., on a review of the cases. And the decision was affirmed in 16 N. Y. 560; on the ground, so far as this point is concerned, that there was no proof that the alteration was made after execution). The objection that legislative journals offered in evidence have been altered and amended without authority goes to their weight as evidence, and not to their admissibility, where the alterations and amendments are not apparent from an inspection. *State ex rel. Morris v. Mason*, 43 La. Ann. 590, 9 So. 776. But election ballots which have been so exposed that they may have been tampered with, and which have not been so guarded as to contravene all suspicion of substitution or change, lose their

presumptive purity, and are not to be relied on in an election contest. *Powell v. Holman*, 50 Ark. 85, 6 S. W. 505; *Fenton v. Scott*, 17 Or. 189, 11 Am. St. Rep. 801, 20 Pac. 95.

In *Cass County Bank v. Morrison*, 17 Neb. 341, 52 Am. Rep. 417, 22 N. W. 782, the court said that an instrument on the face of which a material alteration is apparent generally may be given in evidence, and may go to the jury or trier of fact, leaving the parties to such explanatory evidence of the alteration as they may choose to offer. To the same effect is *Gutherless v. Ripley*, 98 Iowa, 290, 67 N. W. 109. So, a bill of lading is admissible in evidence, although erasures are apparent on its face, where there is sufficient explanatory evidence to enable the jury to determine whether or not the alterations were made after the bill was issued. *Capehart v. Granite Mills*, 97 Ala. 353, 12 So. 44. And a written lease in which material insertions were made after execution is admissible in evidence where it has been shown that the parties recognized the instrument as valid after its alteration. *Janney, S. & Co. v. Goehringer*, 52 Minn. 428, 54 N. W. 481. See also § 7, this title, as to necessity of explanation before admitting in evidence.

As to effect of alteration in books of account on their admissibility in evidence, see note in 52 L.R.A. 574.

4. What is material.

Where the alteration is set up as a bar against enforcing the instrument the question is whether, if effective, it could in any event change the legal liability of the party or work to his prejudice.¹

Where the alteration is objected to merely as requiring explanation before receiving the instrument in evidence, the question is whether it is material to the purpose for which the instrument is offered.²

The question of materiality is one of law, and solely for the court.³

¹ *Booth v. Powers*, 56 N. Y. 22, reversing *Flint v. Craig*, 59 Barb. 319.

Any extended discussion as to what constitutes a material alteration of a written instrument is outside the scope of a work of this character. Upon this question generally, see notes to *Wilson v. Hayes*, 4 L.R.A. 196, and *Sanders v. Bagwell*, 7 L.R.A. 743. As to alteration of note as affecting bona fide holders, see *Citizens' Nat. Bank v. Williams*, 35 L.R.A. 464, with note.

² For illustration, see *Hay v. Douglas*, 8 Abb. Pr. N. S. 217, 2 Sweeney. 49 (receiving deed as corroborative of testimony that a note was given on a purchase, notwithstanding interlineation in description of premises).

The effect of interlineations apparent on the face of a deed ordinarily depends on extrinsic evidence, and cannot be determined on a motion to exclude the deed when offered as an instrument of evidence. *Ward v. Cheney*, 117 Ala. 238, 22 So. 996.

³*Steele v. Spencer*, 1 Pet. 552, 7 L. ed. 259; *Bell v. Bruen*, 1 How. 169, 11 L. ed. 89; *Burnham v. Ayer*, 35 N. H. 354; *Keen v. Monroe*, 75 Va. 427; *Winkles v. Guenther*, 98 Ga. 472, 25 S. E. 527.

5. Inspection.

The jury may be satisfied from an inspection of the paper itself that the alteration was before signing.¹

¹*Hills v. Barnes*, 11 N. H. 395, Citing *Gooch v. Bryant*, 13 Me. 386, 390; *Smith v. United States*, 2 Wall. 219, 232, 17 L. ed. 788, 791 (*dictum*). *Rogers v. Vosburgh*, 87 N. Y. 228, only decides (upon this point) that, where a material alteration after execution is alleged as a defense, the court cannot, on mere inspection of the paper, without allowing intrinsic evidence, decide that it was made before execution. The jury may determine from examination whether leaves which have been detached and refastened in a book belong thereto, without the aid of expert testimony. *Passmore v. Passmore*, 60 Mich. 463, 27 N. W. 601.

6. Signature and body.

Proof of signature and delivery is prima facie evidence that the body of the writing of which it appears to form a part is genuine if uncontradicted by the party, he being present.¹

¹*Com. v. Coe*, 115 Mass. 504. And see *Simpson v. Davis*, 119 Mass. 269, 20 Am. Rep. 324.

The proof or admission of the signature of the maker is prima facie evidence that the instrument written over it is his act, and this will stand as binding proof, unless the maker can rebut it by evidence that an alteration was made after delivery. *Wilson v. Hayes*, 40 Minn. 531, 4 L.R.A. 196, 12 Am. St. Rep. 754, 42 N. W. 467; *Davis v. Jenney*, 1 Met. 221. See also § 7, this title.

7. Effect of call for explanation.

If objection be made that the altered instrument is not sufficient to go to the jury, and the judge is satisfied, both that the alteration is material to the purpose for which the instrument is offered, and that it is sufficiently suspicious to require explanation, before submitting the instrument to the jury, he

may receive it subject to explanation, or on condition that counsel will give explanation.¹

¹Smith v. United States, 2 Wall. 219, 17 L. ed. 788. Whether the instrument or the explanation shall be first received is discretionary. Smith v. McGowan, 3 Barb. 404. And the error, if any, in admitting over objection an instrument containing an unexplained alteration is cured by the subsequent testimony of a witness who has had the custody of the instrument since its execution, that he knows it has never been altered since he received it. Nickum v. Gaston, 28 Or. 322, 42 Pac. 130.

Immaterial alterations need not be explained before introducing the instrument in evidence. Virginia & T. Coal & I. Co. v. Fields Bros. 94 Va. 102, 26 S. E. 426. An interlineation in a deed appearing to be in the same handwriting as its body, and made with the same ink and pen, and not unfavorably affecting the person against whom the deed is offered, does not require explanation to warrant its introduction in evidence. Zimmerman v. Camp, 155 Pa. 152, 25 Atl. 1086. And the erasure of printed words in a tax deed, indicative of the date of sale, and the interlineation of words in the same handwriting as the body of the deed, reciting an adjourned sale held at a later date, are not alterations requiring explanation previous to the admission of the deed. Lee v. Newland, 164 Pa. 360, 30 Atl. 258.

The erasure of the name of a surety from the bond given by an assignee for the benefit of creditors is not such a suspicious circumstance as must be explained before the bond can be admitted in evidence. Rollins v. Humphrey, 98 Wis. 66, 73 N. W. 331. Nor is a note rendered so suspicious as to require explanation before introducing it in evidence because the date line bears evidence of erasure, and some of the figures in the margin and the words in the body of the note indicating the amount are either blurred or written over erasures, where the amount may be ascertained by combining such of the words and figures as are unchanged, and the paper used was so poor that the ink may have spread. Stillwell v. Patton, 108 Mo. 352, 18 S. W. 1075. But the presumption is so strong that the true date of an indorsement upon a note which was first written with a leadpencil and afterwards partially erased and rewritten with pen and ink so as to show an apparent indorsement before maturity, an issue in the case being that the note was indorsed after maturity, is that of the lead pencil writing, as to require explanation before admitting it in evidence. Johnson v. First Nat. Bank, 28 Neb. 792, 45 N. W. 161. And an administrator's deed so altered as to convey entirely different land from that described in the probate record and proceedings of sale is inadmissible in evidence without explanation of the alterations. Collins v. Ball, 82 Tex. 259, 27 Am. St. Rep. 877, 17 S. W. 614. So, a book of entries which is manifestly erased and altered in a material

part is inadmissible in evidence until the alteration is explained (*State v. Collins*, 1 Marv. (Del.) 536, 41 Atl. 144), and its admission without such explanation is reversible error. *Churchman v. Smith*, 6 Whart. 146, 36 Am. Dec. 211, with note. See, however, *Yakima Nat. Bank v. Knipe*, 6 Wash. 348, 33 Pac. 834, in which it was held that an alteration in a written instrument, even though apparent on its face, need not be explained to render it admissible in evidence. To the same effect is *Hawxhurst v. Hennion*, 30 N. Y. S. R. 917, 9 N. Y. Supp. 542.

Proof of execution will sometimes dispense with any preliminary explanation, leaving the question to be determined after the instrument is in evidence. *Conkling v. Olmstead*, 63 Ill. App. 649; *Gwin v. Anderson*, 91 Ga. 827, 18 S. E. 43. Even where the alterations were material and apparent on the face of the instrument. *Cosgrove v. Fanebust*, 10 S. D. 213, 72 N. W. 469; *Fairhaven v. Cowgill*, 8 Wash. 686, 36 Pac. 1093. See also § 6, this title.

No further explanation of an alteration apparent on the face of a note is necessary to warrant its admission in evidence, than the testimony of the payee that such alteration was made previous to its receipt by him on the day of its date, from one of the joint makers. *Stough v. Ogden*, 49 Neb. 291, 68 N. W. 516. So, under a statute requiring a party producing a writing, which appears to have been altered after its execution in a material part, to account for the appearance and alteration before it can be admitted in evidence, it is sufficient to show that there has been no alteration made since it came into his hands. *Mulkey v. Long*, 5 Idaho, 213, 47 Pac. 949.

8. Effect of failure to explain.

If required explanation is not forthcoming, the judge may, if the suspicion be so clear as not to leave a question for the jury, exclude the document, or strike it out if already conditionally received,¹ and, if the document be essential to the cause of action or defense, direct a nonsuit or verdict.²

¹*Sweitzer v. Allen Bkg. Co.* 76 Mo. App. 1 (court sitting as jury).

²*Tillou v. Clinton & E. Mut. Ins. Co.* 7 Barb. 564; *s. p.*, *Evans v. Deming*, 20 N. Y. Week. Dig. 71.

9. Effect of attempted explanation.

If explanation is given such that a verdict could be sustained on the instrument as explained,¹ the instrument with all the evidence as to the alteration will go to the jury for their determination of the question of alteration.²

¹It is for the presiding judge to determine by an inspection of the in-

strument whether the supposed interlineations are apparent on its face; and if apparent whether they are not so accounted for or explained as to require the document to go to the jury as an instrument of evidence. *Ward v. Cheney*, 117 Ala. 238, 22 So. 996.

The burden resting upon plaintiff in an action on a note to explain a material alteration thereof is sufficiently met by proof that it was in the same condition at the time of its execution. *Winters v. Mowrer*, 1 Pa. Super. Ct. 47. If satisfactory explanation is not made, the proper conclusion is a conviction of fact that the alteration was made after the execution of the instrument. *Cattin Coal Co. v. Lloyd*, 180 Ill. 398, 72 Am. St. Rep. 216, 54 N. E. 214. But evidence that the words "and homestead" were interlined in an acknowledgment of a mortgage after its execution must be quite convincing to invalidate the mortgage in view of the fact that the notary must have known that the addition of such words would constitute a heinous crime. *Rosenberg v. Jett*, 72 Fed. 90.

²The conflict in the cases, when analyzed, turns chiefly on the question what instructions should be given the jury on the burden of proof.

10. Effect of alteration on validity.

To invoke the rules that an alteration by the holder, in a material part, precludes him from recovering on it, and that fraudulent alteration by him in such a part precludes him from recovering even on the original consideration,¹ it must be affirmatively shown that the alteration was made by him.²

¹*Meyer v. Huneka*, 55 N. Y. 412, and cases cited, reversing 65 Barb. 304. See also *Walton Plow Co. v. Campbell*, 16 L.R.A. 468, and note, (35 Neb. 173, 52 N. W. 883). And see cases collected in note to *Draper v. Wood*, 17 Am. Rep. 97.

²*Van Brunt v. Van Brunt*, 3 Edw. Ch. 14. To defeat all liability on a note because of material alteration therein it must be alleged and proved that the alterations were made by a person claiming a benefit under the instrument and with intent to defraud. *Gwin v. Anderson*, 91 Ga. 827, 18 S. E. 43, construing a Code provision that a material alteration of a contract by a party claiming a benefit under it with fraudulent intent avoids the whole contract, but if the alteration is unintentional, or made by mistake or in an immaterial manner and without intent to defraud, the court will enforce it if the original contract can be discovered and is capable of execution. *Contra*: *Bowman v. Mitchell*, 79 Ind. 84, which holds that a material alteration in a note, made after execution, will be presumed, unless the contrary is shown, to have been made by the party claiming under it, or by one under whom he claims, and will render unenforceable a mortgage to secure which the note was executed. To the same effect is *Warder, B. & G. Co. v.*

Willyard, 46 Minn. 531, 24 Am. St. Rep. 250, 49 N. W. 300, in which a judgment on the original consideration for a note was reversed for the failure to explain a material alteration therein shown to have been made after the instrument passed from the maker's hands into plaintiff's actual or constructive possession. And an alteration of promissory notes after execution, by substituting for the printed word "order" the word "bearer," will be presumed to have been made with a fraudulent purpose either by the payee or the holder. *Shroeder v. Webster*, 88 Iowa, 627, 55 N. W. 569. And the burden of showing that a material alteration in a check, made after the payee's indorsement and without his consent, was made by a stranger to the instrument, is upon the party seeking to enforce it. *National Ulster County Bank v. Madden*, 114 N. Y. 280, 11 Am. St. Rep. 633, 21 N. E. 408.

Alteration in an instrument which before alteration had already effected a transmutation of title or possession does not defeat it, for alteration cannot reconvey. *Lewis v. Payn*, 8 Cow. 71, 18 Am. Dec. 427; *Smith v. McGown*, 3 Barb. 404.

11. Competency of witness to explain.

Any witness having knowledge may testify to the time of the making or existence of an alteration,¹ even though the instrument be one which can only be proved by a subscribing witness.²

¹ An insured may, in an action on a policy, show that words written into his application were so written after it left his hands and without his knowledge or consent. *McMaster v. New York L. Ins. Co.* 90 Fed. 40. So, a party may prove that a letter from him, put in evidence by the other party, was mutilated, and that something material had been cut off. *Robinson v. Cutter*, 163 Mass. 377, 40 N. E. 112. And on the trial of an indictment for altering a ballot, a witness who saw the alteration made may testify to the fact, although the ballot has been destroyed as required by statute. *Com. v. McGurty*, 145 Mass. 257, 14 N. E. 98. Where a note has been admitted in evidence without any explanatory testimony as to material alterations, it is reversible error to exclude evidence that such alterations were made after its execution, and were unauthorized, *Courcamp v. Weber*, 39 Neb. 533, 58 N. W. 187.

² *Penny ex dem. Penny v. Corwithe*, 18 Johns. 499.

12. Description.

A witness may be questioned as to the facts apparent on the condition of a writing presented to him, as, for instance, whether its body and signature were written with the same ink; whether there appeared to be an erasure; and whether either edge was

cut, or an ordinary foolscap edge;¹ and an expert may be interrogated as to whether an erasure was made before or after the body of the instrument was written,² or whether interlineations are in the same handwriting as the signature.³

¹ *Dubois v. Baker*, 30 N. Y. 355, affirming 40 Barb. 556.

But, on the question of the forgery of a lost deed of which a copy is in evidence, the clerk who recorded it cannot be permitted to testify that it had the appearance on its face of being genuine, as there appeared upon it no erasures or interlineations. *Holland v. Carter*, 79 Ga. 139, 3 S. E. 690.

² *Dubois v. Baker*, 30 N. Y. 355, affirming 40 Barb. 556. But compare *Sackett v. Spencer*, 29 Barb. 180; *Cheney v. Dunlap*, 20 Neb. 265, 57 Am. Rep. 828, 29 N. W. 925; *Phoenix F. Ins. Co. v. Philip*, 13 Wend. 81; and § 8, AGE, as to age of writing.

A witness cannot be asked whether there has been any use of chemicals upon a note, for the purpose of proving the fact of alteration, where the note itself is not offered in evidence, and there is no suggestion that it bears any evidence of an erasure or alteration,—especially since the note itself would be the best evidence of such an erasure. *Lewis v. Hayden*, 3 Ariz. 277, 32 Pac. 263.

³ *Graham v. Spang*, 1 Monaghan (Pa.) 167, 16 Atl. 91.

13. Explaining, as immaterial.

a. In general.—An unnoted erasure in a deed may be shown to be immaterial by oral evidence of the subject-matter referred to.¹

¹ *Hanrick v. Patrick*, 119 U. S. 156, 172, 30 L. ed. 396, 405, 7 Sup. Ct. Rep. 147 (so holding of an alteration changing the name of the grantee from Elizabeth to Eliza, explained by proof that both names indicate the same person).

b. As made by third person.—A material alteration in the instrument under which a party claims may be explained by showing that it was made without his privity while the instrument was not in his possession, and by another party or a stranger; and if the nature and extent of the alteration and the original terms of the contract can be clearly ascertained the alteration will not affect the party so claiming under the instru-

ment.¹

¹Martin v. Tradesmen's Ins. Co. 101 N. Y. 498, 5 N. E. 338.

c. As made by consent.—An unnoted alteration, even in a sealed instrument, may be explained by oral evidence that all parties consented to its being made.¹

¹Speake v. United States, 9 Cranch, 28, 3 L. ed. 645 (erasures of one signature in bond, and substitution of another). It may be otherwise of an alteration in a matter required by statute.

The testimony of the grantor that she read and examined the deed when she acknowledged it for probate is some evidence that she knew of the change made therein in the interval between the signing and acknowledgment. Howell v. Cloman, 117 N. C. 77, 23 S. E. 95.

Evidence that the original maker of a note promised to pay it after it had been materially altered by having two other persons sign it is inadmissible in evidence against him, although not against the additional signers. Browning v. Gosnell, 91 Iowa, 448, 59 N. W. 340. The defendant in an action by a bank upon a note altered by its cashier may show by the bank's books that the note was carried thereon at the amount to which it had been altered, as evidence tending to show knowledge of, and ratification by, the bank of the alteration. Wyckoff v. Johnson, 2 S. D. 91, 48 N. W. 837. The implied admission of the execution of a note as alleged in the complaint, where usury is the only defense set up on the first trial, is sufficient on the second trial, when defendant first claims that an insertion of certain words in the instrument, as pleaded, was made without his consent, which is flatly contradicted by plaintiff, to disprove such defense. McNail v. Welch, 125 Ill. 623, 18 N. E. 737.

14. Extrinsic evidence to supply obliteration.

An instrument is not to be excluded because of an alteration or mutilation canceling a material part, if there is no indication of fraud or intent to annul the instrument, and the lost words are supplied by extrinsic evidence.¹

¹Polk v. Wendall, 9 Cranch, 87, 97, 3 L. ed. 665, 668 (Here the sum fixed as the consideration of a grant had been obliterated by tearing it out. Marshall, Ch. J., said: "Had the whole grant been lost, a copy might have been given in evidence; and it would be strange if the original should be excluded because a word which could not be mistaken, and which, indeed, is not essential to the validity of the grant, has become illegible").

But a memorandum book mutilated by tearing out and destroying some of the entries relating to the suit after its commencement is inadmissible in evidence. *Johnson v. Fry*, 88 Va. 695, 12 S. E. 973, 14 S. E. 183.

Parol evidence. Extrinsic evidence is admissible to explain or account for interlineations in a written instrument. *Cox v. Mignery & Co.* 126 Mo. App. 669, 105 S. W. 675.

15. Abstract or memorandum corroborating the testimony.

An abstract or memorandum of the contents of the original instrument, with proof that it was correctly made, is competent, in connection with the testimony of the witness who made it, to show that a deviation now apparent on the face of the original is a subsequent alteration.¹

¹ *National Ulster County Bank v. Madden*, 41 Hun, 113.

The duplicate of a contract is admissible to show that material erasures and interlineations in the original were made after execution, although the answer admitted the contract as pleaded. *Young v. Cohen*, 42 S. C. 328, 20 S. E. 62. And, upon the question whether or not notes given for the purchase price of goods were altered after their execution, the written contract containing the terms of sale is admissible in evidence to show how far the notes are in conformity to those terms. *Stein v. Brunswick-Balke-Collender Co.* 69 Miss. 277, 13 So. 731.

16. Official document; ancient instrument.

The rule as to requiring explanation from the party offering an altered document does not apply to an official record of a sworn officer produced from the proper custody other than that of the party offering it,¹ nor to a deed purporting to be an ancient document, which comes from the proper source.²

¹ *People ex rel. Stone v. Minck*, 21 N. Y. 539; *Devoy v. New York*, 35 Barb. 264, 22 How. Pr. 226.

² A deed over fifty years old, which has been recorded for over forty years, and comes from the proper source, is admissible in evidence as an ancient instrument, notwithstanding the erasure of the name of the original grantee and the insertion of another grantee. *McOelvey v. Cryer*, 8 Tex. Civ. App. 437, 28 S. W. 691.

17. Certified copy.

Alterations in a certified copy or an exemplification are not

alone ground for excluding it, if they are marked and verified as such by the initials of the authenticating clerk of the court.¹

¹ *Lazier v. Westcott*, 26 N. Y. 146, 82 Am. Dec. 404.

AMBIGUITY.

1. Symbol.
2. Absence of dollar mark.
3. Illegibility.
4. Blank.
5. Patent and latent.
6. Surrounding circumstances.
7. Usage of the business.
8. Practical construction.
9. Creating by extrinsic evidence.
10. Technical meaning.
11. Identity.
12. Insurance contracts.

See also ABBREVIATIONS; ADMISSIONS; BOUNDARIES; CONTRACT; INTENT; OPINION; THREAT; USAGE.

1. Symbol.

Oral evidence is competent to explain the meaning of a symbol used in a written contract, as in a stipulation to pay "at the rate of 100 dolls. per ton."¹

¹ *Taylor v. Beavers*, 4 E. D. Smith, 215 (admitting evidence to show that \$1.10 was in fact agreed on).

2. Absence of dollar mark.

The absence of a dollar mark, and the fact that there is no other indication of the denomination of money indicated by a column of figures, than the column line or period usually

separating dollars and cents, does not impair the admissibility or effect of the account.¹

¹ *State v. Ring*, 29 Minn. 78, 11 N. W. 233. Such omission does not render invalid a warrant for the collection of taxes. *American Tool Co. v. Smith*, 14 Abb. N. C. 378, and cases cited (affirmed, it seems, without opinion in 96 N. Y. 670). The primary meaning of figures standing in the column set apart for the valuation of assessed property in a tax roll will be held to be dollars, although no dollar or other mark is used in connection therewith. *Conklin v. El Paso*, — Tex. Civ. App. —, 44 S. W. 879. And the usual subdivisional account-book lines between the decimal parts of the dollar and the units and tens are a sufficient indication of dollars and cents on an assessment roll, although the words "dollars, cents," etc., or their equivalent signs and abbreviations, are omitted from the top of the lines. *San Luis Obispo County v. White*, 91 Cal. 432, 27 Pac. 756, 24 Pac. 864.

Contra: McClellan v. District of Columbia, 7 Mackey, 94, and cases cited.

The omission of the dollar sign in a transcript of judgment, from the figures apparently intended to state the amount of the judgment, renders it inadmissible in evidence. *Hopper v. Lucas*, 86 Ind. 43.

The effect of the omission of dollar sign or word "dollars" from verdict or judgment is discussed in note in 35 L.R.A. (N.S.) 653.

3. Illegibility.

Oral evidence is competent to dispel doubts as to what a word or character in an instrument was intended to be.¹

¹ *Arthur v. Roberts*, 60 Barb. 580. Parol evidence is admissible to explain what name was intended by obscure and imperfect ballots. *Behrensmeyer v. Kreitz*, 135 Ill. 591, 26 N. E. 704.

Opinions of experts are competent to determine the identity of a numeral which is obscure and difficult to be deciphered. *Kux v. Central Michigan Sav. Bank*, 93 Mich. 511, 53 N. W. 828.

4. Blank.

The omission to fill a blank with a number or other term essential to give meaning to the provision in which it occurs creates a patent ambiguity which cannot be corrected by oral evidence.¹

¹ *Vandervoort v. Dewey*, 42 Hun, 68, 71. Compare *Camden Iron Works v. Fox*, 34 Fed. 200.

5. Patent and latent.

Extrinsic evidence is, subject to the exceptions noted in the following sections, inadmissible to cure a patent ambiguity.¹ But a latent ambiguity being created by extrinsic evidence, such evidence is competent to remove it.²

¹ Johnson v. Johnson, 32 Ala. 637; Brandon v. Leddy, 67 Cal. 43, 7 Pac. 33; Grimes v. Harmon, 35 Ind. 198, 9 Am. Rep. 690; Craven v. Butterfield, 80 Ind. 503; Clarke v. Lancaster, 36 Md. 196, 11 Am. Rep. 486; Storer v. Freeman, 6 Mass. 435, 4 Am. Dec. 155; Comstock v. Van Deusen, 5 Pick. 163; Mithoff v. Byrne, 20 La. Ann. 363; McNair v. Toler, 5 Minn. 435, Gil. 356; Taylor v. Maris, 90 N. C. 619; Brown v. Guice, 46 Miss. 299; Norris v. Hunt, 51 Tex. 609; Nashville L. Ins. Co. v. Mathews, 8 Lea, 499; Brauns v. Stearns, 1 Or. 368; Webster v. Atkinson, 4 N. H. 23; Rood v. School Dist. No. 7, 1 Dougl. (Mich.) 502; McFarland v. Reeve, 5 Del. Ch. 118; Harten v. Leffler, 29 App. D. C. 490; Bruce v. Bruce, 90 N. J. Eq. 118, 105 Atl. 492.

But see apparently *contra*, Kuehle v. Zimmer, 249 Ill. 544, 94 N. E. 957; Karsten v. Karsten, 254 Ill. 480, 98 N. E. 947.

Contra by statute, in Georgia, providing that "parol evidence is admissible to explain all ambiguities both latent and patent." *Mohr v. Dillon*, 80 Ga. 572, 5 S. E. 770. (See Park's Anno. Code of Ga. 1914, § 5789, vol. 5, p. 3908.)

Mr. Abbott suggested in the first edition that this rule is not applicable except where the writing is required by statute which the patent ambiguity prevents it from satisfying, and that in other cases the existence of a patent ambiguity invites extrinsic evidence. The following cases were cited by him as illustrations of the rule: *Mansfield v. New York C. & H. R. R. Co.* 102 N. Y. 205, 6 N. E. 386; *Moore v. Meacham*, 10 N. Y. 207; *Field v. Munson*, 47 N. Y. 221. But none of these cases support this proposition, and no such distinction seems elsewhere to have been raised. On the contrary, the rule laid down in the text has been applied to a patent ambiguity in a promissory note. *Griffith v. Furry*, 30 Ill. 251, 83 Am. Dec. 186. And to one arising from the phraseology of an entry on a book of minutes of corporate proceedings. *Richmond Trading & Mfg. Co. v. Farquar*, 8 Blackf. 89. And to one apparent on the face of a lease for a term less than one year. *Castleman v. Du Val*, 89 Md. 657, 43 Atl. 821.

² *Clay v. Field*, 138 U. S. 464, 34 L. ed. 1044, 11 Sup. Ct. Rep. 419; *Houston v. Bryan*, 78 Ga. 181, 6 Am. St. Rep. 252, 1 S. E. 252; *Lyman v. Gedney*, 114 Ill. 388, 55 Am. Rep. 871, 29 N. E. 282; *McCann v. Preston*, 79 Md. 223, 28 Atl. 1102; *Hurley v. Brown*, 98 Mass. 548, 96 Am. Dec. 671; *Harrisburg Lumber Co. v. Washburn*, 29 Or. 150,

44 Pac. 390; *Coulam v. Doull*, 4 Utah, 267, 9 Pac. 568; *Hawkins v. Garland*, 76 Va. 149, 44 Am. Rep. 158; *Roanoke v. Blair*, 107 Va. 639, 60 S. E. 75; *Moran Bros. Co. v. Pacific Coast Casualty Co.* 48 Wash. 592, 94 Pac. 106; *Jennings v. Talbert*, 77 S. O. 454, 58 S. E. 420. A statute excluding evidence to vary a writing does not exclude evidence to explain an extrinsic ambiguity. *Bogk v. Gassert*, 149 U. S. 17, 37 L. ed. 631, 13 Sup. Ct. Rep. 738.

Extrinsic evidence is competent to apply a contract to its subject-matter, and to remove any uncertainty and ambiguity which arises from such application. *Stoops v. Smith*, 100 Mass. 63, 1 Am. Rep. 85, 97 Am. Dec. 76; *Haskell v. Tukesbury*, 92 Me. 551, 69 Am. St. Rep. 529, 43 Atl. 500; *Clark v. Crawfordville Coffin Co.* 125 Ind. 277, 25 N. E. 288; *Kelly v. Bronson*, 26 Minn. 359, 4 N. W. 607; *Axford v. Meeks*, 59 N. J. L. 502, 36 Atl. 1036; *New England Granite Works v. Bailey*, 69 Vt. 259, 37 Atl. 1043. So extrinsic evidence is admissible to remove a latent ambiguity in the description of a deed, and to identify the land intended to be conveyed. *Robinson v. Allison*, 109 Ala. 409, 19 So. 837; *Bradish v. Yocum*, 130 Ill. 386, 23 N. E. 114; *Marvin v. Elliott*, 99 Mo. 616, 12 S. W. 899; *Bollinger County v. McDowell*, 99 Mo. 632, 13 S. W. 100; *Palmer v. Farrell*, 129 Pa. 162, 15 Am. St. Rep. 708, 18 Atl. 761; *Busby v. Bush*, 79 Tex. 656, 15 S. W. 638. And such evidence is admissible to remove an ambiguity in a will created by an inaccurate description. *Hawkins v. Garland*, 76 Va. 149, 44 Am. Rep. 158; *Webster v. Morris*, 66 Wis. 368, 57 Am. Rep. 278, 28 N. W. 353. Or one arising from the existence of two or more persons or things, either of which will answer the description given. *Bradley v. Rees*, 113 Ill. 327, 55 Am. Rep. 422 (bequest to "four boys" when there were seven); *Morgan v. Burrows*, 45 Wis. 217, 30 Am. Rep. 717; *Gallup v. Wright*, 61 How. Pr. 286; *Tilton v. American Bible Soc.* 60 N. H. 377, 49 Am. Rep. 321.

So the naming of a partnership in a fire insurance policy was permitted to be shown by parol to mean both the partnership and the individual members. *Hammond v. Capital City Mut. F. Ins. Co.* 151 Wis. 62, 138 N. W. 92, Ann. Cas. 1914C, 57.

6. Surrounding circumstances.

Whenever the language used is susceptible of more than one interpretation, oral evidence of the surrounding circumstances existing when the contract was entered into, the situation of the parties, and the subject-matter of the instrument, is admissible.¹

¹ *McGhee v. Alexander*, 104 Ala. 116, 16 So. 148; *Merrill v. Syper*, 65 Ark. 51, 44 S. W. 462; *Lassing v. James*, 107 Cal. 348, 40 Pac. 534;

Solary v. Webster, 35 Fla. 363, 17 So. 646; Donohue v. Donohue, 54 Kan. 136, 37 Pac. 998; Frick v. Frick, 82 Md. 218, 33 Atl. 462; Kelly v. Bronson, 26 Minn. 359, 4 N. W. 607; Longfellow v. McGregor, 56 Minn. 312, 57 N. W. 926; French v. Carhart, 1 N. Y. 102, and cases cited (applying this rule to the construction of a deed of lands); Hinnemann v. Rosenback, 39 N. Y. 98 (holding that a stipulation in a building contract to pay a specified sum, in an order on a firm named, was explainable by oral evidence that the firm were dealers in building materials, and that it was not intended the order should be payable in cash); Manchester Paper Co. v. Moore, 104 N. Y. 680, 10 N. E. 861 (holding that the conversations of the parties in entering into the contract, and the characteristics of the business, and their relative needs and modes of action, could be proved, in order to show what the term "ruling market rates" meant, when it had been shown that there were two market rates. But a prior oral agreement could not be shown); Field v. Munson, 47 N. Y. 221; Agawam Bank v. Strever, 18 N. Y. 502 (oral evidence of attending circumstances admissible to show that a guaranty of "all liabilities incurred" included future liabilities); Wanner v. Landis, 137 Pa. 61, 20 Atl. 950; Wildasin v. Bare, 171 Pa. 387, 33 Atl. 365; Pearsall v. Henry, 153 Cal. 314, 95 Pac. 154, 159; Blood v. Fargo & S. Elevator Co. 1 S. D. 71, 45 N. W. 200; Gardner v. Watson, 76 Tex. 25, 13 S. W. 39; Davis v. State, 75 Tex. 420, 12 S. W. 957; Kinney v. Hooker, 65 Vt. 333, 36 Am. St. Rep. 864, 26 Atl. 690; Jackson Mill Co. v. Chandos, 82 Wis. 437, 52 N. W. 759; Scott v. Neeves, 77 Wis. 305, 45 N. W. 421; Crook v. First Nat. Bank, 83 Wis. 31, 35 Am. St. Rep. 17, 52 N. W. 1131; Drivers' Nat. Bank v. Albany County Bank, 44 Fed. 183. And a statute excluding evidence to vary a writing does not exclude evidence of the circumstances under which a written agreement or deed was made or to which it relates. Bogk v. Gassert, 149 U. S. 17, 37 L. ed. 631, 13 Sup. Ct. Rep. 738; Smith v. Pfluger, 126 Wis. 253, 2 L.R.A.(N.S.) 783, 110 Am. St. Rep. 911, 105 N. W. 476. See also note in L.R.A.1916B, 64.

By the weight of authority this rule authorizes the admission in evidence of the verbal declarations of the parties which tend to show their understanding of the meaning of the ambiguous expression. Re Curtis, 64 Conn. 501, 42 Am. St. Rep. 200, 30 Atl. 769; Jenkinson v. Monroe Bros. 61 Mich. 454, 28 N. W. 663; Ellis v. Harrison, 104 Mo. 270, 16 S. W. 198; Manchester Paper Co. v. Moore, 104 N. Y. 680, 10 N. E. 681; La Chicotte v. Richmond R. & Electric Co. 15 App. Div. 380, 44 N. Y. Supp. 75; Lemp v. Armengol, 86 Tex. 690, 26 S. W. 941; Bartels v. Brain, 13 Utah, 162, 44 Pac. 715; Foster v. Dickerson, 64 Vt. 233, 24 Atl. 253; Ganson v. Madigan, 15 Wis. 148, 82 Am. Dec. 652. *Contra*: Kretschmer v. Hard, 18 Colo. 223, 32 Pac. 418; McClelland v. James, 33 Iowa, 577; Scraggs v. Hill, 37 W. Va. 706, 17 S. E. 185; Caperton v. Caperton, 36 W. Va. 479, 15 S. E. 257.

In the case of a will, if it is found that the language is susceptible of two constructions, evidence of the testator's feelings towards plaintiff may be admitted which will enable the court to put itself, so far as may be, in the testator's place, that the words used may be read in the light of his environment at the time the will was executed: *Kerens v. St. Louis Union Trust Co.* 283 Mo. 601, 11 A.L.R. 293, 223 S. W. 645.

7. Usage of the business.

To explain ambiguous language in a contract, evidence of the known and ordinary course of the particular business is competent;¹ but not evidence of how it was understood by other dealers with the same house, unless the party to the contract is shown to have been cognizant of such other transactions.²

¹ *Lyon v. Lenon*, 106 Ind. 567, 7 N. E. 311; *Brunold v. Glasser*, 25 Misc. 285, 53 N. Y. Supp. 1021; *Hansbrough v. Neal*, 94 Va. 722, 27 S. E. 593. Evidence of the custom of watchmakers to use kerosene or benzine in reasonable quantities is admissible upon the question as to what is covered by the ambiguous expression "watchmaker's materials" in a policy of insurance. *Maril v. Connecticut F. Ins. Co.* 95 Ga. 604, 30 L.R.A. 835, 51 Am. St. Rep. 102, 23 S. W. 463. So evidence of a local custom by which the completed area was measured to determine the quantity of stone used is admissible to show what the parties to a contract to furnish stone blocks for use in a sewer meant by the words "square yard," even though such a custom has not been pleaded. *Breen v. Moran*, 51 Minn. 525, 53 N. W. 755. Evidence of usage is admissible to explain the meaning of ambiguous terms in a dispositive writing. *Pitcher v. Bingay*, 21 N. S. 31. But usage is only admissible to explain what is doubtful, and not to contradict what is plain. *Cummings v. Blanchard*, 67 N. H. 268, 68 Am. St. Rep. 664, 36 Atl. 556. See also AGENCY; CONTRADICTION; USAGE.

And the presumption is that a contract which is ambiguous was made with reference to the known usage or general course of the particular business. *Leiter v. Emmons*, 20 Ind. App. 22, 50 N. E. 40.

² *Newhall v. Appleton*, 102 N. Y. 133, 6 N. E. 120 (excluding other transactions for want of evidence of plaintiff's knowledge); *Fabbri v. Phoenix Ins. Co.* 55 N. Y. 129 (admitting other transactions where the party's knowledge was shown).

8. Practical construction.

When the meaning of a contract is ambiguous, extrinsic evidence, oral or written, is competent to show the practical construction put upon it by the parties by their acts under it.¹

So of their practical construction of previous similar contracts in the same terms.²

Evidence is admissible to ascertain the subject-matter of a contract with reference to which the parties proceeded to negotiate, including their situation and the surrounding circumstances, so that the court may stand in substantially the same light in reading the words of the contract as did the parties when adopting those words.³

¹ French v. Carhart, 1 N. Y. 96, 102, and cases cited (receiving such evidence as to what was conveyed or reserved by a deed), Approved in Steinbach v. Stewart, 11 Wall. 566, 20 L. ed. 56 (receiving such evidence on the question whether a deed was intended as a grant of a license); New York v. Starin, 106 N. Y. 1, 12 N. E. 631, and cases cited; Maloney v. Iroquois Brewing Co. 63 App. Div. 454, 71 N. Y. Supp. 1098; Cosper v. Nesbit, 45 Kan. 457, 25 Pac. 866; Engel v. Scott & H. Lumber Co. 60 Minn. 39, 61 N. W. 825; Ellis v. Harrison, 104 Mo. 270, 16 S. W. 198; Drovers' Nat. Bank v. Albany County Bank, 44 Fed. 183; Cavazos v. Trevino, 6 Wall. 773, 787, 18 L. ed. 813, 816; Union Bank v. Hyde, 6 Wheat. 572, 5 L. ed. 333. (An indorser's stipulation that if his notes should not be protested he would consider himself bound in the same manner as if legally protested, held to be ambiguous, and parol evidence was admissible to show that, by the understanding of both parties, and practical construction by one acquiesced in by the other, it dispensed with demand and notice on paper not strictly subject to "protest"); Scholbe v. Schuchardt, 292 Ill. 529, 13 A.L.R. 247, 251, 127 N. E. 169, in which the court said: "Where a contract is uncertain, ambiguous or incomplete, the whole agreement may be proven."

² Gray v. Gannon, 4 Hun, 57, 6 Thomp. & C. 245.

³ Excelsior Wrapper Co. v. Messinger, 116 Wis. 549, 93 N. W. 459; Marx v. American Malting Co. 95 C. C. A. 80, 169 Fed. 582.

Evidence is inadmissible of conversation between the parties at the time of entering into a contract, in order to explain the meaning of the parties in the use of the term "about." Waddell v. Phillips, 133 Md. 497, 105 Atl. 771.

Evidence was not admissible of prior or contemporaneous conversations or stipulations not carried into the contract, in order to fix a maximum amount of gas to be furnished under the contract. Home Gas Co. v. Mannington Co-op. Window Glass Co. 63 W. Va. 266, 61 S. E. 329. For additional cases and full discussion see note in 7 A.L.R. 514.

9. Creating by extrinsic evidence.

To create an ambiguity in the use of common and ordinary

language in a written contract, so as to let in oral evidence, it is not enough to show circumstances known to one of the parties, but unknown to the other, which might have influenced the former in making the contract; but there must be proof of circumstances known to all of the parties to the agreement, and available to all, in selecting the language employed to express their meaning.¹

¹ *Brady v. Cassidy*, 104 N. Y. 147, 10 N. E. 131 (use of words "manufactured stock on hand" in a bill of sale, not explainable by showing that a part of the apparent stock had been previously contracted to others). Evidence as to the meaning of "single dwelling house" among real-estate men is inadmissible in an action to restrain the violation of a restriction of the use of real property to that purpose, where none of the original or subsequent purchasers of such property were real-estate men. *Stone v. Pillsbury*, 167 Mass. 332, 45 N. E. 768.

10. Technical meaning.

It may be shown by oral evidence that a term has acquired a technical meaning in trade or art, different from its ordinary meaning, for the purpose of showing which meaning was intended.¹

¹ *Pollen v. LeRoy*, 30 N. Y. 549, Affirming 10 Bosw. 38; *Long Bros. v. J. K. Armsby Co.* 43 Mo. App. 253; *Moore v. Hill*, 62 Vt. 424, 19 Atl. 997; *St. Paul & M. Trust Co. v. Harrison*, 64 Minn. 300, 66 N. W. 980. So by a statute in Montana. *Newell v. Nicholson*, 17 Mont. 389, 43 Pac. 180. But if a party seeks to show that certain words used in the contract have a different acceptation from their ordinary sense, he must prove it by clear, distinct, and irresistible evidence. *De Witt v. Berry*, 134 U. S. 306, 33 L. ed. 896, 10 Sup. Ct. Rep. 536.

Parol evidence is admissible to show that a term used in an insurance policy has a special and technical meaning according to the custom of an insurance business. *Halsey v. Adams*, 63 N. J. L. 330, 43 Atl. 708; *Fry v. Provident Sav. Life Assur. Soc.* — Tenn. — 38 S. W. 116. So, evidence is admissible to explain the meaning of the term "Harbor of New York" as used in a contract of marine insurance. *Petrie v. Phenix Ins. Co.* 132 N. Y. 137, 30 N. E. 380. Evidence as to the meaning of the term "brass buttons" in trade and commerce is admissible upon the question whether certain buttons are dutiable as such. *Erhardt v. Ullman*, 2 C. C. A. 319, 1 U. S. App. 257, 51 Fed. 414. And evidence is admissible to show among printers the meaning of the words "equivalent" and "square," as used in a statute

providing for the payment for publication of legal notices at a designated price "per square of ten lines of brevier type or its equivalent." *Brown v. Lucas County*, 94 Iowa, 70, 62 N. W. 694. And evidence of the custom of surveyors in locating town plots is admissible to determine whether the word "west" in a deed means west according to the United States survey, or according to the true meridian. *Reed v. Tacoma Bldg. & Sav. Asso.* 2 Wash. 198, 26 Am. St. Rep. 851, 26 Pac. 252. Compare *Moran v. Prather*, 23 Wall. 492, 23 L. ed. 121 (holding that the phrase "indebtedness due us, by said steamboat," and the like, in the release and guaranty, could not be explained by oral evidence as meaning only debts enforceable *in rem*).

Experts may testify as to the meaning of the term "surfacing" in a railroad construction, and whether it includes "old grading." *Henderson-Boyd Lumber Co. v. Cook*, 149 Ala. 226, 42 So. 838.

The plaintiff, in an action on a contract has the burden to show that the term "six story building" used in the contract had a special meaning which the parties either knew or should have known. *Abrams v. Bloch*, 101 N. Y. Supp. 109.

11. Identity.

Land described in a deed,¹ or a contract for the conveyance of property,² or a mortgage,³ or a lease,⁴ may be identified by parol evidence. So, parol evidence is admissible to identify land devised by a will,⁵ and extrinsic evidence is admissible to identify the plaintiffs in an action on a foreign judgment in favor of a partnership.⁶ Parol evidence is also admissible to identify a person or corporation mentioned in a will or other instrument.⁷ And where an instrument specifies a person as agent, but it does not appear for whom he is agent, oral evidence is admissible to explain the agency and identify the principal.⁸ But parol evidence is not admissible to identify a document referred to in a will, where the will attempts to incorporate the contents of the document without identifying it in a clear, explicit, and unambiguous manner.⁹

¹ *Staub v. Hampton*, 117 Tenn. 706, 101 S. W. 776; *Reed v. Munn*, 80 C. C. A. 215, 147 Fed. 737.

² *Moayon v. Moayon*, 114 Ky. 855, 60 L.R.A. 415, 102 Am. St. Rep. 303, 72 S. W. 33.

³ *Walden v. Walden*, 128 Ga. 126, 57 S. E. 323.

⁴ *Bulkley v. Devine*, 127 Ill. 406, 3 L.R.A. 330, 20 N. E. 16.

⁵ *Eckford v. Eckford*, 91 Iowa, 54, 26 L.R.A. 370, 58 N. W. 1093. But

see *Bingel v. Völz*, 142 Ill. 214, 16 L.R.A. 321, 34 Am. St. Rep. 64, 31 N. E. 13.

⁶ *Fisher v. Fielding*, 67 Conn. 91, 32 L.R.A. 236, 52 Am. St. Rep. 270, 34 Atl. 714.

⁷ *Kingman v. New Bedford Home for Aged*, 237 Mass. 323, 129 N. E. 449, and cases cited under *IDENTITY* § 8, Note 1. Note in 47 L.R.A. (N.S.) 514.

⁸ *Hanna v. Espalla*, 148 Ala. 313, 42 So. 443.

⁹ *Bryan's Appeal*, 77 Conn. 240, 68 L.R.A. 353, 107 Am. St. Rep. 34, 58 Atl. 748, 1 Ann. Cas. 393.

12. Insurance contracts.

Parol evidence is admissible in the case of insurance contracts, as well as in the case of other written contracts, to explain their terms whenever ambiguous.¹ So, parol evidence was held admissible to show that the attention of the insurer was called to the manner in which a smokehouse was used and the smoked meat stored, and that smoked meats were what were to be insured in connection with the smokehouse, upon the question of what was included under the word "contents."² And upon the question of intention with which the words "total and permanent loss of the sight of both eyes" were used, knowledge of the agent that the insured had only one eye when the policy was issued is admissible to show that the words were equivalent to "loss of eyesight."³ And parol evidence of the company's knowledge that the insured was a railroad contractor is admissible on the question of the interpretation of the words used in the policy, "contractor, office, and traveling."⁴

¹ *Kentucky Vermillion Min. & Concentrating Co. v. Norwich Union F. Ins. Soc.* 77 C. C. A. 121, 146 Fed. 695; *James River Ins. Co. v. Merritt*, 47 Ala. 387; *Eggleston v. Council Bluffs Ins. Co.* 65 Iowa, 308, 21 N. W. 652; *Milwaukee Mechanics' Ins. Co. v. Brown*, 3 Kan. App. 225, 44 Pac. 35; *Frosts' Detroit Lumber & Wood-Ware Works v. Millers' & Mfrs.' Mut. Ins. Co.* 37 Minn. 300, 5 Am. St. Rep. 846. 34 N. W. 35; *Singleton v. St. Louis Mut. Ins. Co.* 66 Mo. 63, 27 Am. Rep. 321; *Modern Woodmen Acci. Asso. v. Kline*, 50 Neb. 345, 69 N. W. 943; *Pitney v. Glens Falls Ins. Co.* 61 Barb. 335, affirmed in 65 N. Y. 6; *Bidwell v. North Western Ins. Co.* 24 N. Y. 302; *Smith v. Farmers' & M. Mut. F. Ins. Co.* 89 Pa. 287; *Graham v. American F. Ins. Co.* 48 S. C. 195, 59 Am. St. Rep. 707, 26 S. E. 323; *Carrigan v. Lycoming F. Ins. Co.* 53 Vt. 418, 38 Am. Rep. 687; *Washington Mut. F. Ins. Co. v. St. Mary's Seminary*, 52 Mo. 480.

- ² Graybill v. Penn Twp. Mut. F. Ins. Asso. 170 Pa. 75, 29 L.R.A. 55, 50 Am. St. Rep. 747, 32 Atl. 632.
- ³ Humphreys v. National Ben. Asso. 139 Pa. 264, 11 L.R.A. 564, 20 Atl. 1047.
- ⁴ Ward v. Preferred Acci. Ins. Co. 80 Vt. 321, 67 Atl. 821.

AMOUNT.

1. Voluminous books, records, papers, etc.
2. Alternative computations by experts.

See also QUANTITY.

1. Voluminous books, records, papers, etc.

Whenever books, records, papers, accounts, and the like, are so voluminous that the examination of them would consume much time, and it would be difficult for the jury to understand them or make the necessary computations, the court may, in its discretion, permit a qualified witness, who has examined them with reference to the ascertainment of the correct amount or balance, to testify to the result of his examination;¹ or it may receive in evidence statements or schedules verified by his testimony showing the details and result of his computation.²

¹ Chicago, St. L. & P. R. Co. v. Wolcott, 141 Ind. 267, 50 Am. St. Rep. 320, 39 N. E. 451; McCann v. Gould, 71 Conn. 629, 42 Atl. 1002; State v. Cadwell, 79 Iowa, 432, 44 N. W. 700 (amount of assets to determine financial condition of bank as to solvency); Wolford v. Farnham, 47 Minn. 95, 49 N. W. 528; State v. Findley, 101 Mo. 217, 14 S. W. 185, 8 Am. Crim. Rep. 191; Bartley v. State, 53 Neb. 310, 73 N. W. 744, and cases cited.

² *Culver v. Marks*, 122 Ind. 554, 7 L.R.A. 489, 17 Am. St. Rep. 377, 23 N. E. 1086; *San Pedro Lumber Co. v. Reynolds*, 121 Cal. 74, 53 Pac. 410.

But the extended and complicated character of the books, papers, accounts, etc., must be shown by the pleadings, according to *Equitable Acci. Ins. Co. v. Stout*, 135 Ind. 444, 33 N. E. 623.

2. Alternative computations by experts.

To assist the jury or court in calculating the amount according to several theories of liability or hypotheses, it is proper to receive statements or plans of adjustment made by experts according to each of the several hypotheses or theories, not as evidence of the facts stated, but leaving the jury free to accept either or reject all.¹

¹ *Home Ins. Co. v. Baltimore Warehouse Co.* 93 U. S. 527, 547, 23 L. ed. 868, 870.

Summary. A witness should not be permitted to state the total amount of various items of set-offs, but the items should be separately proved. *Holmes v. McKennan*, 120 Ill. App. 320.

APPLICATION OF PAYMENTS.

1. Burden of proof to show direction; presumption.
2. Oral evidence.
3. Direct testimony.
4. Direct and circumstantial evidence.

See also PAYMENT.

1. Burden of proof to show direction; presumption.

One owing more than one debt to the same person, has the onus of proving that he directed the application of a payment.¹

A payment made without direction as to application is presumed to be intended to apply on the earlier of several debts.²

¹ *Thatcher & Co. v. Massey*, 26 S. C. 155, 1 S. E. 465; *White v. White*, 19 Ky. L. Rep. 1590, 44 S. W. 83.

² *Kloepfer v. Maher*, 84 N. Y. Supp. 138.

2. Oral evidence.

Oral evidence is competent to show that it was agreed that a payment should be applied, not in the order in which the items stood in the account, but in a different manner.¹

But evidence of an oral agreement as to the order of applying payments on a note after maturity, where the note itself is silent in relation thereto, is within the rule prohibiting oral evidence to vary or contradict a writing.²

¹ *Mack v. Adler*, 22 Fed. 570; *Christman v. Pearson*, 100 Iowa, 634, 69 N. W. 1055.

² *Anderson v. Perkins*, 10 Mont. 154, 25 Pac. 92.

3. Direct testimony.

The testimony of one of the parties to the transaction, that they looked over their accounts and agreed on a specified balance, and that they then agreed to apply it, or previously had agreed it should be applied, to a cross-demand, is testimony to an act done, constituting payment, and binds a subsequent assignee. It is not a mere admission or declaration which cannot bind an assignee.¹

¹ *Holcomb v. Campbell*, 42 Hun, 398. See also *Abbott*, Trial Ev. (3d ed.) pp. 710, 2192.

4. Direct and circumstantial evidence.

The application of payments may be shown by direct evidence, or it may be implied from circumstances tending to show it.¹

¹ *Curtis v. Nash*, 88 Me. 476, 34 Atl. 273.

APPRAISAL.

Competency.

An official appraisal is not inadmissible merely because not made in the presence of the jury. It is in the nature of a public record; and, the appraiser being called and testifying to its correctness, it may be received in evidence.¹

¹ *Buckley v. United States*, 4 How. 251, 11 L. ed. 961; *Miller v. Long Island R. Co.* 9 Hun, 194, reversed in 71 N. Y. 380, on other grounds. If there were two appraisers, both must be called. *Com. v. Eastman*, 1 Cush. 189, 48 Am. Dec. 596.

APPROVAL.

1. By judge.
2. By corporation.

1. By judge.

Approval of an instrument when required by statute, from a judge, is a judicial act;¹ but it may be proved by the certificate of the clerk.²

But when the statute requires examination by the judge, and his approval indorsed on the instrument, oral evidence is not admissible to show an approval prior to the approval formally entered on the record.³

If the law does not require approval to be indorsed, it may be proved by a recital in subsequent proceedings,⁴ or by oral evidence⁵.

¹ *O'Reilly v. Edrington*, 96 U. S. 724, 24 L. ed. 659; 1 Abbott, New Pr. & Forms, 470, 478.

² *United States v. Evans*, 2 Fed. 147, 1 Crim. L. Mag. 600, 604, 12 Chicago Legal News, 271. s. p., *Schermerhorn v. Talman*, 14 N. Y. 93 (oaths).

³ *Holden v. Curry*, 85 Wis. 504, 55 N. W. 965.

⁴ *Anderson v. Kanawha Coal Co.* 12 W. Va. 526.

⁵ *Myers v. McGavock*, 39 Neb. 843, 42 Am. St. Rep. 627, 58 N. W. 522.

2. By corporation.

Approval by a person or corporation of an instrument, although expressly required by law, may be presumed notwithstanding there was no record of such approval.¹

¹ *Bank of United States v. Dandridge*, 12 Wheat: 64, 6 L. ed. 552 (approval of cashier's bond by directors in action by the corporation on the bond). See also *Jennings v. Burnham*, 56 N. J. L. 289, 28 Atl. 1048, holding that a survey of proprietary lands which have stood upon the public records without question for nearly two hundred years will be conclusively presumed to have been approved by the proprietors.

ARBITRATION AND AWARD.

1. Presumptions and burden of proof.
2. Parol evidence generally.
3. Testimony of arbitrators.
4. Sufficiency of evidence.

1. Presumptions and burden of proof.

Every reasonable presumption will be indulged in favor of an award regular on its face,¹ and the burden of proof rests upon the party attacking an award.²

¹ *Haywood v. Harmon*, 17 Ill. 477; *Tyblewski v. Svea Fire Assur. Co.* 220 Ill. 436, 77 N. E. 196; *Shear v. Mosher*, 8 Ill. App. 119; *Witz v. Tregallas*, 82 Md. 351, 33 Atl. 718; *Leonard v. Root*, 15 Gray, 553; *Brush v. Fisher*, 70 Mich. 469, 14 Am. St. Rep. 510, 38 N. W. 446; *Mosness v. German-American Ins. Co.* 50 Minn. 341, 52 N. W. 932; *Upshaw v. Hargrove*, 6 Smedes & M. 286; *Hinkle v. Harris*, 34 Mo. App. 223; *Locke v. Filley*, 14 Hun, 139; *Nichols v. Rensselaer County Mut. Ins. Co.* 22 Wend. 125; *Liverpool & L. & G. Ins. Co. v. Goehring*, 99 Pa. 13; *New York Lumber & W. Working Co. v. Schneider*, 119 N. Y. 475, 24 N. E. 4; *Young v. Kinney*, 48 Vt. 22; *Burchell v. Marsh*, 17 How. 344, 15 L. ed. 96; *Reedy v. Scott*, 23 Wall. 352, 23 L. ed. 109.

² *Hardin v. Almand*, 64 Ga. 582; *Heritage v. State*, 43 Ind. App. 595, 88 N. E. 114; *Gorham v. Millard*, 50 Iowa, 554; *New Orleans Elevator Co. v. New Orleans*, 47 La. Ann. 1351, 17 So. 860; *Witz v. Tregallas*, 82 Md. 351, 33 Atl. 718; *Roberts v. Old Colony R. Co.* 123 Mass. 552; *Brush v. Fisher*, 70 Mich. 469, 14 Am. St. Rep. 510, 38 N. W. 446; *Birkbeck v. Burrows*, 2 Hall, 63; *Hardeman v. Burge*, 10 Yerg. 202; *Dougherty v. McWhorter*, 7 Yerg. 239; *Ridgell Bros. v. Dupree*, — Tex. Civ. App. —, 85 S. W. 1166; *Leavitt v. Comer*, 5 Cush. 129.

2. Parol evidence generally.

The general rule is that parol evidence is not admissible to vary or contradict an award.¹ But it may be shown by parol what took place at the hearing and that the arbitrators exceeded their powers, or that the award was not final.² And parol evidence is admissible to show what matters were submitted to the arbitrators and embraced in the award,³ and also to show the consideration by the arbitrators of matters which were not submitted,⁴ or a failure to consider matters which were submitted.⁵

¹ *Evans v. Clapp*, 123 Mass. 165, 25 Am. Rep. 52; *Hinkle v. Harris*, 34 Mo. App. 223; *Furber v. Chamberlain*, 29 N. H. 405; *May v. Miller*, 59 Vt. 577, 7 Atl. 818; *Doke v. James*, 4 N. Y. 568; *Barlow v. Todd*, 2 Johns. 367; *Scott v. Green*, 89 N. C. 278.

But see *Bridgeport v. Eisenman*, 47 Conn. 34, holding parol evidence admissible to impeach an award and show irregularity in the consultation and proceedings of the arbitrators.

² *Re Williams*, 4 Denio, 194.

³ *Bennett v. Pierce*, 28 Conn. 315; *Shackelford v. Burket*, 2 A. K. Marsh. 435, 12 Am. Dec. 422; *Carter v. Shibbles*, 74 Me. 273; *Buck v. Spofford*, 35 Me. 526; *Leonard v. Root*, 15 Gray, 553; *Morss v. Osborn*, 64 Barb. 543; *Osborne v. Colvert*, 86 N. C. 170, s. c. prior appeal 83 N. C. 365; *Converse v. Colton*, 49 Pa. 346; *Evans v. Clapp*, 123 Mass. 165, 25 Am. Rep. 52; *Blackwell v. Goss*, 116 Mass. 394; *Tucker v. Gordon*, 7 How. (Miss.) 306; *Torrence v. Graham*, 18 N. C. (1 Dev. & B. L.) 284; *Webster v. Lee*, 5 Mass. 334.

But it has been held that, where the submission was of all matters in controversy, parol evidence is not admissible to limit the extent of the submission or to show that it was to be confined to matters actually in dispute or controversy. *Patrick v. Batten*, 123 Mich. 203, 81 N. W. 1081; *De Long v. Stanton*, 9 Johns. 38; *Shelling v. Farmer*, 1 Strange, 646.

⁴Hubbell v. Bissell, 2 Allen, 196; Hinkle v. Harris, 34 Mo. App. 223; Thompson v. Blanchard, 2 Iowa, 44; Hall v. Vanier, 6 Neb. 85; Dodds v. Hakes, 114 N. Y. 260, 21 N. E. 398; Briggs v. Smith, 20 Barb. 409; Butler v. New York, 7 Hill, 329.

⁵Thompson v. Blanchard, 2 Iowa, 44.

3. Testimony of arbitrators.

Testimony of the arbitrators is generally admissible in any case where parol evidence can be received;¹ as, to show what matters were considered and decided by them,² or to show that they acted in excess of their jurisdiction,³ or that there was a mistake in the award,⁴ or that the award had been returned to the clerk within the time stipulated in the arbitration agreement.⁵ So, an arbitrator may depose to facts which took place during the arbitration and which tend to show that the award is void for legal cause.⁶ And testimony of an arbitrator showing that no final award was made because he, being intrusted with the award, discovered a mistake in it soon after he signed it, and thereupon refused to deliver it, is admissible.⁷ But an arbitrator cannot testify to impeach his award, as by showing that he did not concur in it or that he was guilty of misconduct.⁸ Nor can he testify to the misconduct of a party if such evidence at the same time involves the misconduct of the arbitrator.⁹ And arbitrators cannot be summoned by the court to explain what on the face of the award is vague and uncertain, nor can the court receive evidence of the referees giving a construction of their report and stating what is meant to be presented.¹⁰ And the ground of the award cannot be proved by the testimony or declarations of the arbitrators.¹¹ But an arbitrator may testify as to what took place before him and as to the conduct of a party tending to influence his decision.¹² And an arbitrator who has refused to join in an award may testify to acts of partiality or misconduct on the part of other arbitrators.¹³

¹Spurck v. Crook, 19 Ill. 415; Thompson v. Blanchard, 2 Iowa, 44; Evans v. Clapp, 123 Mass. 165, 25 Am. Rep. 52; Huntsman v. Nichols, 116 Mass. 521; Strong v. Strong, 9 Cush. 560; Hodges v. Hodges, 5 Met. 205; Walker v. Walker, 61 N. C. (Phill. L.) 545.

²Buck v. Spofford, 35 Me. 526; Evans v. Clapp, 123 Mass. 165, 25 Am. Rep. 52; Hale v. Huse, 10 Gray, 99; Zeigler v. Zeigler, 2 Serg. & R.

286; *New York v. Butler*, 1 Barb. 325, 4 How. Pr. 446; *Burbeck v. Burrows*, 2 Hall, 63; *Osborne v. Calvert*, 83 N. C. 365; *Converse v. Colton*, 49 Pa. 346; *Hall v. Vanier*, 6 Neb. 85; *Abel v. Fitch*, 20 Conn. 90; *Stevens v. Gray*, 2 Harr. (Del.) 347; *Jensen v. Deep Creek Farm & Live Stock Co.* 27 Utah, 66, 74 Pac. 427.

3 *Dodds v. Hakes*, 114 N. Y. 260, 21 N. E. 398.

4 *Thompson v. Blanchard*, 2 Iowa, 44.

5 *Young v. Dugan*, 1 G. Greene, 152.

6 *Strong v. Strong*, 9 Cush. 560.

7 *Shulte v. Hennessy*, 40 Iowa, 352.

8 *Overby v. Thrasher*, 47 Ga. 10; *Tucker v. Page*, 69 Ill. 179; *Bigelow v. Maynard*, 4 Cush. 317; *Strong v. Strong*, 9 Cush. 560; *Ellison v. Weathers*, 78 Mo. 115; *Schmidt v. Glade*, 126 Ill. 485, 18 N. E. 762; *Doke v. James*, 4 N. Y. 568; *New York v. Butler*, 1 Barb. 325, 4 How. Pr. 446; *Stone v. Atwood*, 28 Ill. 30; *Buccleuch v. Metropolitan Bd. of Works*, L. R. 3 Exch. 306, L. R. 5 H. L. 418, 41 L. J. Exch. N. S. 137, 27 L. T. N. S. 1, 3 Eng. Rul. Cas. 455.

9 *Elmaker v. Buckley*, 16 Serg. & R. 72.

10 *Aldrich v. Jessiman*, 8 N. H. 516; *Mulligan v. Perry*, 64 Ga. 567.

11 *Withington v. Warren*, 10 Met. 431.

12 *Spurck v. Crook*, 19 Ill. 415.

13 *Levine v. Lancashire Ins. Co.* 66 Minn. 138, 68 N. W. 855.

4. Sufficiency of evidence.

To justify setting aside an award, evidence of the ground of impeachment must be clear and strong.¹

¹ *Bridgeport v. Eisenman*, 47 Conn. 34; *Overby v. Thrasher*, 47 Ga. 10; *Claycomb v. Butler*, 36 Ill. 100; *Beam v. Macomber*, 33 Mich. 127; *Goddard v. King*, 40 Minn. 164, 41 N. W. 659; *Mitchell v. Curran*, 1 Mo. App. 453; *Atkinson v. Townley*, 1 N. J. L. 388; *Wood v. Auburn & R. R. Co.* 8 N. Y. 160; *Bond v. Olden*, 4 Yeates, 243; *Young v. Kinney*, 48 Vt. 22.

ASSENT.

I. ASSENT WITHOUT SIGNING.

1. Instrument delivered to be retained as evidence.
 - a. Presumption generally.
 - b. Conclusiveness of presumption; rebuttal.
2. Instrument delivered, but to be surrendered again.
3. Direct testimony.

II. NONASSENT NOTWITHSTANDING SIGNING.

4. Presumptions.
5. Neglect to read.
6. Direct testimony.
7. Conditional delivery.

(The few leading cases here mentioned are chosen as giving in short compass a convenient clue to numerous authorities sustaining the discriminations indicated.)

Assent or acceptance by grantee of deed of trust for creditors, see note in 24 L.R.A. 369.

I. ASSENT WITHOUT SIGNING.

1. Instrument delivered to be retained as evidence.

a. *Presumption generally.*—It is a presumption of law that a party who received an instrument in the ordinary course of business, to be retained as the evidence of his right in respect to the transaction in hand, was acquainted with, and assented to, its contents.¹

Otherwise, where a previous agreement in different terms had been made, on the faith of which the transaction was had;² especially where the subsequent delivery of the instrument was to one not authorized to modify the agreement.³ Or where the act or omission of the party delivering it prevented the party receiving it from objecting.⁴ Or where delivery was to a casual messenger not authorized to make a contract, the course of business between the parties not requiring any writing.⁵ Or where the instrument as to which it is sought to invoke the rule

formed no part of the original transaction made, but was delivered subsequent thereto.⁶

¹ As, for instance, an express receipt with conditions. *Belger v. Dinsmore*, 51 N. Y. 166, 10 Am. Rep. 575.

Or a receipt or bill of lading for freight to be shipped, with conditions. *Grace v. Adams*, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131; *Cox v. Central Vermont R. Co.* 170 Mass. 129, 49 N. E. 97, and cases cited; *Schaller v. Chicago & N. W. R. Co.* 97 Wis. 31, 71 N. W. 1042, and cases cited. *Contra: Chicago & N. W. R. Co. v. Simon*, 160 Ill. 648, 43 N. E. 596.

Or a receipt given for passage money. *Steers v. Liverpool, N. Y. & P. S. S. Co.* 57 N. Y. 1, 15 Am. Rep. 453, with note.

So held, also, of a statement of an account between an employee and his employer, showing the exact amount of his compensation for a stated period of time. *Goldsmith v. Latz*, 96 Va. 680, 32 S. E. 483.

And of an invoice and bill of lading with conditions of the sale. *Dickerson v. Matheson*, 6 C. C. A. 466, 14 U. S. App. 569, 57 Fed. 524.

This presumption above stated applies to married women; and is conclusive in the absence of proof to the contrary or of fraud or undue influence. *Smyth v. Munroe*, 84 N. Y. 354, Affirming 19 Hun, 550.

² *Bostwick v. Baltimore & O. R. Co.* 45 N. Y. 712; *Mobile & M. R. Co. v. Jurey*, 111 U. S. 584, 28 L. ed. 527, 4 Sup. Ct. Rep. 566.

³ *Fillebrown v. Grand Trunk R. Co.* 55 Me. 462, 92 Am. Dec. 606 (carrier's receipt).

⁴ *Palmer v. Hartford F. Ins. Co.* 54 Conn. 488, 9 Atl. 248 (insurance policy on renewal, delivered to the party himself without the original to compare it with).

So held, also, where the paper as delivered was not fully legible; as, for instance, by reason of a stamp covering part of it. *Perry v. Thompson*, 98 Mass. 249.

And where the delivery of the bill of lading was after the goods had been already shipped, so that the party shipping and receiving the bill of lading could not have reclaimed the goods had he objected to the contents of the bill. *Guillaume v. General Transp. Co.* 100 N. Y. 491, 3 N. E. 489, and cases cited. (Here this rule was applied where the shipper had been informed that the ship would sail on the day before the bill of lading was received by him, and had no information to the contrary, although it did not sail until later.)

⁵ *Buckland v. Adams Exp. Co.* 97 Mass. 124. Compare *Squire v. New York C. R. Co.* 98 Mass. 239, 93 Am. Dec. 162 (holding that agent in charge of animals in transportation represented the absent owners, and could bind them).

⁶ *Fisher v. Metropolitan L. Ins. Co.* 162 Mass. 236, 38 N. E. 503 (small receipt book containing rules, which was delivered to insured subsequent to issuance of policy).

And the acceptance and retention without objection, by the payee of a judgment note, of a declaration signed by the maker to the effect that the note was given as collateral, are not sufficient to raise an implication of his assent thereto as the basis of relief from an execution on a judgment on the note, where it is denied that such declaration was delivered with the note or that it expressed any terms ever considered or suggested, and there is no evidence to overcome such denial. *Gillespie v. Webster*, 180 Pa. 405, 36 Atl. 928.

b. Conclusiveness of presumption; rebuttal.—A presumption that a party receiving such an instrument assented to its terms cannot be rebutted by mere proof that he did not read it;¹ but, in the absence of fraud, it must be shown that the circumstances were such that he would not have been bound to reject the instrument if he had read it.²

¹ Mere ignorance of its contents, arising from failure to read it, or make some reasonable effort to obtain information, is, in the absence of any evidence of fraud, or the use of any means by the party delivering it to deter the party receiving it from fully understanding it, insufficient to overcome the presumption. *Schaller v. Chicago & N. W. R. Co.* 97 Wis. 31, 71 N. W. 1042. Compare cases in note 1, section preceding this.

² *Germania F. Ins. Co. v. Memphis & C. R. Co.* 72 N. Y. 90, 94, 28 Am. Rep. 113, Affirming 7 Hun, 233.

2. Instrument delivered, but to be surrendered again.

The receipt of an instrument for a temporary purpose, which is to be surrendered, such as a passage ticket,¹ or a letter of instructions for a third person, not the agent of the party receiving it,² does not raise a presumption that he read it, and assented to its terms; but is a circumstance to be considered by the jury on that question.³

¹ *Baltimore & O. R. Co. v. Harris*, 12 Wall. 65, 85, 20 L. ed. 354, 359, and cases cited (holding that the burden of showing that a passenger had knowledge of a memorandum on the face of his ticket, limiting the liability of the company, and assented to it, is on the company). S. P., *Brown v. Eastern R. Co.* 11 Cush. 97 (memorandum on back of ticket), Approved in *Rackett v. Stickney*, 27 Fed. 878; *Malone v. Boston & W. R. Corp.* 12 Gray, 388, 74 Am. Dec. 598 (similar memorandum on back, and the words "Look on the back" printed on the face).

² *Rackett v. Stickney*, 27 Fed. 878.

³ *Brown v. Eastern R. Co.* 11 Cush. 97.

3. Direct testimony.

When the giving of assent is directly in issue it is not competent for a party to testify in his own behalf that he never assented, this being the question for the jury.¹

¹ *Stanton v. Crispell*, 9 Hun, 502 (question was whether he ever assented to an alleged settlement). Compare *CONTRACT*.

II. NONASSENT NOTWITHSTANDING SIGNING.

4. Presumptions.

The presumption is that one competent to do business, who signed an instrument, knew and assented to its contents at the time of signing.¹

¹ *Glover v. Silverman*, 6 Misc. 347, 26 N. Y. Supp. 779. See also *Abbott*, *Trial Ev.* (3d ed.) pp. 349, 2135.

5. Neglect to read.

The effect of signing, by one who was able to read and understand, cannot be defeated by showing that he neglected to do so, relying on the reading by another.¹

¹ *Chapman v. Rose*, 56 N. Y. 137, 15 Am. Rep. 401. Confirmed in other states, 22 Cent. L. J. 149.

And even in the case of an illiterate person, the burden is upon him to show that the instrument was falsely read, or represented to be otherwise than as written. *Knarr v. Elgren*, 7 Sadler (Pa.) 172, 19 W. N. C. 531, 9 Atl. 875; *Green v. Maloney*, 7 Houst. (Del.) 22, 30 Atl. 672. See also *Abbott*, *Trial Ev.* (3d ed.) p. 1128. But compare *Wienecke v. Arbin*, 88 Md. 182, 44 L.R.A. 142, 40 Atl. 709, holding that a presumption arose against the instrument where the signer could not read, and the attesting witness gave unsatisfactory testimony, and did not show that the instrument was read to the signer.

A shipper should read the contract he is required to sign, otherwise he may be presumed to have assented to the limitations imposed by it. *Houston & T. C. R. Co. v. Smith*, 44 Tex. Civ. App. 299, 97 S. W. 836.

Not reading contract. One who has the ability and the opportunity to

read a contract but neglects to do so before signing is estopped by his own negligence from afterwards claiming that it does not conform to the previous oral agreement of the parties. *Reed v. Coughran*, 21 S. D. 257, 111 N. W. 559. See also *Fulton v. Messenger*, 61 W. Va. 477, 56 S. E. 830, where it was held that a person is bound to know the contents of a paper he signs, and if he neglects to acquaint himself with it, he must abide the consequences of his neglect unless the signature was obtained by fraud.

Failure to read contract as affecting right to assert fraud in respect thereto is discussed in notes in 6 L.R.A.(N.S.) 463, and L.R.A.1917F, 637.

6. Direct testimony.

On the question whether a person was induced to sign an instrument by misrepresentations, and without knowledge of its contents, he may be asked whether at the time he signed he knew in any way that he was doing what the instrument purported to show that he was doing; but cannot state his understanding as to the purpose of the instrument.¹

¹*National Syrup Co. v. Carlson*, 155 Ill. 210, 40 N. E. 492 (release for damages for personal injuries).

7. Conditional delivery.

The effect of signing an obligation cannot be defeated by showing that the signer signed only on condition that another should also sign, who has not done so, if there is nothing on the face of the paper indicating that another was to sign, and it is not shown that the obligee was informed of the condition, nor that there was anything which should have put him on inquiry.¹

¹*Dair v. United States*, 16 Wall. 1, 21 L. ed. 491, approved and followed in *Harris v. Regester*, 70 Md. 109, 16 Atl. 386; *Bangs v. Bangs*, 41 Hun, 41, and cases cited. *Contra*: *People v. Bostwick*, 32 N. Y. 445, which, however, is opposed in *Quick v. Milligan*, 108 Ind. 419, 58 Am. Rep. 49, 9 N. E. 392, 6 West. Rep. 883, with note, and questioned in *Russell v. Freer*, 56 N. Y. 67.

Otherwise if the instrument mentioned as an obligor the one not signing it. *Fletcher v. Austin*, 11 Vt. 447, 34 Am. Dec. 698.

For an exhaustive discussion of this question, see note to *Benton County Sav. Bank v. Boddicker*, 105 Iowa, 548, 45 L.R.A. 321.

ASSIGNMENT.

1. Necessity of proof.
2. Oral evidence.
 - a. In general.
 - b. Notwithstanding written evidence exists.
3. Form.
4. Proof by entries in books of account.
5. Proof by proof of substitution of party.
6. Description.
7. Principal and collateral.
8. Qualifying the schedules.
9. Reservation.
10. Impeaching.
 - a. By motive or purpose.
 - b. By evidence of abandonment.
11. Defeasance.

Presumption of assent by grantee of deed of trust for creditors and rebuttal thereof, see note in 24 L.R.A. 369.

See also **ASSENT; CONTRACT; OWNERSHIP; TITLE.**

1. Necessity of proof.

Assignment of the cause of action must be proved if alleged,¹ but not necessarily proved to have been made in the manner alleged.²

¹ *Garrigue v. Loescher*, 3 Bosw. 578; *Ford v. Bushard*, 116 Cal. 273, 48 Pac. 119; *Baltimore & O. R. Co. v. Vanderwerker*, 44 W. Va. 229, 28 S. E. 829.

Otherwise as to the maker of a promissory note who promises to pay it knowing of an assignment, or, after suit by the assignee has been commenced, admits the assignment. *Derry v. Holman*, 27 S. C. 621, 2 S. E. 841.

² *Bowman v. Keleman*, 65 N. Y. 598.

2. Oral evidence.

a. In general.—An assignment of a debt resting only in account may be made by words, without any writing.¹

¹ *Risley v. Phenix Bank*, 83 N. Y. 318, 333, and cases cited, with note in 38 Am. Rep. 421. *Contra*: *White v. Kilgore*, 77 Me. 571, 1 Atl. 739

contending, on a review of authorities, that the doctrines of equity require a delivery). See also *Gregg v. Mallett*, 111 N. C. 74, 15 S. E. 936 (holding that possession of an open account in favor of another is no evidence of the holder's ownership by reason of an assignment to him).

So held of the right secured by an entry of public lands, unless the parties put their transaction in writing; and a receipt for part of the purchase price is not sufficient to exclude oral evidence. *Bryan v. Hodges*, 107 N. C. 492, 12 S. E. 430.

Parol evidence is competent to show an assignment of a cause of action on an open account by a former plaintiff, or it may be proved by a written assignment if there is one, in which case there must be proof of the execution of the assignment. *Standifer v. Bond Hardware Co.*—Tex. Civ. App.—, 94 S. W. 144.

The owner of a chose in action may, for a valuable consideration transfer a good title thereto by a parol assignment. *Hanes v. Sackett*, 56 App. Div. 610, 67 N. Y. Supp. 843.

As to requisite proof of assignment generally, see *Abbott*, Trial Ev. (3d ed.) p. 7.

b. Notwithstanding written evidence exists.—When the fact of an assignment is only collaterally involved, oral evidence is competent without producing or accounting for the writing, unless contents of the writing are to be proved.¹

¹ *Elliott v. Dyche*, 80 Ala. 376.

In which event the writing must be produced or accounted for. *Voorhies v. Hennessy*, 7 Wash. 243, 34 Pac. 931.

But even then secondary evidence is admissible when the party offering it proves that his failure to produce the writing is not caused by any lack of diligence on his part. *Tibbals v. Ifland*, 10 Wash. 451, 39 Pac. 102.

3. Form.

No formal or express words are necessary to prove an assignment, especially where there is a delivery.¹

¹ *First Nat. Bank v. Clark*, 42 Hun, 16, 19.

But to prove an assignment by a contractor to do public work of a claim for money to become due him under the contract, a written instrument, or delivery of the contract, or sworn evidence of the claim, is essential; and testimony of the contractor that he has made an assignment is insufficient. *Paige v. New York*, 33 N. Y. S. R. 844, 11 N. Y. Supp. 496.

4. Proof by entries in books of account.

Assignment of a fund or credit may be proved by entries in account books of the fund holder, coupled with other evidence showing the request or assent of the other party.¹

¹ Coates v. First Nat. Bank, 91 N. Y. 20, 30.

5. Proof by proof of substitution of party.

The fact that the plaintiff has been substituted as such, proved by the order of substitution and papers on which it was made, is sufficient evidence of the assignment of the cause of action to him.¹

¹ Ross-Lewin v. Johnson, 32 Hun, 408, 410, Citing Smith v. Zalinski, 94 N. Y. 519, affirming 26 Hun, 225. (In this case after the substitution plaintiff filed no amended complaint alleging the assignment, but on the motion for nonsuit objection was made that plaintiff failed to prove his case in that the evidence of assignment was insufficient; but it was held as above stated. But in Ford v. Bushard, 116 Cal. 273, 48 Pac. 119, the assignee, on substitution as plaintiff, after his assignor's death, filed an amended complaint alleging the assignment, and was held to have the burden of proving the assignment the same as any other material fact alleged).

6. Description.

Oral evidence is competent for the purpose of applying the description, even so far as to require the rejection of erroneous parts, if what is left is sufficient.¹

¹ Mansfield v. New York C. & H. R. R. Co. 102 N. Y. 205, 6 N. E. 386, and cases cited (holding that, for this purpose, a judgment recovered after the assignment was competent).

7. Principal and collateral.

Assignment of principal obligation implies assignment of collateral incidents;¹ but assignment of collateral does not imply assignment of the principal obligation,² unless there be delivery of the principal,³ or some other evidence of intent to pass it.

¹ Jackson ex dem. Barclay v. Blodget, 5 Cow. 202; Cady v. Sheldon, 38 Barb. 103.

² Merritt v. Bartholick, 36 N. Y. 44.

³ Yates County Nat. Bank v. Blake, 43 Hun, 162.

8. Qualifying the schedules.

Oral evidence is competent to show other assets as passing besides those mentioned in the inventory annexed to a general bill of sale or assignment;¹ but not to show that demands included in the general language of the instrument were not intended to pass.²

¹ *Cram v. Union Bank*, 1 Abb. App. Dec. 461. Compare *Mims v. Armstrong*, 31 Md. 87, 1 Am. Rep. 22.

² *Albright v. Voorhies*, 36 Hun, 437.

9. Reservation.

A remaining or contingent interest in the assignor is not competent to impeach an assignment of the cause of action, but is competent for the purpose of showing bias in the assignor if he is called as a witness.¹

¹ *Durgin v. Ireland*, 14 N. Y. 322; *Moore v. Viele*, 4 Wend. 420.

But the party offering the proof must make it known to the court that it is offered for that purpose. *Enright v. Franklin Pub. Co.* 24 Misc. 180, 52 N. Y. Supp. 704.

10. Impeaching.

a. By motive or purpose.—Motive is not relevant;¹ but illegality of object may be.²

¹ *McBride v. Farmers' Bank*, 26 N. Y. 450, affirming 25 Barb. 657; *Peterson v. Chemical Bank*, 32 N. Y. 21, 88 Am. Dec. 298; *Gardner v. Barden*, 34 N. Y. 433; *Westervelt v. Allcock*, 3 E. D. Smith, 243; *Osborne v. Moss*, 7 Johns. 161, 5 Am. Dec. 252; *Waterbury v. Westervelt*, 9 N. Y. 598; 1 Abbott, New Pr. & Forms, 515 (citing cases of assignment to affect jurisdiction).

² *Mann v. Fairchild*, 3 Abb. App. Dec. 152; *Moses v. McDivitt*, 2 Abb. N. C. 47.

b. By evidence of abandonment.—A written assignment may be proved ineffectual by evidence that the consideration was never paid, and that by common consent of both parties the instrument never went into operation, and that by their practi-

cal construction the apparent assignor continued to be the owner.¹

¹ Philadelphia, W. & B. R. Co. v. Trimble, 10 Wall. 367-383, 19 L. ed. 948-953.

11. Defeasance.

Oral evidence to show that a written assignment was merely as collateral security is not competent if the instrument contains special clauses stating a contrary intent.¹

¹ Marsh v. McNair, 99 N. Y. 174, 1 N. E. 660, and cases cited.

AUTOPSY.

1. One of several physicians.
2. Irregularity.

1. One of several physicians.

One of several physicians who together conducted an autopsy may testify to a fact observed by another.¹

¹ People v. Willson, 109 N. Y. 345, 16 N. E. 540.

2. Irregularity.

A qualified expert may testify as to the results of an autopsy made by him, notwithstanding his failure to follow the directions of the statute.¹

¹ Com. v. Taylor, 132 Mass. 261.

A physician who performed an autopsy on the body of a man alleged to have been murdered, was held competent to testify that the injury on his head could not have been produced by a single blow. People v. Schmidt, 168 N. Y. 568, 61 N. E. 907.

BAD CASE.

Tampering with evidence and jurors.

Proof is admissible of a party's attempt to suborn false testimony,¹ or to suppress material evidence,² or to secure, by bribery of the officers calling them, jurors biased in his favor,³ since such acts are in the nature of an admission that he has a bad case.

¹ *McHugh v. McHugh*, 186 Pa. 197, 41 L.R.A. 805, 65 Am. St. Rep. 849, 40 Atl. 410. See also *Patterson*, *Railway Acci. Law*, 423. For the same principle, see *Trial Brief for Civil Issues*, (4th ed.) *Tampering*, p. 512; *Criminal Trial Brief*.

² As by getting control of the prosecuting witness. *People v. Flaherty*, 27 App. Div. 535, 50 N. Y. Supp. 574.

Or by preventing the attendance of the witness. *Carpenter v. Willey*, 65 Vt. 168, 26 Atl. 488.

For cases as to the presumption against the destroyer (spoliator) of evidence, see note to *Hays v. Peterson*, 34 L.R.A. 581.

³ *Kidd v. Ward*, 91 Iowa, 371, 59 N. W. 279.

BELIEF.

1. Belief as characterizing one's own act.
2. Cross-examining.
3. Asking for impression.
4. Belief at the time of the transaction.
5. Reason for belief.
6. Qualifying words as to belief.

As to belief in impending death of one making dying declaration, see DYING DECLARATIONS.

See also GOOD FAITH; INDUCEMENT; INTENT; MOTIVE.

1. Belief as characterizing one's own act.

Where the belief under which the witness did an act is material, his testimony to his belief is competent.¹

¹ *McKown v. Hunter*, 30 N. Y. 625 (belief in making charge now the sub-

ject of an action for malicious prosecution); *Lake Erie & W. R. Co. v. Matthews*, 13 Ind. App. 355, 41 N. E. 842 (belief of one that a freight train carried passengers, and the facts justifying that belief, as a reason for his entering it); *Baldrige & C. Bridge Co. v. Cartrett*, 75 Tex. 628, 13 S. W. 8 (belief of one crossing a bridge in the safety of the railings, and in the sufficiency of their strength to stop his team, against which they backed, and which gave way, where he is charged with contributory negligence in not jumping from the wagon when his team began to back); *Bayliss v. Cockcroft*, 81 N. Y. 363, and cases cited, affirming 8 N. Y. Week. Dig. 153 (belief that certificate to business character of paper was true, as bearing on intent to evade usury law. But the court says the reception of such testimony is not encouraged). *s. p.*, *Hamilton v. People*, 57 Barb. 625; *Goodman v. Stroheim*, 4 Jones & S. 216; *Farnam v. Feeley*, 56 N. Y. 451.

A person may testify to his belief that he had a right to ride on a railroad train, where the issue involved the question of whether he was a passenger. *Fitzgibbon v. Chicago & N. W. R. Co.* 119 Iowa, 261, 93 N. W. 276.

2. Cross-examining.

One who has testified as to his own belief at a given time may be cross-examined as to subsequent declarations of his state of mind on the subject.¹

¹ *Livingston v. Keech*, 2 Jones & S. 547, 553 (holding thus of a party who has testified on his own behalf). *s. p.*, as to hostile witness, *Com. v. Moinehan*, 140 Mass. 463, 5 N. E. 259.

3. Asking for impression.

A hostile witness who will not answer positively as to a fact resting in the observation of minutiae may be asked if he "thinks" the fact was so.¹

¹ *Com. v. Moinehan*, 140 Mass. 463, 5 N. E. 259. (Witness testified he did not know whether what he drank was lager beer or not; on cross-examination he said it was weak beer and had an intoxicating effect. Held, no error to allow, on redirect examination the question if he did not think it was lager beer; and whether he had not elsewhere testified that he thought it was.

Holmes, J., said: "The application of a class name to an object perceived by the senses is generally the expression of an inference, and testimony would be impossible if such inferences could not be stated. If the witness had said that it was lager beer, his testimony would

only have meant that he confidently thought, or inferred from the qualities directly perceived by him, that the substance had the other qualities denoted by the name."

Compare, however, *People v. Williams*, 29 Hun, 520, 524, holding it error to allow a witness who could not swear who it was he saw, to be asked what was his impression, and who he thought it was. Judgment therefore reversed.

4. Belief at the time of the transaction.

In some cases the belief or impression produced on a witness's mind at the time of the occurrences of which he speaks is admitted as giving the necessary and proper color to his testimony to the occurrence; as in case of circumstantial evidence or opinion evidence.¹

¹ See, for instance, *Fraser v. Fraser*, 5 Notes of Cases, 11, 34; *Faussett v. Faussett*, 7 Notes of Cases, 88; *Davidson v. Davidson*, 1 Deane & S. Eccl. Rep. 132, 164 Eng. Reprint, 526, 2 Jur. N. S. 547, 4 Week. Rep. 590.

5. Reason for belief.

Where testimony to a fact resting in inference is competent because resulting from observation of minutiae not easily describable with the same effect, the witness may state the reasons for his belief.¹

¹ *Griffin v. Brown*, 2 Pick. 304, 309. (Witness, having testified that a person lived extravagantly, may state the reasons for his belief.)

6. Qualifying words as to belief.

An answer of a witness is not to be struck out because he qualified his statement of a fact by such cautious expressions as "I would judge," "I think;"¹ the admissibility of the evidence is not affected thereby.²

¹ *Hallahan v. New York, L. E. & W. R. Co.* 102 N. Y. 194, 6 N. E. 287.

(A witness, being asked to describe the position of a passenger's elbow, said: "His elbow was resting on the sill, and I should judge that it could not project out of the window by the position that he held it in the car. . . . It was probably on a level with the outside of the car [window sill?]; my opinion was, from the position, that it was inside." Held, not error to refuse to strike out the parts

thus qualified); *Bradley v. Second Ave. R. Co.* 8 Daly, 289. ("He seemed to me drunk, but I could not say positively that he was," sufficient to go to the jury.)

Otherwise, if the impression of the witness is merely another name for his opinion, in which case it is not competent unless as opinion evidence. *Guiterman v. Liverpool, N. Y. & P. Mail S. S. Co.* 9 Daly, 119, 125, reversed, without impugning this rule, in 83 N. Y. 358.

The words "I think they are worth \$100," are not alone sufficient to establish the value of services. *Harrison v. Ayers*, 18 Hun, 336.

Belief of a witness, however confident, not evidence without recollection.

Butler v. Benson, 1 Barb. 526, 537.

² Note in 4 A.L.R. 979.

BIAS.

1. In general; presumption.
2. Cross-examining on details.
3. Calling witness's attention.
4. Repelling.

Including HOSTILITY; INTEREST; PREJUDICE.

As to Conversations and Admissions, see those titles.

1. In general; presumption.

Evidence cannot be excluded because of the bias of the witness, but bias may be shown for the purpose of affecting the credibility and weight of the evidence.¹ It is always competent to show the animus of a witness concerning an issue in the action and his feeling toward a party.² Thus, in a prosecution for carrying concealed weapons it is proper for the defendant to show bias, prejudice, or unfriendly feeling on the part of the witness for the state.³ And a party may show bias on the part of his own witness, or that he is more interested in the other party.⁴ But bias cannot necessarily be inferred from the fact that a witness has voluntarily come from another state to testify in a cause.⁵

¹ *Grayson v. State*, 162 Ala. 414, 50 So. 349.

² *Walker v. Rome*, 6 Ga. App. 59, 64 S. E. 310.

³ *Cook v. State*, 152 Ala. 66, 44 So. 549.

⁴ *Pittsburgh, C. C. & St. L. R. Co. v. Carlson*, 24 Ind. App. 559, 56 N. E. 251; *Fine v. Interurban Street R. Co.* 45 Misc. 587, 91 N. Y. Supp. 43.

⁵ *Timma v. Timma*, 72 Kan. 73, 82 Pac. 481.

2. Cross-examining on details.

A party may cross-examine his adversary's witness for the purpose of affecting his credibility by showing the relation between him and the party calling him,¹ or between him and a party financially but not legally interested,² though the hostility of a witness may be shown by testimony of others as well as by his cross-examination.³

The fact that a witness under cross-examination admits bias does not impair the right of the cross-examiner to call out details and particular facts manifesting it.⁴

¹ *Chicago City R. Co. v. Schaefer*, 121 Ill. App. 334; *Chicago City R. Co. v. Handy*, 208 Ill. 81, 69 N. E. 917; *Luckhurst v. Schroeder*, 183 Mich. 487, 149 N. W. 1009.

Henry v. Tacoma R. & Power Co. 135 C. C. A. 544, 219 Fed. 874, where a judgment in a personal injury suit was reversed because the court refused to permit the street car conductor of defendant company to be cross-examined as to whether he had a contract with that company to reimburse it for any damages caused by his negligence.

In a prosecution for selling liquor to a person of intemperate habits, a witness for defendant may be asked on cross-examination if a prosecution is not pending against him for the same offense. *McCormack v. State*, 133 Ala. 202, 32 So. 268.

² *Wabash Screen Door Co. v. Black*, 61 C. C. A. 639, 126 Fed. 721; *Di Tommaso v. Syracuse University*, 172 App. Div. 34, 158 N. Y. Supp. 175, affirmed on this point in 218 N. Y. 640, 112 N. E. 1057.

³ *People v. Mallon*, 116 App. Div. 425, 101 N. Y. Supp. 814.

⁴ *People v. Penhollow*, 42 Hun, 103, and cases cited.

The extent of the interest or prejudice of the witness is as material as the main fact of its existence. *Blenkiron v. State*, 40 Neb. 11, 58 N. W. 587; *Stewart v. Kindel*, 15 Colo. 539, 25 Pac. 990; *State v. Collins*, 33 Kan. 77, 5 Pac. 368; *State v. Dee*, 14 Minn. 35, Gil. 27. See also *Abbott's Civil Trial Brief*, 4th ed. p. 250.

The trial court may limit the extent of a cross-examination intended to show bias, and check cumulative evidence and also evidence weaker than the evidence already adduced. *Collins v. McGuire*, 76 App. Div. 443, 78 N. Y. Supp. 527.

3. Calling witness's attention.

The rule that before declarations of a witness (other than a party) can be proved to impeach his testimony, his attention must be called to time, place, etc., although it applies to declarations expressing bias, sought to be proved, not to contradict, but only to discredit,¹ does not preclude proving the fact of a quarrel, and sufficient in the discretion of the court to indicate the extent of the difficulty and consequent ill-feeling²

¹ *Edwards v. Sullivan*, 30 N. C. (8 Ired. L.) 302 (reversing for error in not requiring it); *Baker v. Joseph*, 16 Cal. 173, s. p., *Queen's Case*, 2 Brod. & B. 284, 311, 129 Eng. Reprint, 976. (The leading case. Held, that acts of subornation of perjury could not be proved against the witness, his attention not having been called to them on cross-examination.)

But compare *Day v. Stickney*, 14 Allen, 255, to the effect that hostility in the very matter in issue may be proved, without having called attention to it.

² *Ellsworth v. Potter*, 41 Vt. 685; *Pierce v. Gilson*, 9 Vt. 216 (holding it error to exclude).

4. Repelling.

To repel an imputation of bias in favor of the party calling the witness, arising from relationship, the party may show that he and his witness have been at variance,¹ and apparent interest in the result may be rebutted by showing that the witness has parted with his interest before suit.²

¹ *Clapp v. Wilson*, 5 Denio, 285.

² A witness who is sued as a member of a partnership may testify that he has sold out to his codefendant, and was indemnified by him as to all liabilities of the firm. *Tomson v. Heidenheimer*, 16 Tex. Civ. App. 114, 40 S. W. 425.

BIRTH.

1. Premature or still birth.
2. Presumption.
3. Hearsay.
4. Date of birth.

See also AGE; CHILD BEARING.

1. Premature or still birth.

Upon the question whether or not a child was born alive, those present at the time being all dead, evidence is admissible of declaration of the attending physician made to the father at the time, of general reputation in the community, and of family reputation to which relatives of the family may testify.¹

¹Turner v. Person, 175 N. C. 219, L.R.A.1918D, 1082, 95 S. E. 362; Wiess v. Hall, — Tex. Civ. App. —, 135 S. W. 384.

Generally as to premature or still birth see Young v. Makepeace, 103 Mass. 50; Daegling v. State, 56 Wis. 586, 14 N. W. 593; Wallace v. State, 10 Tex. App. 255.

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2. Presumption.

There is no presumption of fact from the mere absence of evidence that a person did or did not die childless.¹

¹Emerson v. White, 29 N. H. 482, and cases cited.

3. Hearsay.

Place of birth not a fact of pedigree to be proved by declaration of a person since deceased.¹

¹Wilmington v. Burlington, 4 Pick. 174 (settlement of pauper).

4. Date of birth.

A church record or certificate of baptism, though it may be evidence that the birth occurred previously,¹ is not evidence of the date of birth as stated therein,² unless it can be made competent by proof of the declaration of the parent or other qualified person on the faith of which it was made.³

An entry in a family Bible need not have been made by a member of the family to render it admissible to prove the date of birth of a member of such family,⁴ but such an entry is inadmissible where the person who made it is living and able to testify.⁵

The date of birth of a child may be proved by the declaration of its father, since deceased.⁶

¹ Re Wintle, L.R. 9 Eq. 373. And see *Whitcher v. McLaughlin*, 115 Mass. 167. Compare *Bradford v. Bradford*, 51 N. Y. 669.

² *Durfee v. Abbott*, 61 Mich. 471, 28 N. W. 521; *Houlton v. Manteuffel*, 51 Minn. 185, 53 N. W. 541; *Collins v. German-American Mut. Life Asso.* 112 Mo. App. 209, 86 S. W. 891.

³ *Wihe v. Law*, 3 Starkie, 63, 23 Revised Rep. 757.

⁴ *Union Cent. L. Ins. Co. v. Pollard*, 94 Va. 146, 36 L.R.A. 271, 64 Am. St. Rep. 715, 26 S. E. 421.

But an entry in a family Bible as to a date of birth, made years after the event occurred, with nothing to show by whom or under what circumstances it was made except that the Bible came from the possession of a deceased relative, is entitled to little or no weight as evidence. *Amey v. Cockey*, 73 Md. 297, 20 Atl. 1071.

⁵ *People v. Mayne*, 118 Cal. 516, 62 Am. St. Rep. 256, 50 Pac. 654 (so held under a statute making the declaration of a deceased person admissible to prove the date of birth of a relative).

⁶ *Mutual Reserve L. Ins. Co. v. Jay*, — Tex. Civ. App. —, 101 S. W. 545.

BLOOD.

1. Direct testimony.
2. Examination of blood for disease.

See also, **IDENTITY; PATERNITY; QUALITY.**

1. Direct testimony.

Any witness who is able from observation to do so may testify whether a spot or stain was blood.¹

And the clothing may be submitted to the jury to say if the stains on it are new or old, and, if old, dating back a long time.²

Whether it was human, or animal, blood, is a question for experts only.³

¹ *Greenfield v. People*, 85 N. Y. 75, 39 Am. Rep. 636; *People v. Deacons*, 109 N. Y. 374, 16 N. E. 676, and cases cited. *People v. Burgess*, 153 N. Y. 561, 47 N. E. 889; *Barbour v. Com.* 80 Va. 287; *State v. Welch*, 36 W. Va. 690, 15 S. E. 419.

Experts may testify from microscopic examination that stains were produced by blood. *State v. Martin*, 47 S. C. 67, 25 S. E. 113; *Green v. State*, 97 Tenn. 50, 36 S. W. 700.

² *King v. New York C. & H. R. R. Co.* 72 N. Y. 607 (*dictum*).

³ *Dicta* in *Greenfield v. People*, 85 N. Y. 75, 39 Am. Rep. 636; *Barbour v. Com.* 80 Va. 287; *King v. New York C. & H. R. R. Co.* 72 N. Y. 607.

Experts may testify which it was. *Lindsay v. People*, 63 N. Y. 143, reported more fully in 67 Barb. 548. As to distinguishing them, see 10 Cent. L. J. 183. On expert testimony and the microscopic examination of blood, see 19 Am. L. Reg. 529, 593.

The testimony of expert witness as to blood stains, ascertained by a chemical or microscopic examination, must be received with great caution on a trial for homicide, and valued according to the learning and skill of the expert and the nature of the investigation, and received or rejected as any other testimony. *State v. Miller*, 9 Houst. (Del.) 564, 32 Atl. 137.

An expert was permitted to testify as to blood stains on a suit of clothes introduced in evidence, it appearing that the defendant on the day of the alleged murder wore a suit of the same color in the neighborhood, and that the suit was found in his room. *People v. Neufeld*, 165 N. Y. 43, 58 N. E. 786.

2. Examination of blood for disease.

Evidence of the so-called "Wasserman" blood test for venereal disease is admissible in evidence unless procured by compulsion.¹

¹ *Wragg v. Griffin*, 185 Iowa, 243, 2 A.L.R. 1327, 170 N. W. 400, 18 N. C. C. A. 76, holding a compulsory test unlawful in the absence of a definite statute.

See also note in 2 A.L.R. 1332 and title PRIVILEGE, post.

BLOODHOUNDS.

The authorities are in conflict as to the competency of evidence as to the trailing of persons or animals by bloodhounds.¹ The more recent cases which have had to decide the question of such competency for the first time in their respective jurisdictions have held such evidence should never be admissible in any case civil or criminal.² They hold that the information obtainable by bloodhounds "is not of such a character as to furnish any satisfactory basis or reason for the admission of this class of evidence."³ The rejection of this evidence has also the vigorous support of Professor Wigmore.⁴

On the other hand there is a long line of cases in eight or ten states holding that such evidence is competent and therefore admissible, provided a proper foundation has been laid.⁵ These authorities vary somewhat as to the requisite preliminary proof required, depending on the character, training and experience of the bloodhounds, and the conditions and circumstances of each particular case.⁶ The theory upon which this evidence is admitted, is that the path taken by every human being or animal is strewn with waste matter from his or its body, which gives off an odor that the bloodhound is able to follow, and differentiate; and that when properly safeguarded, "testimony as to the trailing by a bloodhound may be permitted to go to the jury for what it is worth as one of the circumstances which may tend to connect the defendant with the crime."⁷ But before such evidence can be admitted it must appear that the dogs in question were able at the time and under the circumstances to follow the scent or track of a person, and that they were accurate, certain and reliable.⁸

And it is not sufficient to show that the dog is of pure blood and of a stock characterized by acuteness of sense and power of discrimination.⁹ And it must also be shown that the dog was led on the trail at a point where the circumstances tend clearly

to show that the person had been, or on a track which such circumstances indicate to have been made by him.¹⁰ The conduct and behavior of bloodhounds after being set upon the trail of a fugitive criminal may not be given in evidence by the state for the purpose of proving that the scent of the accused and the scent of the person who perpetrated the crime which is being investigated are identical.¹¹ And, in an action to recover damages for unlawful search of plaintiff's premises, evidence as to the conduct of hounds used to track the thief is only admissible on the question of malice, in mitigation of damages, and evidence as to the breeding and training of the dogs, their conduct in trailing, letters indorsing their usefulness, and stories concerning their ability, is inadmissible.¹² To discredit the evidence furnished by bloodhounds in trailing criminals, evidence is not admissible of the conduct of other dogs trained by the same trainer which fail to keep the trail.¹³

¹ *People v. Pfanschmidt*, 262 Ill. 411, 104 N. E. 804, Ann. Cas. 1915A, 1171; *Ruse v. State*, 186 Ind. 237, L.R.A.1917E, 726, 115 N. E. 778. See also note in 14 Columbia L. Rev. 535.

² *People v. Pfanschmidt*, *supra*; *Brott v. State*, 70 Neb. 395, 63 L.R.A. 789, 97 N. W. 593.

³ *People v. Pfanschmidt*, *supra*.

⁴ Note 9 Ill. L. Rev. 190, where Prof. Wigmore quotes an interesting passage concerning bloodhounds evidence from the detective story "A Case of Premeditation" in the volume entitled "The Singing Bone" by R. Austin Freeman.

⁵ *McDonald v. State*, 165 Ala. 85, 51 So. 629; *Cranford v. State*, 130 Ark. 101, 197 S. W. 19; *Padgett v. State*, 125 Ark. 471, 188 S. W. 1158; *State v. Robinson*, 181 N. C. 516, 106 S. E. 155; *Blair v. Com.* 181 Ky. 218, 204 S. W. 67; *State v. Rasco*, 239 Mo. 535, 144 S. W. 449. See also note in L.R.A.1917E, 730 for additional cases.

⁶ Thus, the following cases hold such evidence admissible when properly introduced by other testimony:—*Hargrove v. State*, 147 Ala. 97, 119 Am. St. Rep. 60, 41 So. 972, 10 Ann. Cas. 1126; *Davis v. State*, 46 Fla. 137, 35 So. 76; *Denham v. Com.* 119 Ky. 508, 84 S. W. 538; *Spears v. State*, 92 Miss. 613, 16 L.R.A.(N.S.) 285, 46 So. 166; *State v. Dickerson*, 77 Ohio St. 34, 13 L.R.A.(N.S.) 341, 122 Am. St. Rep. 479, 82 N. E. 969, 11 Ann. Cas. 1181; *Parker v. State*, 46 Tex. Crim. Rep. 461, 108 Am. St. Rep. 1021, 80 S. W. 1008, 3 Ann. Cas. 893.

⁷ Com. v. Hoffman, 52 Pa. Super. Ct. 272, 277.

⁸ State v. Adams, 85 Kan. 435, 35 L.R.A.(N.S.) 870, 116 Pac. 608.

⁹ Pedigo v. Com. 103 Ky. 41, 42 L.R.A. 432, 44 S. W. 143.

¹⁰ Ibid.

And evidence of the conduct of a bloodhound in baying the accused was held not admissible upon the trial of an indictment for larceny in corroboration of a confession of an alleged accomplice, where there was no evidence to connect the circumstances of the baying of the two defendants or either of them with the making of the tracks at the time the larceny was committed; nor any evidence that the dog scented any that were made by either of the defendants, nor any way to ascertain that fact. State v. Moore, 129 N. C. 497, 55 L.R.A. 96, 39 S. E. 626.

¹¹ Brott v. State, 70 Neb. 395, 63 L.R.A. 789, 97 N. W. 593.

¹² McClurg v. Brenton, 123 Iowa, 368, 65 L.R.A. 519, 101 Am. St. Rep. 323, 98 N. W. 881.

¹³ Spears v. State, 92 Miss. 613, 16 L.R.A.(N.S.) 285, 46 So. 166; Simpson v. State, 111 Ala. 6, 20 So. 573. But see Gallant v. State, 167 Ala. 60, 52 So. 739, holding that a witness testifying as to the ability of dogs to take the scent of human beings may give a comparison between the dogs in question and others he has seen perform, to show his qualification from observation to have and entertain an opinion as to when a dog has been trained to track human beings.

For a more extensive review of the cases on this subject, see notes in 42 L.R.A. 432; 35 L.R.A.(N.S.) 870; and L.R.A.1917E, 730.

BOUNDARIES.

1. How proved in general.
2. Presumptions and burden of proof.
3. Documentary evidence.
4. Parol evidence.
5. Opinions and conclusions.
6. Hearsay; declarations.
7. Variance.
8. Practical location.

1. How proved in general.

In determining the question of a disputed boundary, recourse

may be had to every kind of evidence which is competent to prove the existence of the fact in issue.¹ An agreement adjusting boundary lines may be shown by facts and circumstances as well as by direct evidence.²

¹ Scott v. Yard, 46 N. J. Eq. 79, 18 Atl. 359.

The manner in which a survey was made may be shown by the testimony of one who knows the facts, although he was not the surveyor. Wheeler v. State, 114 Ala. 22, 21 So. 941.

² Ernsting v. Gleason, 137 Mo. 594, 39 S. W. 70; Galbraith v. Lunsford, 87 Tenn. 89, 1 L.R.A. 522, 9 S. W. 365.

2. Presumptions and burden of proof.

In an action to try title in which the location of a line is in issue, the burden of fixing the line with reasonable certainty is upon the plaintiff.¹ Plaintiff likewise assumes the burden of proof that at the time of the surveys the road forming the boundary line ran through an established corner which would entitle him to the land in controversy as against defendant in possession under title to the land as part of his survey.² A plaintiff in ejectment claiming under deeds reserving a specified number of acres as previously conveyed has the burden of showing that the land claimed by defendant is not a part of the land reserved.³ So, one claiming that calls in a deed which vary from those previously run on the ground did not represent the will of the grantor, has the burden of showing that fact where the calls in the deed are not inherently inconsistent.⁴

Monuments mentioned in a description of land as marking its boundary are presumed to exist until the contrary is shown.⁵ And land bordering on a highway will be presumed to be bounded by the center line of the highway.⁶ But the presumption that the center of a railroad roadbed is the center of a strip of land conveyed to the railroad company for a right of way may be overcome by evidence of acts of the company inconsistent therewith.⁷ So, a presumption that the title to land bounded on a stream goes to the center may be rebutted.⁸

¹ Scott v. Pettigrew, 72 Tex. 321, 12 S. W. 161.

² Griffith v. Rife, 72 Tex. 185, 12 S. W. 168.

³ Maxwell Land Grant Co. v. Dawson, 7 N. M. 133 34 Pac. 191, reversed on

other grounds in 151 U. S. 586, 38 L. ed. 279, 14 Sup. Ct. Rep. 453; Harman v. Stearns, 95 Va. 58, 27 S. E. 601; Stockton v. Morris, 39 W. Va. 432, 19 S. E. 531. *Contra*: Roan Mountain Steel & I. Co. v. Edwards, 110 N. C. 353, 14 S. E. 861; Wyman v. Taylor, 124 N. C. 426, 32 S. E. 740.

⁴ Elliott v. Jefferson, 133 N. C. 207, 64 L.R.A. 135, 45 S. E. 558.

⁵ Kleiner v. Bowen, 166 Ill. 537, 46 N. E. 1087.

⁶ Carpenter v. Buckman, 19 Ky. L. Rep. 700, 41 S. W. 579.

There is no presumption, however, that property described in an assessment for taxes as a "lot" extends to the center of the block in which it is situated. Harvey v. Meyer, 117 Cal. 60, 48 Pac. 1014. And that some portion of a highway is upon a section line creates no presumption that it follows the line throughout. Seisler v. Smith, 150 Ind. 88, 46 N. E. 993.

⁷ Pennsylvania R. Co. v. Pearsol, 173 Pa. 496, 34 Atl. 226.

⁸ Devonshire v. Pattinson, L. R. 20 Q. B. Div. 263, 57 L. J. Q. B. N. S. 189, 58 L. T. N. S. 392, 52 J. P. 276.

And the presumption that the line run by a deputy surveyor general as forming the boundary of a reservation was the meander of a creek forming such boundary may be overcome by evidence that the line was located some distance from the creek. Barnhart v. Ehrhart, 33 Or. 274, 54 Pac. 195. But failure of a deed from one owning to low-water mark to mention the stream as a boundary will not overcome the presumption of an intent to convey to low-water mark, where the boundary given in the deed was substantially coincident with such mark, unless a contrary intention is manifested from the language of the deed. Slauson v. Goodrich Transp. Co. 94 Wis. 642, 69 N. W. 990.

As to effect of boundary grant on river or tide water, see note in 42 L.R.A. 502.

3. Documentary evidence.

Recitals in ancient deeds are admissible to prove the location of a disputed line.¹ So, recitals in deeds under which either of the parties to a suit claims are admissible to prove boundary lines.² So, maps,³ surveys, plats, or field notes⁴ are admissible on the question of boundaries, and a judgment in ejectment, although uncertain in some of its calls, is admissible in a subsequent action where the pleadings and evidence in the former action, together with other evidence offered, show that the boundary lines in the controversy were fixed in the prior action.⁵

¹ Hathaway v. Evans, 113 Mass. 264; Merwin v. Morris, 71 Conn. 555, 42 Atl. 855.

³ *Fleming v. Moore*, 122 Ala. 399, 26 So. 174; *Windus v. James*, — Tex. —, 19 S. W. 873; *Winemann v. Grunmond*, 90 Mich. 280, 51 N. W. 500.

A prior deed of the land in question is competent to show that a stream which forms one boundary was formerly known by a different name. *Sanscrainte v. Torongo*, 87 Mich. 69, 49 N. W. 497.

Recitals in a deed as to boundary lines are admissible in evidence against a subsequent grantee of adjoining land from the grantors in such deed. *Sperry v. Wesco*, 26 Or. 483, 38 Pac. 623. And a subsequent deed from the common grantor describing as the dividing line the one which is most favorable to the grantee in the prior deed is admissible in the latter's favor. *Ladies' Seamen's Friend Soc. v. Halstead*, 58 Conn. 144, 19 Atl. 658. A prior deed of adjoining land executed by the common grantor contemporaneously with a survey of the premises deeded to the later grantee, and calling for the same lines mentioned but not described in his deed, is admissible to fix the limits of his possession as against the prior grantee. *Donohue v. Whitney*, 133 N. Y. 178, 30 N. E. 848. Grants from the state to adjoining owners are competent to determine the vacancy of the land applied for under the headright laws by establishing the contiguous boundaries. *Pritchett v. Ballard*, 102 Ga. 20, 29 S. E. 210. But a deed giving the depth of a lot as less than is shown on a plat referred to in the deeds under which a party claims title to an adjoining lot is inadmissible on the question of the depth of such lot when no privity of estate is shown on the part of either party as to the other lot. *Guentherodt v. Ross*, 121 Mich. 47, 79 N. W. 920.

A junior deed is not competent as evidence of the location of the corner of an older deed. *Euliss v. McAdams*, 108 N. C. 507, 13 S. E. 162. A deed executed after the survey of a division line, which refers to a private road as the boundary, is admissible to show that the agreement under which the survey was made was to divide the land by the center of the road. *Capelli v. Dondero*, 123 Cal. 324, 55 Pac. 1057. A deed, even if delivered only for purposes of examination, and if the previous memorandum of sale is fatally defective under the statute of frauds, is competent to show the precise locality of the property which the memorandum of sale was intended to embrace. *Ryan v. United States*, 136 U. S. 68, 34 L. ed. 447, 10 Sup. Ct. Rep. 913. A deed used as the basis of a survey is admissible to enable the jury to understand and apply the oral evidence as to the boundary. *Silvey v. McCool*, 86 Ga. 1, 12 S. E. 175.

³ Maps in common and accepted use at the time of a conveyance are admissible to show the true location of a line contained in the description in the deed. *Hanlon v. Union P. R. Co.* 40 Neb. 52, 58 N. W. 590. An ancient map filed in the department of public works, showing the boundary of land taken by the state, is competent although it was not filed at the exact time the state entered upon the land, where it is made about the time of the appropriation. *Smucker v. Pennsylvania R. Co.* 188 Pa. 40, 41 Atl. 457. A certified copy of an old map filed

in the Texas general land office is admissible in evidence to identify and fix the boundaries of the land. *Ayers v. Watson*, 137 U. S. 584, 34 L. ed. 803, 11 Sup. Ct. Rep. 201. But certified copies of maps from a public office are not admissible in evidence to locate a disputed boundary, in the absence of any evidence rendering the originals admissible, or of any statute requiring the maps to be filed in such office. *Donohue v. Whitney*, 133 N. Y. 178, 30 N. E. 848. A recent map is inadmissible to show the location of a disputed boundary, in the absence of any of the facts outlined upon it or connecting it with some possessory act or claim of title of a party to the controversy. *Ibid*.

* An ancient survey is evidence of itself to elucidate and ascertain a boundary. *Mineral R. & Min. Co. v. Auten*, 188 Pa. 568, 41 Atl. 327. A junior survey of public lands, though incompetent to establish the lines of an older survey, is admissible to show that before the original marks were effaced the state acknowledged the lines of the older survey on the ground in the location of the younger survey. *Fisher v. Kaufman*, 170 Pa. 444, 33 Atl. 137. A survey and plan made by a district surveyor according to the United States standard is admissible in evidence on an issue as to whether a wall was a party wall. *McVey v. Durkin*, 136 Pa. 418, 20 Atl. 541. The original plat of land to be granted by the state, which a surveyor is required by statute to make, is evidence of the true shape and location of the land granted. *Redmond v. Mullenax*, 113 N. C. 505, 18 S. E. 708. A recorded plat of a state road not shown to have been opened or traveled is admissible in evidence on an issue as to the location of a boundary referred to in a deed as the center of such road. *Atwood v. Canrike*, 86 Mich. 99, 48 N. W. 950.

A plat is competent to show the location of the boundary where the person who made it testifies that it is accurate. *Wahl v. Laubersheimer*, 174 Ill. 338, 51 N. E. 860; *Rowland v. McCown*, 20 Or. 538, 26 Pac. 853. An original map to which reference for description is made in a deed is admissible for the purpose of establishing the boundary line of the premises conveyed. *Olsen v. Rogers*, 120 Cal. 225, 52 Pac. 486. And a plat is admissible in a suit to determine a boundary line, where the conveyances of title of those early in possession of the property referred to the plat. *Guentherodt v. Ross*, 121 Mich. 47, 79 N. W. 920.

A plat may be used to explain the testimony of a surveyor as to the location of a boundary line, although it is not authenticated in the manner required by statute. *Justen v. Schaaf*, 175 Ill. 45, 51 N. E. 695. And a map used for such purpose need not be official, nor be shown to be correct. *Griffith v. Rife*, 72 Tex. 185, 12 S. W. 168. Otherwise where a map is shown to a witness to enable him to testify to the position of objects indicated upon it which are of essential importance in determining the location of a boundary line in controversy. *Jacob Tome Inst. v. Davis*, 87 Md. 591, 41 Atl. 166.

Field notes and plats of an original government survey are competent evi-

dence in ascertaining where monuments are located. *Peterson v. Skjelver*, 43 Neb. 663, 62 N. W. 43. A certified copy of the original field notes of a survey of land under a government grant filed in the Texas general land office is competent to identify the boundary of the land. *Ayers v. Watson*, 137 U. S. 584, 34 L. ed. 803, 11 Sup. Ct. Rep. 201. Field notes of an unauthorized survey are inadmissible in evidence in trespass to try title, although certified from the general land office. *Von Rosenberg v. Haynes*, 85 Tex. 357, 20 S. W. 143. Field notes of a deceased surveyor relative to a boundary controversy are competent evidence. *Detwiler v. Toledo*, 2 Ohio Dec. 620. Field notes of a void and canceled survey are admissible after the death of a surveyor to show the boundaries of an adjoining survey also made by him a few days before as established and recognized by him when the land was located. *Stanus v. Smith*, 8 Tex. Civ. App. 685, 30 S. W. 262. But to be admissible the entries in the field book must have been made in connection with the transaction which is the subject of inquiry. *Cable v. Jackson*, 16 Tex. Civ. App. 579, 42 S. W. 136.

⁶ *Graves v. Hebron*, 125 Cal. 400, 58 Pac. 12.

But a judgment roll in an action to foreclose a mortgage is inadmissible on a question of boundary against a plaintiff not in privity with the parties thereto,—especially where the complaint therein does not purport to describe the place whose boundary is in question. *Martin v. Lloyd*, 94 Cal. 195, 29 Pac. 491. A division of an estate made by warrant of a probate court under which the parties claim is admissible in evidence, not only so far as it relates to the title of the parties, but also to the portion of the estate held by others, from the position of which a disputed boundary can be determined. *Hathaway v. Evans*, 113 Mass. 264.

4. Parol evidence.

Parol evidence is admissible to identify monuments,¹ and to prove the existence and location of stakes shown by a survey,² and to show the location of boundary lines in cases of uncertainty.³ So, parol evidence is admissible to show a mistake in locating a line,⁴ and to show whether the line of a highway as surveyed, or as actually occupied and used, was meant,⁵ and to prove that a particular line was generally recognized by the name used in the deed.⁶ But parol evidence is not admissible to control or vary lines or boundaries definitely fixed by a deed.⁷

¹ *Anderson v. Richardson*, 92 Cal. 623, 28 Pac. 679; *Davidson v. Shuler*, 119 N. C. 582, 26 S. E. 340; *Bonaparte v. Carter*, 106 N. C. 534, 11 S. E. 262.

² *Burke v. McCowen*, 115 Cal. 481, 47 Pac. 367.

³ Andreu v. Watkins, 26 Fla. 390, 7 So. 876; Hagins v. Whitaker, 19 Ky. L. Rep. 1203, 43 S. W. 224; Sheets v. Sweeney, 136 Ill. 336, 26 N. E. 648; Driggs v. State, 52 Ohio St. 37, 38 N. E. 882; Kanne v. Otty, 25 Or. 531, 36 Pac. 537; Rugg v. Ward, 64 Vt. 402, 23 Atl. 726.

Parol evidence is admissible to show the true boundaries where no specific description is given. Diggs v. Kurtz, 132 Mo. 250, 53 Am. St. Rep. 488, 33 S. W. 815. And to identify the land described in a judgment pleaded as *res judicata* on the question of boundary, where the pleadings and papers in the prior suit are lost. Reast v. Donald, 84 Tex. 648, 19 S. W. 795.

The boundary line between adjoining surveys is not unknown and uncertain so as to render parol proof admissible to locate it, merely because some of the original monuments placed to mark the corners are missing or cannot be identified, if the field notes of the original surveys afford means for ascertaining the true location of the boundary. Pickett v. Nelson, 79 Wis. 7, 47 N. W. 936.

⁴ Capelli v. Dondero, 123 Cal. 324, 55 Pac. 1057; Hopper v. Justice, 111 N. C. 418, 16 S. E. 626.

⁵ Wead v. St. Johnsbury & L. C. R. Co. 64 Vt. 52, 24 Atl. 361.

⁶ Hanlon v. Union P. R. Co. 40 Neb. 52, 58 N. W. 590.

The testimony of a surveyor that he ran the disputed boundary line, and that a certain map of the survey is correct, is admissible on the question of the location of such boundary, although his information was gained and the line run in processioning the land. Gunn v. Harris, 88 Ga. 439, 14 S. E. 593. And the testimony of a surveyor that many years before, he surveyed a disputed boundary line, and found it and certain maps to correspond, is competent to establish a location of the line, although the maps are not in evidence and are not shown to be authentic. Wineman v. Grummond, 90 Mich. 280, 51 N. W. 509.

⁷ Olson v. Keith, 162 Mass. 485, 39 N. E. 410; Beardsley v. Crane, 52 Minn. 537, 54 N. W. 740; Fuller v. Weaver, 175 Pa. 182, 34 Atl. 634; Segar v. Babcock, 18 R. I. 203, 26 Atl. 257.

5. Opinions and conclusions.

A surveyor's testimony as a man of science is never receivable to establish a boundary except in connection with the data from which he surveys.¹ And opinions of surveyors that when land was originally surveyed only one line was actually run, are incompetent as their testimony should be confined to the facts as they found them to exist on the ground.² And the mere opinion of a surveyor as to whether or not a certain boundary was located by a previous government survey before the land was surveyed by himself, is inadmissible.³ So, a surveyor cannot give his opinion as to the location of land based on the

testimony of a witness or description in deeds.⁴ But a surveyor may give his opinion as to whether marks on trees or piles of stones were intended as monuments.⁵ And opinions of deceased surveyors as shown by their acts and declarations upon the ground are some evidence upon the question of the true location of boundary lines.⁶

The understanding of the owner of premises as to the location of the boundary line, derived from the description in the deed, is admissible in connection with testimony relating to the occupation of the land and his claim of ownership up to such line, upon the issue of adverse possession.⁷ And a party to a boundary line contest may give his opinion based on the other testimony as to how much of his land the other party has inclosed, where the evidence tends to show that the inclosure extended over the true line, although not to show right or title in himself independently of any other evidence.⁸

¹ Jones v. Lee, 77 Mich. 35, 43 N. W. 855.

² Randall v. Gill, 77 Tex. 351, 14 S. W. 134.

³ Burt v. Busch, 82 Mich. 506, 46 S. W. 790.

⁴ Schultz v. Lindell, 30 Mo. 310.

⁵ Davis v. Mason, 4 Pick. 156.

⁶ Tyrone Min. & Mfg. Co. v. Cross, 128 Pa. 636, 18 Atl. 519.

⁷ Swerdferger v. Hopkins, 67 Vt. 136, 31 Atl. 153.

⁸ Payne v. Crawford, 97 Ala. 604, 11 So. 725.

6. Hearsay; declarations.

Hearsay evidence, if pertinent and material to the issues, may be received to establish boundaries, in the absence of better evidence.¹ Thus, traditionary evidence,² or evidence of common reputation,³ is admissible. Declarations of deceased persons who were disinterested at the time the declarations were made, in respect to boundary lines and corners of land, are competent evidence to prove their location if such persons had opportunity to be informed in respect thereto.⁴ And the mere fact that the declarant was the owner of an adjoining tract of land does not make his declarations incompetent on the ground of interest,⁵ although some courts hold that he must have no motive to misrepresent.⁶ But the declarant must have had peculiar means of knowing the fact in question,⁷ except where such declarations

are against interest and are offered in evidence against those claiming through, or justifying under, declarant.⁸ Some jurisdictions go so far as to hold that the declarant must have had a particular duty or interest in acquiring the information.⁹ And the declarant must have died to render his declarations admissible.¹⁰

Declarations of original landowners, since deceased, made while in possession, are admissible against subsequent grantees to prove the boundaries at the time the declarations were made.¹¹ And declarations of deceased owners are admissible although it does not affirmatively appear that they were made in restriction of, or against, their own rights.¹² But declarations of a deceased owner in possession, even against interest, are not admissible to control the location of a boundary line by a well-defined description and an undisputed survey by course and distance.¹³ And statements as to a boundary line by one who has no interest in the land at the time are not rendered admissible against him by reason of his subsequent ownership, unless they are of such a nature as to create an estoppel.¹⁴

Declarations of a deceased surveyor as to the boundary of a survey, made while running the lines, are admissible in evidence,¹⁵ but not unless made while he was pointing out or marking the boundaries or discharging some duty relating thereto.¹⁶ And if not present when the original survey was made, his declarations are not rendered competent because he subsequently subdivided one of the tracts thereon.¹⁷ Inability of a surveyor, on account of his physical condition, to testify either orally or by deposition will render admissible his declarations if otherwise competent.¹⁸

¹ Taylor v. Fomby, 116 Ala. 621, 67 Am. St. Rep. 149, 22 So. 910; Donohue v. Whitney, 39 N. Y. S. R. 706, 15 N. Y. Supp. 622.

But on the question of boundary testimony as to what was done in the absence of one party by those under whom the other party claims in pointing out the line is hearsay and inadmissible. Phillips v. O'Neal, 85 Ga. 142, 11 S. E. 581. And testimony as to the location of surveys is not admissible if the facts are not within the personal knowledge of the witnesses. Howard v. Zimpelman, — Tex. —, 14 S. W. 59.

² Duluth Storage & Forwarding Co. v Prentice, 50 Fed. 878; McAfee v. Newberry, 144 Ga. 473, 87 S. E. 392; note in 29 Harvard L. Rev. 783.

³ Common reputation is admissible to establish a boundary line of general and public interest. *Muller v. Southern Pacific Branch R. Co.* 83 Cal. 240, 23 Pac. 265. Or to establish a public boundary upon which the location of a private boundary depends. *Mullaney v. Duffy*, 145 Ill. 559, 33 N. E. 750.

Evidence of common repute is admissible as to boundaries established by a United States survey, where the monuments set in making the survey have disappeared. *Thoen v. Roche*, 57 Minn. 135, 47 Am. St. Rep. 600, 58 N. W. 686. General reputation is admissible in Connecticut for the purpose of showing, not only public boundaries, but the boundaries of lands of individual proprietors. *Kinney v. Farnsworth*, 17 Conn. 535. General reputation is admissible to show that a given tree is the corner of a private tract of land. *Shaffer v. Gaynor*, 117 N. C. 15, 23 S. E. 154. But evidence of common repute that a certain fence was not on the true boundary line is inadmissible on an issue of title acquired by adverse possession up to the fence. *Atwood v. Canrike*, 86 Mich. 99, 48 N. W. 950.

⁴ *Bethea v. Byrd*, 95 N. C. 309, 59 Am. Rep. 240; *Spear v. Coate*, 14 S. C. L. (3 M'Cord.) 227, 15 Am. Dec. 627; *Whalen v. Nisbet*, 95 Ky. 464, 26 S. W. 188.

⁵ *Lewis v. John L. Roper Lumber Co.* 113 N. C. 55, 18 S. E. 52; *Bethea v. Byrd*, 95 N. C. 309, 59 Am. Rep. 240.

⁶ *Scaife v. West North Carolina Land Co.* 33 C. C. A. 47, 61 U. S. App. 647, 90 Fed. 238.

⁷ *Miller v. Wood*, 44 Vt. 378; *Fry v. Stowers*, 92 Va. 13, 22 S. E. 500.

⁸ *Deming v. Carrington*, 12 Conn. 1, 30 Am. Rep. 591.

⁹ *Smith v. Stanley*, 114 Va. 117, 75 S. E. 742. See also note in 26 Harvard L. Rev. 372.

¹⁰ *Smith v. Cornett*, 18 Ky. L. Rep. 818, 38 S. W. 689; *Shaffer v. Gaynor*, 117 N. C. 15, 23 S. E. 154; *Miller v. Wood*, 44 Vt. 378.

¹¹ *Moran v. Lezotte*, 54 Mich. 83, 19 N. W. 757; *Smith v. Forrest*, 49 N. H. 230; *Peters v. Gracia*, 110 Cal. 89, 42 Pac. 455; *Taylor v. Arnold*, 13 Ky. L. Rep. 516, 17 S. W. 361.

Statements as to boundaries, made by an officer of a corporation while negotiating a sale of real property, may be proved after his death against the corporation or its subsequent grantees. *Holmes v. Turner's Falls Co.* 150 Mass. 535, 6 L.R.A. 283, 23 N. E. 305. But declarations by the owners of the west half of a survey as to the location of the southerly line are not admissible against the owners of the east half who do not claim under, and are in no wise connected with, the owners of the west half. *Bailey v. Baker*, — Tex. Civ. App. —, 42 S. W. 124.

¹² *Royal v. Chandler*, 83 Me. 150, 21 Atl. 842; *Wood v. Foster*, 8 Allen, 24, 85 Am. Dec. 681; *Daggett v. Shaw*, 5 Met. 223; *High v. Pancake*, 42 W. Va. 602, 26 S. E. 536; *Payne v. Crawford*, 102 Ala. 387, 14 So. 854; *Wood v. Fiske*, 62 N. H. 173.

The declarant must at some time have been the owner or in possession of the land to render such declarations admissible. *Bartlett v. Emerson*, 7 Gray, 174. And in Massachusetts such declarations must have been made while in the act of pointing out the land. *Long v. Colton*, 116 Mass. 414; *Goyette v. Keenan*, 196 Mass. 416, 420, 82 N. E. 427. *Contra*, in Vermont. *Powers v. Silsby*, 41 Vt. 288; *Hathaway v. Goslant*, 77 Vt. 199, 212, 59 Atl. 835. The fact that two deceased owners of conflicting interests in lands both made the same declarations long before the trial, at a time when no controversy existed with regard to the boundary, is sufficient to render such declarations admissible in evidence. *Whitman v. Haywood*, 77 Tex. 557, 14 S. W. 166. Declarations of a former owner in possession while defining his possession to a person negotiating for a purchase are admissible to show the actual extent of his occupation. *Abeel v. Van Gelder*, 36 N. Y. 513. But declarations as to boundaries, made by a former deceased owner not against interest and not shown to have been uttered in the presence of the other parties or of their predecessors in title, are inadmissible in favor of his successor in interest. *Thaxter v. Inglis*, 121 Cal. 593, 54 Pac. 86.

¹³ *Shaffer v. Gaynor*, 117 N. C. 15, 23 S. E. 154.

¹⁴ *Reed v. Phillips*, — Tex. Civ. App. —, 33 S. W. 986.

¹⁵ *Clement v. Packer*, 125 U. S. 309, 31 L. ed. 731, 8 Sup. Ct. Rep. 907; *Cottingham v. Seward*, — Tex. Civ. App. —, 25 S. W. 797.

¹⁶ *Hunnicut v. Peyton*, 102 U. S. 333, 26 L. ed. 113; *Clay County Land & Cattle Co. v. Montague County*, 8 Tex. Civ. App. 575, 28 S. W. 704; *Titterington v. Trees*, 78 Tex. 567, 14 S. W. 692.

¹⁷ *Angle v. Young*, — Tex. Civ. App. —, 25 S. W. 798.

¹⁸ *Griffith v. Sauls*, 77 Tex. 630, 14 S. W. 230.

7. Variance.

A mere variance which may be cured by amendment, and not a cause of action wholly unproved, exists where the description in a complaint in ejectment differs from the proof as to two sides of the lot, but is correct as to patent, number of lot, and the other two sides.¹ Proof that the true boundary line was within that alleged in the complaint, in an action to reform an agreement fixing the boundary line between adjoining owners, so as to establish the true line, is not a fatal variance.² And an allegation in a petition to enforce a mechanics' lien describing the land as bounded on one side by a specified street, is sustained by evidence that the street was known by that name, whether or not it was the true name.³ So, field notes are ad-

missible in evidence to locate the beginning corner, although one of the calls was omitted by inadvertence from the description of such notes as set out in the petition.⁴

¹ Russell v. Comm. 20 N. Y. 81.

² Philip Zorn Brewing Co. v. Malott, — Ind. —, 46 N. E. 23, reversed on rehearing in 151 Ind. 371, 51 N. E. 471.

³ Dodge v. Hall, 168 Mass. 435, 47 N. E. 110.

⁴ Irvin v. Bevil, 80 Tex. 332, 16 S. W. 21.

8. Practical location.

Where the true boundary is uncertain, practical location is of the highest importance.¹ Thus, evidence that the use and occupation of lands in two adjacent towns by the owners was in accordance with the line in dispute is admissible in evidence on an issue as to the true boundary line between such towns.² And evidence that the dividing line run by a county surveyor has been acquiesced in for many years is competent upon the question where the true line was originally run by the United States surveyor.³ Long acquiescence by a city in the location of an alley way and of improvements made on the line of the alley by an adjoining owner is entitled to great weight in determining, in a conflict of evidence, where the boundary is.⁴ Evidence that parties compelled a trespasser to desist from cutting timber on the land in question is admissible to show how far he occupied under his deed.⁵ And evidence that adjoining owners abandoned a survey of a disputed boundary line and agreed upon another line, and moved their fences to such agreed line, is admissible on appeal from the survey.⁶

¹ Ratcliffe v. Gray, 3 Keyes, 510; Sherman v. Kane, 86 N. Y. 57.

² Aldrich v. Griffith, 66 Vt. 390, 29 Atl. 376.

³ Taylor v. Fomby, 116 Ala. 621, 67 Am. St. Rep. 149, 22 So. 910.

⁴ Decatur v. Niedermeyer, 168 Ill. 68, 48 N. E. 72.

The maintenance of a fence between a lot and the street for many years, together with the city's acquiescence in the boundary line so established, will properly outweigh a recent survey. *Mt. Carmel v. McClintock*, 155 Ill. 608, 40 N. E. 829; *Racine v. Emerson*, 85 Wis. 80, 39 Am. St. Rep. 819, 55 N. W. 177. The presumption that a fence which has stood for thirty years is located on the line of the original survey is not overcome by the fact that upon a resurvey based upon

no original monument, another line is established. *Welton v. Poynter*, 96 Wis. 346, 71 N. Y. 597. Evidence that a landowner for many years constructed his fences so as to manifest an intention to dedicate a space for highway purposes is sufficient to sustain a verdict that a fence on such space was in the public highway, which had become such by lawful user. *Bartlett v. Beardmore*, 77 Wis. 356, 46 N. W. 494.

⁵ *Donahue v. Whitney*, 39 N. Y. S. R. 706, 15 N. Y. Supp. 622.

⁶ *Horton v. Brown*, 130 Ind. 113, 29 N. E. 414; *Rosenmeier v. Mahrenholz*, 179 Ind. 467, 101 N. E. 721.

A permanent boundary alleged to have been agreed upon by adjoining owners is not conclusively proved by the erection of a fence by one owner, and his cultivation of the land up to the fence. *Coleman v. Drane*, 116 Mo. 387, 22 S. W. 801. But a boundary line may be acquiesced in and adhered to for so long a time as to constitute proof of so conclusive a nature that either party is precluded from offering any evidence to the contrary. *Baldwin v. Brown*, 16 N. Y. 359. But acquiescence for a few months is not conclusive. *Reed v. McCourt*, 41 N. Y. 435.

The maintenance of a fence for more than twenty years and undisturbed possession of the land for that period, conclusively establishes the boundary, in the absence of any proof of intention not to fix the line. *Wentworth v. Braun*, 38 Misc. 702, 78 N. Y. Supp. 233.

BREED.

1. Expert may testify to.
2. Published herd book.

1. Expert may testify to.

Expert may testify to,¹ but his certificate is only hearsay.²

¹ *Harris v. Panama R. Co.* 4 Jones & S. 373, 378, affirmed without discussing this point, in 58 N. Y. 660; *Fleming v. McClaffin*, 1 Ind. App. 537, 27 N. E. 875.

² *Hamilton v. Wabash, St. L. & P. R. Co.* 21 Mo. App. 152.

2. Published herd book.

A published herd book is not competent alone,¹ but may be

made so by testimony that it is generally received and used by experts as a standard authority.²

¹ Crawford v. Williams, 48 Iowa, 247; Ashworth v. Kittridge, 59 Am. Dec. 186, note.

² Kuhns v. Chicago, M. & St. P. R. Co. 65 Iowa, 528, 22 N. W. 661; War-
rick v. Reinhard, 136 Iowa, 27, 30, 111 N. W. 983; Louisville & N. R.
Co. v. Kice, 109 Ky. 786, 60 S. W. 705; Townsley v. Missouri P. R. Co.
89 Mo. 31, 1 S. W. 15, note; Citizens' Rapid Transit Co. v. Dew, 100
Tenn. 317, 40 L.R.A. 518, 66 Am. St. Rep. 754, 45 S. W. 790; note in
125 Am. St. Rep. 857.

Evidence of the pedigree of a dog is not admissible in a criminal prosecu-
tion for malicious killing of the dog unless the knowledge of the ped-
igree is brought home to the defendant. State v. Churchill, 15 Idaho,
645, 19 L.R.A. (N.S.) 835, 98 Pac. 853, 16 Ann. Cas. 947.

BUSINESS.

1. Nature and usual course.
2. Scope of particular trade.
3. Practice of particular house.
4. Contradiction of ground of belief.
5. Who proprietor.

See also ABBREVIATIONS; AMBIGUITY; JUDICIAL NOTICE; USAGE.

1. Nature and usual course.

The court may take judicial notice of the nature and usual course of business of banks,¹ railroad,² and express³ companies, and boards of trade.⁴ So, also, of the nature and function of such established and well-known instruments of commerce as mercantile agencies.⁵

So, also, of the manner in which general commercial business is carried on,⁶ and of the usual course of trade to make advances on produce by the use of bills of lading,⁷ and the practice of putting small packages adapted for retail trade into larger pack-

ages for wholesale trade.⁸ But courts will not take judicial notice of a custom peculiar to a class of business operations.⁹

¹ *Merchants' Nat. Bank v. Hall*, 83 N. Y. 338, 38 Am. Rep. 434, affirming 18 Hun, 176; *Yerkes v. National Bank*, 69 N. Y. 383, 25 Am. Rep. 208, 2 Browne Nat. Bank Cas. 296; *Hutchinson v. Manhattan Co.* 150 N. Y. 250, 44 N. E. 775. Judicial notice will be taken that a collecting bank does not ordinarily remit the identical specie collected to its correspondent. *First Nat. Bank v. Wilmington & W. R. Co.* 23 C. C. A. 200, 42 U. S. App. 232, 77 Fed. 401; *Bowman v. First Nat. Bank*, 9 Wash. 614, 43 Am. St. Rep. 870, 38 Pac. 211. And see *Beal v. Somerville*, 17 L.R.A. 291, 1 C. C. A. 598, 5 U. S. App. 14, 50 Fed. 647, holding that a court will take judicial notice of a long notorious and universal usage of banks to treat a deposit for collection of checks on another bank as a bailment and not as creating the relation of debtor and creditor which will allow the deposit to be checked out before collection of the check deposited.

² *Cleveland, C. C. & St. L. R. Co. v. Jenkins*, 174 Ill. 398, 62 L.R.A. 922, 66 Am. St. Rep. 296, 51 N. E. 811; *Isaacson v. New York C. & H. R. Co.* 94 N. Y. 278, 46 Am. Rep. 142, reversing 25 Hun, 350 (practice of checking baggage through over several connecting lines); *Louisville & N. R. Co. v. Boland*, 96 Ala. 626, 18 L.R.A. 260, 11 So. 667 (necessity of hauling cars of one railroad company over the road of another); *Burlington, C. R. & N. R. Co. v. Dey*, 82 Iowa, 312, 12 L.R.A. 436, 3 Inters. Com. Rep. 584, 31 Am. St. Rep. 477, 48 N. W. 98 (custom to transfer cars over different lines without breaking bulk); *Atchison, T. & S. F. R. Co. v. Headland*, 18 Colo. 477, 20 L.R.A. 822, 33 Pac. 185 (practice with reference to separation of passenger and freight trains); *Smith v. Lake Shore & M. S. R. Co.* 114 Mich. 460, 72 N. W. 328, reversed in 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565 (custom to issue mileage books); *State v. Indiana & I. S. R. Co.* 133 Ind. 69, 18 L.R.A. 502, 32 N. E. 817 (custom to maintain and operate telegraph lines in connection with railroads); *Lane v. New York, L. E. & W. R. Co.* 23 N. Y. Week. Dig. 267 (practice of employing trackmen to inspect the line); *Topham v. Interurban Street R. Co.* 96 App. Div. 323, 89 N. Y. Supp. 298, reversing 42 Misc. 503, 86 N. Y. Supp. 295 (transfers).

³ The court will take judicial notice that the express business is not conducted without the use of railroad or steamboat transportation. *Pacific Exp. Co. v. Seibert*, 44 Fed. 310.

⁴ *Nicol v. Ames*, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522.

⁵ *Eaton, C. & B. Co. v. Avery*, 83 N. Y. 31, 38 Am. Rep. 389, affirming 18 Hun, 44; Followed in *Holmes v. Harrington*, 20 Mo. App. 661; *Wilmot v. Lyon*, 11 Ohio C. C. 238, 7 Ohio C. D. 394.

⁶Nash v. Classen, 163 Ill. 400, 45 N. E. 276 (practice of purchaser of grain to be governed by the last available quotations in his possession); Best v. Muir, 8 N. D. 44, 73 Am. St. Rep. 742, 77 N. W. 95 (ordinary course of business in storing grain).

The custom is so universal that the court may take judicial notice that the business of a fire insurance agent, at least in the smaller cities and towns, is to represent contemporaneously several insurance companies, and consists in soliciting persons to permit the agent to place insurance for them, or in being solicited by those desirous of being insured, for the same purpose. *National F. Ins. Co. v. Sullard*, 97 App. Div. 233, 89 N. Y. Supp. 934.

⁷Gibson v. Stevens, 8 How. 384, 12 L. ed. 1123.

The court will take judicial notice of the ordinary course of trade, that upon the shipment of cotton and taking bills of lading therefor the shipper draws his bill of exchange against the cotton, and attaches thereto the bills of lading and insurance certificates, negotiates it in market, and the holder of the documents when the cotton reaches its destination presents them and receives the cotton, and is entitled to the insurance if delivery is prevented by any risk insured against. *Insurance Co. of N. A. v. Svendsen*, 77 Fed. 220.

⁸King v. Gallun, 109 U. S. 99, 27 L. ed. 870, 3 Sup. Ct. Rep. 85.

⁹First Nat. Bank v. Farmers' & M. Bank, 56 Neb. 149, 76 N. W. 430.

2. Scope of particular trade.

To prove the scope of a particular trade, neither direct testimony of a witness,¹ nor the opinion of a witness, is competent,² but it must be proved as a fact, by evidence of usage,³ etc.

¹Steinbach v. LaFayette F. Ins. Co. 54 N. Y. 90.

²Home Ins. Co. v. Weide, 11 Wall. 438, 20 L. ed. 197.

³Steinbach v. LaFayette F. Ins. Co. 54 N. Y. 90. See also cases cited under title USAGE, post.

3. Practice of particular house.

Evidence of the uniform practice of a particular house is not competent for the purpose of showing what was done in a particular transaction, if the transaction should have been entered in their books and the books are not produced or accounted for.¹ Otherwise when such evidence is offered in corroboration of collateral testimony.²

¹Bank of Utica v. Hillard, 5 Cow. 153.

ABB. FACTS—19.

² *Knickerbocker L. Ins. Co. v. Pendleton*, 115 U. S. 339, 29 L. ed. 432, 6 Sup. Ct. Rep. 74; *Dunlop v. United States*, 165 U. S. 486, 41 L. ed. 799, 17 Sup. Ct. Rep. 375; *Baker v. State*, 80 Wis. 416, 50 N. W. 518.

4. Contradiction of ground of belief.

After a witness has testified that the ground of his belief of a fact he has sworn to is the existence of a uniform practice or usage to that effect, it is competent, for the purpose of contradicting the existence of such practice or usage, that at specific times other than that in issue it was not pursued.¹

¹ *Wentworth v. Eastern R. Co.* 143 Mass. 248, 9 N. E. 563.

5. Who proprietor.

On the issue of proprietorship it is competent to prove inscription on sign, card, and label, etc.,¹ or that a person assumed to be the proprietor.² Possession of capital may be shown when its lack is relied on to show nonproprietorship.³

¹ *State v. Wilson*, 5 R. I. 291 (sign "boarding by" defendant, placed in bar room in building occupied by him competent to show his proprietorship of liquor business); *Com. v. Twombly*, 119 Mass. 104 (business card); *Com. v. Dearborn*, 109 Mass. 368 (tags attached to liquor jugs); *Com. v. Jennings*, 107 Mass. 488 (express tags, marks on barrels of liquor). The manner in which business is conducted, under what name and style, under what license, are pertinent to show in whose interest the business was conducted. *Carr v. Manahan*, 44 Vt. 246.

The declarations of one in possession of a mill that he had leased it, and that the business was his own, and bills of account containing his name printed thereon as proprietor, and meal sacks with words printed thereon to the effect that the meal was manufactured by him, are admissible in favor of one claiming under an execution on the judgment against him, as against one claiming to be the owner. *Nodle v. Hawthorn*, 107 Iowa, 380, 77 N. W. 1062.

² *State v. Skinner*, 34 Kan. 256, 8 Pac. 420.

³ Testimony of a wife that she received money from renting rooms is admissible on the issue whether a business was hers or her husband's, where want of capital was one of the reasons for claiming that the business, though carried on by her, was in fact that of her husband. *King v. Bird*, 85 Iowa, 535, 52 N. W. 494.

CAPACITY.

1. Qualification of witness.
2. Comparison with similar machine.
3. Capacity of minor to comprehend and avoid danger.

As to mental capacity, see **SANITY**. See also **ABILITY**; **CARE**; **CHARACTER**; **OPINIONS**.

1. Qualification of witness.

A witness who has had actual experience of the capacity of a machine¹ or structure,² is not such as in ordinary use in common life,³ may testify what is its capacity. The opinions of witnesses from personal observation that a culvert,⁴ a bridge,⁵ or a sewer⁶ was too small have been held proper. And the testimony of a witness as to the extent to which the capacity of an irrigating ditch had been diminished by a change in its channel and certain obstructions has also been held competent.⁷

The fact that the witness's examination was long after the time to which the evidence should be directed does not render his testimony, incompetent.⁸

¹ *Bemis v. Central Vermont R. Co.*, 58 Vt. 636, 3 Atl. 531 (holding expert evidence to prove that a crane was of sufficient capacity and repair, competent. The experts were a carpenter who had repaired it, and the roadmaster and division superintendent. Held, that their qualification as experts was in the discretion of the court); *Louisville, N. A. & C. R. Co. v. Berkey*, 136 Ind. 181, 35 N. E. 3 (capacity of iron in a coupling pin); *Little v. Head & D. Co.*, 69 N. H. 494, 43 Atl. 619 (capacity of iron hooks to suspend staging of given weight); *Conway v. Fitzgerald*, 70 Vt. 103, 39 Atl. 634 (capacity of cars to carry logs, although witness's experience has not been on the route in question).

² *Paddock v. Bartlett*, 68 Iowa, 16, 25 N. W. 906 (action for price of building packing house of specified capacity. Witnesses whose opinions are based upon observation and experience in working in a pork house are competent to testify as to the capacity of the house for packing pork); *Osten v. Jerome*, 93 Mich. 196, 53 N. W. 7 (capacity of ditch to carry water); *Brown v. Swanton*, 69 Vt. 53, 37 Atl. 280 (capacity of sluice under public highway to carry off water); *Frey v. Lowden*, 70 Cal. 550, 552, 11 Pac. 838 (capacity of ditch for carrying water to mine, a question of fact, to which an expert in mining and measuring and selling water may testify, although not scientifically trained in measurements).

That opinion evidence is competent as to safe carrying capacity of a ship,
 * see *Ogden v. Parsons*, 23 How. 167, 16 L. ed. 410.

² According to *Bemis v. Central Vermont R. Co.* 58 Vt. 636, 3 Atl. 531, the competency of opinions as to the capacity of a machine depends on its being a peculiar or unusual one,—not such as is in ordinary use. Hence, opinions as to the safe capacity of a railroad derrick were held incompetent.

And if the question is one requiring special knowledge and skill, a nonexpert cannot testify. *Kansas City, Ft. S. & M. R. Co. v. Cook*, 57 Ark. 387, 21 S. W. 1066 (holding that a nonexpert could not answer a question put to him as to whether from his knowledge of the country and the water carried by a certain slough in times of ordinary high water, he thinks an opening 100 feet wide in a railway embankment is sufficient to carry off the waters in times of ordinary flood).

⁴ *McPherson v. St. Louis, I. M. & S. R. Co.* 97 Mo. 253, 10 S. W. 846.

⁵ *Standley v. Atchison, T. & S. F. R. Co.* 121 Mo. App. 537, 97 S. W. 244.

⁶ *Indianapolis v. Huffer*, 30 Ind. 235. See also note in L.R.A.1918A, 688.

⁷ *Denver, T. & F. W. R. Co. v. Pulaski Irrigating Ditch Co.* 19 Colo. 367, 35 Pac. 910.

⁸ *National Bank & L. Co. v. Dunn*, 106 Ind. 110, 6 N. E. 131 (two years held not too long, where the testimony related to the structure and general character); *Burns v. Welch*, 8 Yerg. 117 (testimony of witness as to capacity of sawmill, founded upon knowledge acquired four years previously, competent).

2. Comparison with similar machine.

To show the capacity of a patented machine, a witness who has used one of the same kind, manufacture, and number may testify to its capacity, although he never saw the one in suit.¹

And on the question whether a machine performed the work which it was intended to, and which it was contracted it would perform, testimony comparing it with a good machine used by the purchasers, showing that it was insufficient, is competent.²

¹ *Sprout v. Newton*, 48 Hun, 209 (alleged breach of warranty of capacity of evaporator, as defense to action for price. Held, that plaintiff might prove capacity of an exactly similar one. The court says this tends to show capacity, assuming that the machine was perfect in all its parts. Any defects impairing its power would be the subject of proof); *Dempster Mill Mfg. Co. v. Fitzwater*, 6 Kan. App. 24, 49 Pac. 624. See also *Brierly v. Davol Mills*, 128 Mass. 291 (admitting testimony to the working of one substantially similar).

In *National Bank & L. Co. v. Dunn*, 106 Ind. 110, 6 N. E. 131, a similar ruling was sustained on the ground that it was an incidental and in-

ferential point; distinguishing *McCormick Harvesting Mach. Co. v. Gray*, 100 Ind. 285, where it was held error to allow a witness to testify how a machine worked, based on comparison with other machines not produced.

But in *McCormick Harvesting Mach. Co. v. Brower*, 88 Iowa, 607, 55 N. W. 537, evidence as to the draft of a machine as compared with other machines of like character was held inadmissible on the question as to whether the machine complied with the warranty that it would work well.

² *Davis's Sons v. Sweeney*, 80 Iowa, 391, 45 N. W. 1040.

3. Capacity of minor to comprehend and avoid danger.

At what age the presumption as to a child's capacity to understand and appreciate danger arises is a question of law, and not of fact.¹ But whether the burden of showing the child's capacity or incapacity, as the case may be, to understand and avoid danger has been met by him upon whom the law declares that burden to rest, is generally a question for the jury.² The courts have very generally fixed upon the age of fourteen as the time when the presumption of the child's incapacity to understand and avoid danger will no longer be indulged, and when the burden of showing such incapacity will rest upon him who asserts it. Prior to fourteen years of age, a child is held *prima facie* incapable of exercising judgment and discretion.³ But, of course, this presumption may be rebutted by evidence.⁴ The presumption is not rebutted, however, by evidence that the child was "bright, smart, and industrious."⁵ If the child is over the age of fourteen, the *prima facie* presumption that he is capable of exercising judgment and discretion will be indulged.⁶

¹ *Burnett v. Roanoke Mills Co.* 152 N. C. 35, 67 S. E. 30; *Nagle v. Allegheny Valley R. Co.* 88 Pa. 35, 32 Am. Rep. 413; *E. S. Higgins Carpet Co. v. O'Keefe*, 25 C. C. A. 220, 51 U. S. App. 74, 79 Fed. 900.

See generally as to capacity of children notes in L.R.A.1917F, 10, 123, 172 and 195 and cases cited under title CARE, § 13, c (3) post.

² *Bromberg v. Evans Laundry Co.* 134 Iowa, '38, 111 N. W. 417, 13 Ann. Cas. 33.

³ *Pratt Coal & I. Co. v. Brawley*, 83 Ala. 371, 3 Am. St. Rep. 751, 3 So. 555; *Jefferson v. Birmingham R. & Electric Co.* 116 Ala. 299, 38 L.R.A. 458, 67 Am. St. Rep. 116, 22 So. 546; *Hazlerigg v. Dobbins*, 145 Iowa, 495, 123 N. W. 196; *McDonald v. Metropolitan Street R. Co.* 80 App. Div. 233, 80 N. Y. Supp. 577; *Kehler v. Schwenk*, 144 Pa. 348,

13 L.R.A. 374, 27 Am. St. Rep. 633, 22 Atl. 910; *Goodwin v. Columbia Mills Co.* 80 S. C. 349, 61 S. E. 390; *Lynchburg Cotton Mills v. Stanley*, 102 Va. 590, 46 S. E. 908; *Ewing v. Lanark Fuel Co.* 65 W. Va. 726, 29 L.R.A.(N.S.) 487, 65 S. E. 200. See also extensive notes in L.R.A.1917F, 10, 123, 172 and 195 and cases cited under title *CARE*, § 13, c, (3), post.

⁴ *Pratt Coal & I. Co. v. Brawley*, 83 Ala. 371, 3 Am. St. Rep. 751, 3 So. 555; *Lynchburg Cotton Mills v. Stanley*, 102 Va. 590, 46 S. E. 908; *Tucker v. Buffalo Cotton Mills*, 76 S. C. 539, 121 Am. St. Rep. 957, 57 S. E. 626; *Goodwin v. Columbia Mills Co.* 80 S. C. 349, 61 S. E. 390.

⁵ *Tutwiler Coal, Coke & I. Co. v. Enslen*, 129 Ala. 336, 30 So. 600; *Jones v. Strickland*, 201 Ala. 138, 77 So. 562.

⁶ *Lovell v. De Bardelaben Coal & I. Co.* 90 Ala. 15, 7 So. 756; *Kehler v. Schwenk*, 144 Pa. 348, 13 L.R.A. 374, 27 Am. St. Rep. 633, 22 Atl. 910; *Greenway v. Conroy*, 160 Pa. 185, 40 Am. St. Rep. 715, 28 Atl. 692; *Wilkinson v. Kanawha & H. Coal & Coke Co.* 64 W. Va. 93, 20 L.R.A.(N.S.) 331, 61 S. E. 875; *Ewing v. Lanark Fuel Co.* 65 W. Va. 726, 29 L.R.A.(N.S.) 487, 65 S. E. 200; *Malsky v. Schumacher & Eitlinger*, 7 Misc. 8, 27 N. Y. Supp. 331; *Groth v. Thomann*, 110 Wis. 488, 86 N. W. 178.

For other cases on this subject, see notes in 20 L.R.A.(N.S.) 487, and L.R.A.1917F, 10, 123, 172, and 195.

As to duty to warn minor servant of dangers of which he is already aware, see note in 29 L.R.A.(N.S.) 111.

As to whether incompetence of a minor to perform the duties of a particular employment may be inferred from his minority alone, see note in 20 L.R.A.(N.S.) 331.

CARBON COPIES.

Carbon copies of documents are generally received in evidence as duplicate originals.¹

¹ *National Harvester Co. v. Elfstrom*, 101 Minn. 263, 12 L.R.A.(N.S.) 343, 118 Am. St. Rep. 626, 112 N. W. 252, 11 Ann. Cas. 107; *Wright v. Chicago, B. & Q. R. Co.* 118 Mo. App. 393, 94 S. W. 555; *Cole v. Ellwood Power Co.* 216 Pa. 283, 65 Atl. 678; *Virginia-Carolina Chemical Co. v. Knight*, 106 Va. 674, 56 S. E. 725; *Gardner v. Eberhart*, 82 Ill. 316; *Westbrook v. Fulton*, 79 Ala. 510; *Chesapeake & O. R. Co. v. Stock*, 104 Va. 97, 51 S. E. 161; *Edmunds v. Atchison, T. & S. F. R. Co.* 174 Cal. 246, 162 Pac. 1038; *Contra, State v. Teasdale*, 120 Mo. App. 692, 97 S. W. 995. See also note in 30 Harvard L. Rev. 764.

CARE.

1. Opinion evidence.
 - a. In matter of special knowledge.
 - b. In matter of common life.
2. Form of question to witness.
3. What might have been done.
4. Whether injury might have been avoided.
5. Conduct of the witness.
6. Observation dependent on minutiae.
7. General habit.
8. Taking advice.
9. Evidence of other accidents.
10. Precautions.
 - a. In general.
 - b. Subsequent to the fact.
11. Variance.
 - a. In general.
 - b. Degree of negligence.
12. Circumstantial evidence.
13. Presumptions and burden of proof.
 - a. In general.
 - b. Presumption of want of care from fact of loss or injury.
 - (1) In general.
 - (2) Statutes making injury prima facie evidence of negligence.
 - c. Contributory negligence.
 - (1) Burden of proof.
 - (2) Presumptions.
 - (3) Care required of children.
14. Cogency of evidence.

As to character for care or skill, see CHARACTER.

See also CONDITION; DUTY; NEGLIGENCE.

1. Opinion evidence.

a. In matter of special knowledge.—On any subject not within common knowledge and experience of men of common education, in the ordinary walks of life, an expert witness may be asked whether or not a supposed act would be proper or prudent

under specified circumstances, though that is to be the very question for the jury if they find the fact as supposed.¹

¹ *Eastern Transp. Line v. Hope*, 95 U. S. 297, 24 L. ed. 477, and cases cited (an action for loss from negligent towing, holding it not error to ask a pilot and tugboat captain of many years' experience whether it would be safe and prudent to tow three abreast in wide waters in high wind).

Carpenter v. Eastern Transp. Co. 71 N. Y. 574, affirming 67 Barb. 570, *dictum* (that witness may be asked whether specified conduct in towing is seamanlike and proper).

Ayres v. Binghamton Water Comrs. 22 Hun, 297, holding it competent to ask what would have been a proper manner of filling a street excavation, but not as to how you would do it.

Hayes v. Southern P. Co. 17 Utah, 99, 53 Pac. 1001, holding it competent to ask whether buildings of a more or less complicated structure, used exclusively in railroad business, and whose construction requires particular skill, were properly and carefully constructed.

Culver v. Alabama Midland R. Co. 108 Ala. 330, 18 So. 827, holding that a witness may testify that a specified distance at which a person was standing from a railroad track when killed by a passing train was a safe one, where the company contends that he was standing in dangerous proximity to the track.

Grant v. Varney, 21 Colo. 329, 40 Pac. 771, holding it competent for experienced miners to be asked as to the proper method of timbering a drift run in such grounds as the one in question.

Laufer v. Bridgeport Traction Co. 68 Conn. 475, 37 L.R.A. 533, 37 Atl. 379, holding it competent to ask experts in the management of electric cars what sort of management of such a car would be reasonable.

Lang v. Terry, 163 Mass. 138, 39 N. E. 802, holding it competent to ask an expert in the use of derricks as to whether a derrick without a guy rope is a safe and proper one to use for certain work, and as to the usual and proper method of attaching a guy rope.

Olmscheid v. Nelson-Tenney Lumber Co. 66 Minn. 61, 68 N. W. 605, holding that witness may be asked as to the effect on the safety of the operator of using a "bolting saw" without a carriage attachment.

Kumberger v. Congress Spring Co. 158 N. Y. 339, 53 N. E. 3, holding that witness may be asked whether it is proper to place an engine on a floor without knowing what that floor is, where it is disputed as to whether the vendee was to provide a foundation for the engine.

Cochrane v. Little, 71 Md. 323, 18 Atl. 698, holding competent, testimony that legal advice under given circumstances was not such as a prudent and careful lawyer of ordinary capacity would have given.

Whether a given act is performed in a prudent and proper manner is a subject upon which a witness qualified to speak may express an opinion. He may state the manner of the performance, and whether the precautions taken or work done were reasonably sufficient for the purpose in view; but whether a line of conduct, like the deposit of refuse from a mine in a stream, is negligent or careful, is for the jury after the facts are laid before them. *Elder v. Lykens Valley Coal Co.* 157 Pa. 490, 37 Am. St. Rep. 742, 27 Atl. 545.

Expert evidence has been held competent to show the proper method of loading car wheels on a flat car (*Meily v. St. Louis & S. F. R. Co.* 215 Mo. 567, 114 S. W. 1013); as to the proper manner of constructing a trestle in a logging railroad (*Bundy v. Sierra Lumber Co.* 149 Cal. 772, 87 Pac. 622); as to whether forcing a stick of frozen dynamite into a drill hole was a dangerous operation (*Currelli v. Jackson*, 77 Conn. 115, 58 Atl. 762); as to precautions necessary in repairing broken electric wires (*Jacksonville Electric Co. v. Sloan*, 52 Fla. 257, 42 So. 516); as to whether proper care had been exercised in the installation of electric light wires in a building (*German-American Ins. Co. v. New York Gas & Electric Light Co.* 103 App. Div. 310, 93 N. Y. Supp. 46).

For other cases involving expert testimony, as to the proper construction of a thing, see CONSTRUCTION; OPINIONS.

b. In matter of common life.—On a subject within the common knowledge and experience of men in the ordinary walks of life and of common education, a witness cannot be asked whether or not the act was careful or prudent,¹ even though he be an expert in the estimation of risks caused by such acts.² In some instances however an opinion that an act was done carefully seems to have been held admissible where it did not state a legal conclusion and where the character of the act was such that the witness could not so describe it as to make it possible for the jury to determine the question of care for itself.³ Where the facts can be presented so that the jury can draw its own conclusions therefrom an opinion as to whether an act was being performed in a proper manner is not admissible.⁴

¹ But the witness may be asked for facts, as, whether he observed anything

rendering it an unfit place. *Baltimore & O. R. Co. v. Schultz*, 43 Ohio St. 270, 54 Am. Rep. 805, 1 N. E. 324 (sufficiency of fence); *Fraser v. Tupper*, 29 Vt. 409 (opinions as to suitability of a day for setting fires, excluded); *Higgins v. Dewey*, 107 Mass. 494, 9 Am. Rep. 63 (opinion that there was no probability such fire would spread, excluded).

Nonexperts are not competent to testify that a machine was very dangerous for a child of tender years to be around, the dangerous character of the machine being a question for the jury. *Evans v. Mills*, 124 Ga. 318, 52 S. E. 538.

And so as to the question whether cog wheels should have been covered. *Marks v. Harriet Cotton Mills*, 135 N. C. 287, 47 S. E. 432.

Whether a railroad company's rule requiring work trains to flag regular trains was an exercise of proper care was held a question for the jury and not a proper subject for opinions. *Gulf, C. & S. F. R. Co. v. Hays*, 40 Tex. Civ. App. 162, 89 S. W. 29.

² *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 474, 24 L. ed. 256, 259, an action for negligently causing fire, holds that it is not error to exclude a question to an insurance expert, as to whether, owing to the distance between the buildings, one would be considered an exposure to the other, increasing the risk. *s. p.*, *Mulry v. Mohawk Valley Ins. Co.* 5 Gray, 541, 66 Am. Dec. 380. See the contrary doctrine advocated in 19 Am. Law Record, 701. And see *Hill v. Portland & R. R. Co.* 55 Me. 438, 92 Am. Dec. 601, approved in *Stowe v. Bishop*, 58 Vt. 498, 56 Am. Rep. 569, 3 Atl. 494.

White v. Ballou, 8 Allen, 408 (an action for negligently starting fire, in which the court holds that a question as to whether putting wood to dry on the top of an arch with fire in it was safe and prudent was properly excluded).

Stowe v. Bishop, 58 Vt. 498, 56 Am. Rep. 569, 3 Atl. 494 (an action for injury to a horse by leaving him where he was frightened and ran; holding it proper to exclude a question whether it was prudent or careful to leave such a horse at such a place).

Brink's Chicago City Exp. Co. v. Kinnare, 168 Ill. 643, 48 N. E. 446, holding the possibility of a driver stopping his team in time to avert running over a person after seeing him in a position of danger not to be a subject for expert testimony. Otherwise of the question whether an electric car could, with proper care and attention, have been stopped in time to avoid a collision. *Howland v. Oakland Consol. Street R. Co.* 110 Cal. 513, 42 Pac. 983.

Morris v. Farmers' Mut. F. Ins. Co. 63 Minn. 420, 65 N. W. 655, holding it a matter of common knowledge, and not a question for expert testimony, whether it was dangerous to thresh with steam when a high wind was blowing towards the stacks.

Nutt v. Southern P. Co. 25 Or. 291, 35 Pac. 653, holding that whether the lowering of heavy tiles from a flat-car to the ground by rolling them down "skids," with a rope around them and snubbed to a post, was a safe method of unloading them, is not a proper subject for expert testimony.

Sappenfield v. Main Street & Agri. Park R. Co. 91 Cal. 48, 27 Pac. 590, holding inadmissible testimony as to whether a pin attaching the horse to the drawhead of a horse car was or was not a safe appliance.

Alabama Mineral R. Co. v. Jones, 114 Ala. 519, 62 Am. St. Rep. 121, 21 So. 507, holding a question whether or not the danger of riding on a hand car while in motion was obvious and patent to any man of common sense, properly excluded.

So, the tendency of fire to spread and cause damage under certain circumstances is a matter of common knowledge, and the question of proper safeguards to prevent its spread is not a subject for expert testimony. **Pulsifer v. Berry**, 87 Me. 405, 32 Atl. 986.

And whether a machine is very dangerous cannot be shown by expert testimony where the degree of danger involved in its use can be understood by persons of common intelligence without the aid of experts. **Gleason v. Smith**, 172 Mass. 50, 51 N. E. 460.

The question as to whether property carried upon the deck of a canal boat is properly covered so as to protect it from rain is not properly a subject of expert testimony; the facts should be presented to the jury, and the question left them for determination. **Schwinger v. Raymond**, 105 N. Y. 648, 11 N. E. 952.

Expert testimony as to the proper manner of turning a stone so as not to bring an undue strain upon the derrick when hoisting it cannot be rejected on the ground that it is a matter of common knowledge, where experts for plaintiff differed widely from those for defendant. **Leslie v. Granite R. Co.** 172 Mass. 468, 52 N. E. 542.

* On an issue whether it was safe to lower a timber weighing four hundred pounds with a single tackle and no guy line an expert cannot properly testify, the jury being competent to decide the question without the aid of experts. **Kelpy v. Triest**, 73 App. Div. 597, 76 N. Y. Supp. 742.

* **T. & C. Ins. Co. v. Fouke**, 94 Ark. 358, 127 S. W. 461; **Berry v. Greenville**, 84 S. C. 122, 65 S. E. 1030, 19 Ann. Cas. 978; **Wilson v. New York, N. H. & H. R. Co.** 18 R. I. 598, 29 Atl. 300.

⁴ *Brush Electric L. & P. Co. v. Wells*, 103 Ga. 512, 30 S. E. 533, 4 Am. Neg. Rep. 255.

2. Form of question to witness.

To call for the opinion of a witness on the care, propriety, or prudence of an act,¹ he cannot be asked his opinion as to what was or was not done as a matter of fact, as, for instance, that there was nothing that the person whose conduct is in question could have done;² whether he omitted or neglected to do anything which he might have done;³ whether he caused the injury by his own negligence or carelessness;⁴ whether he was "careful;"⁵ or whether everything was done that could be done.⁶

¹ *Bemis v. Central Vermont R. Co.* 58 Vt. 636, 3 Atl. 531 (prudence of using a railroad crane or derrick for a specified weight of stone).

In *Price v. Powell*, 3 N. Y. 326 (action against carrier by sea for injury to marble), a seafaring man for forty years, habituated to carrying marble, and familiar with the proper mode of stowing it in sea-going vessels, was allowed to be asked if in his opinion the marble was properly stowed; but this question under the present stricter practice might be objectionable as assuming that the mode of stowing was conclusively proved.

² *Bessemer Land & Improv. Co. v. Campbell*, 121 Ala. 50, 77 Am. St. Rep. 17, 25 So. 793.

³ *Carpenter v. Eastern Transp. Co.* 71 N. Y. 574, 580, affirming 67 Barb. 570 (distinguished in *Brink v. Hanover F. Ins. Co.* 80 N. Y. 108, 116, where it was held proper to ask witness if he did all he could); *Fogel v. San Francisco & S. M. R. Co.* 5 Cal. Unrep. 194, 42 Pac. 565; *Schwander v. Birge*, 46 Hun, 66, and cases cited (omission to provide building with fire escape).

⁴ *Camp v. Hall*, 39 Fla. 535, 22 So. 792.

⁵ *Phifer v. Carolina C. R. Co.* 122 N. C. 940, 29 S. E. 578, and cases cited; and *Louisville & N. R. Co. v. Milliken*, 21 Ky. L. Rep. 489, 51 S. W. 796, holds inadmissible a witness's opinion that it is not improper or an act of carelessness for a brakeman to sit on top of a freight car with his feet over the side. See also *Sickles v. Missouri, K. & T. R. Co.* 13 Tex. Civ. App. 434, 35 S. W. 493, holding that a witness cannot state

that in his opinion the exercise of the highest degree of care by the railroad company would have placed its track and roadbed in a safe condition for the running of trains.

So held, also, of the question whether it was negligence for a person having business on a railroad track to stand on a track immediately in front of a moving train. *Hamilton v. Rich Hill Coal Min. Co.* 108 Mo. 364, 18 S. W. 977.

And *Insley v. Shire*, 54 Kan. 793, 45 Am. St. Rep. 308, 39 Pac. 713, holds it improper to ask a witness whether or not a member of a firm had exercised due diligence in attending to its business.

6 *Fogel v. San Francisco & S. M. R. Co.* — Cal. —, 42 Pac. 565.

And *Duer v. Allen*, 96 Iowa, 36, 64 N. W. 682, holds that evidence that all care was taken that could be was properly excluded. The witness should have been required to state what care was taken.

3. What might have been done.

An expert witness, who has testified to the facts, may be asked whether he knew of anything that the person might have done.¹

1 *Carpenter v. Eastern Transp. Co.* 71 N. Y. 574, 580, affirming 67 Barb. 570 (*dictum*); s. p., *CONDITIONS*; *Hutchins v. Ford*, 82 Me. 363, 19 Atl. 832; *Freeman v. Travelers' Ins. Co.* 144 Mass. 572, 12 N. E. 372 (train might have been stopped sooner).

And while he may properly testify that an alleged defect in the machinery could have been discovered by employing prescribed methods, he cannot state that it could have been discovered by the exercise of ordinary care and precaution. *Pacheco v. Judson Mfg. Co.* 113 Cal. 541, 45 Pac. 833.

As to the admissibility of evidence other than expert, to show what might have been done, see *Geloneck v. Dean Steam Pump Co.* 165 Mass. 202, 43 N. E. 85 (evidence as to other appliances which were at hand, and other methods which might have been used, to move the pump, the issue being negligence in causing it to be moved as it was); *Bessemer Land & Improv. Co. v. Campbell*, 121 Ala. 50, 77 Am. St. Rep. 17, 25 So. 793 (evidence of what a superintendent of a mine might have done during a fire in the mine toward procuring means adequate to the rescue of the imprisoned miners).

As to the admissibility of evidence to show want of care on the part of a locomotive engineer, and to show what he might have done in the way of seeing and doing, compare *Baltimore & O. R. Co. v. Hellenthal*, 31 C. C. A. 414, 60 U. S. App. 156, 88 Fed. 116; *Alabama G. S. R. Co. v. Burgess*, 114 Ala. 587, 22 So. 169; *East Tennessee, V. & G. R. Co. v. Watson*, 90 Ala. 41, 7 So. 813; *Central R. & Bkg. Co. v. Vaughan*, 93 Ala. 209, 30 Am. St. Rep. 50, 9 So. 468; *Kansas City, M. & B. R. Co. v. Crocker*, 95 Ala. 412, 11 So. 262; *Alabama G. S. R. Co. v. Richie*, 99 Ala. 346, 12 So. 612; *Chicago, B. & Q. R. Co. v. Grablin*, 38 Neb. 90,

56 N. W. 796, 57 N. W. 522; *Sheldon v. Chicago, M. & St. P. R. Co.* 6 S. D. 606, 62 N. W. 955; *Byers v. Nashville, C. & St. L. R. Co.* 94 Tenn. 345, 29 S. W. 128; *Young v. Clark*, 16 Utah, 42, 50 Pac. 832.

4. Whether injury might have been avoided.

By a proper hypothetical question assuming the facts claimed to be in evidence, an expert witness may be asked whether with proper skill and care the injury would have resulted.¹

¹ *Boldt v. Murray*, 2 N. Y. S. R. 232, *Bradley, J.* (action for surgical malpractice).

So held, also, of a question whether, if they had been properly loaded, railroad rails could have fallen from a car. *McCray v. Galveston, H. & S. A. R. Co.* 89 Tex. 168, 34 S. W. 95.

5. Conduct of the witness.

Where the witness cannot be asked whether the thing was done as soon as possible, he may be asked if he himself did all he he could to get it done as soon as possible, even though this involves the very question for the jury.¹

And a witness may state that he did all he could.² But he cannot be asked a question which in effect calls for his opinion as to what constitutes proper care.³

¹ *Brink v. Hanover F. Ins. Co.* 80 N. Y. 108.

The same practice applies to other elements in care and diligence. See ABILITY.

Otherwise of the question whether another person did, or omitted, anything which he might have done, etc. See *supra*, FORM OF QUESTION, § 2.

² *Little Rock & M. R. Co. v. Shoecraft*, 56 Ark. 465, 20 S. W. 272.

³ As to ask a witness to state whether or not he was ordinarily careful at the time in question. *Louisville & N. R. Co. v. Bouldin*, 110 Ala. 185, 20 So. 325.

And one suing for personal injuries cannot state in general terms that he acted cautiously, but he must state the facts showing caution. *Mayfield v. Savannah, G. & N. A. R. Co.* 87 Ga. 374, 13 S. E. 459.

Nor should he be allowed to designate the degree of care he used. *Springfield v. Coe*, 166 Ill. 22, 46 N. E. 709.

6. Observation dependent on minutiae.

The principle that if the fact in question is one the observer's knowledge of which is necessarily derived from minutiae which cannot be described with the same effect as observed unless the

impression of the witness is given, the witness may state the fact directly as he apprehended it, leaving the minutiae to be called out on cross-examination,¹ applies to the case of any complex mechanical operation. An expert who observed the work may be asked whether it was carefully and properly done.² And an expert who did not see it may state his opinion upon an hypothetical question,³ even though it be the very question for the jury.⁴

¹ For other illustration, see *CONDITION OF PERSONS, ETC.*, §§ 5 *et seq.* S. P., *Curtis v. Gano*, 26 N. Y. 426; *Ward v. Kilpatrick*, 85 N. Y. 413, 39 Am. Rep. 674 (cabinet maker may be asked if work was a good job and well done); *Schwander v. Birge*, 46 Hun, 66 (citing cases, and holding that opinions are competent on subjects of which observation and experience have given the opportunity and means of knowledge, which exists in reasons rather than descriptive facts, and therefore cannot be intelligently communicated to others not familiar with the subject so as to possess them with a full understanding of it).

² *Eureka Co. v. Bass*, 81 Ala. 200, 60 Am. Rep. 152, 8 So. 216 (as to blasting, proper to ask if the holes were "properly charged" before the fuse was ignited, that being a collective fact, not a mere opinion; but not to ask "Within what time would it be safe to return to a hole charged with a dynamite cartridge which had failed to explode?").

³ In *Guiterman v. Liverpool, N. Y. & P. S. S. Co.* 83 N. Y. 358, the judgment in 9 Daly, 119, was reversed for error in allowing the question without stating to the witness the facts to be assumed. The question here was one of good seamanship.

⁴ *Eastern Transp. Line v. Hope*, 95 U. S. 297, 298, 24 L. ed. 477, 478.

7. General habit.

On the question of care or negligence in a particular matter evidence of the general habit of a person is not competent,¹ but if such evidence has been received, one has a right to contradict it by similar evidence to the contrary.²

¹ *Chase v. Maine C. R. Co.* 77 Me. 538, 1 Atl. 673, and cases cited; *Baltimore & O. R. Co. v. Colvin*, 118 Pa. 230, 12 Atl. 337 (*dictum*, the point held being that to receive evidence of reputation was reversible error); *Harriman v. Pullman Palace-Car Co.* 29 C. C. A. 194, 56 U. S. App. 313, 85 Fed. 353, and cases cited; *Glass v. Memphis & C. R. Co.* 94 Ala. 581, 10 So. 215; *Atlanta & W. P. R. Co. v. Smith*. 94 Ga. 107, 20 S. E. 763; *Gould v. Schermer*, 101 Iowa, 582, 70 N. W. 697; *Southern Kansas R. Co. v. Robbins*, 43 Kan. 145, 23 Pac.

113; *Erb v. Popritz*, 59 Kan. 264, 68 Am. St. Rep. 362, 52 Pac. 871, and cases cited; *Langworthy v. Green Twp.* 88 Mich. 207, 50 N. W. 130; *Jagger v. National German-American Bank*, 53 Minn. 386, 55 N. W. 545; *Eaton v. Boston & M. R. Co.* 67 N. H. 422, 40 Atl. 112; *Lucia v. Meech*, 68 Vt. 175, 34 Atl. 695; *Houston v. Brush*, 66 Vt. 331, 29 Atl. 380.

Otherwise if there is a conflict of testimony as to whether the act was done; as, for instance, in the case of one killed by being struck by a train, where no one saw the accident. *Illinois C. R. Co. v. Ashline*, 171 Ill. 313, 49 N. E. 521; *Casey v. Chicago R. Co.* 269 Ill. 386, L.R.A. 1916B, 824, 109 N. E. 984; *Atchison, T. & S. F. R. Co. v. Alsdurf*, 68 Ill. App. 149, s. p., *Atchison, T. & S. F. R. Co. v. Gants*, 38 Kan. 608, 5 Am. St. Rep. 780, 17 Pac. 56 (holding that to disprove use of bad language evidence of a contrary habit is not competent). See also cases cited in note in 14 Mich. L. Rev. 411.

As to the admissibility of evidence of the general reputation of one for sobriety, see *Stevens v. San Francisco & N. P. R. Co.* 100 Cal. 554, 35 Pac. 165; *Langworthy v. Green Twp.* 88 Mich. 207, 50 N. W. 130; *Norfolk & W. R. Co. v. Hoover*, 79 Md. 253, 25 L.R.A. 710, 47 Am. St. Rep. 392, 29 Atl. 994.

As to admissibility of intoxication as evidence of negligence, see note to *Kingston v. Fort Wayne & E. R. Co.* 112 Mich. 40, 40 L.R.A. 143.

² *Shindler v. Norwood* (N. Y.) 3 Alb. L. J. 50, reversing judgment for refusal to receive it.

8. Taking advice.

Evidence that, before acting in a matter alleged to be negligence, the party took competent and skilful advice, and acted in conformity with it, is competent, as tending to show caution and good faith.¹

¹ *Winn v. Abeles*, 35 Kan. 85, 57 Am. Rep. 138, 10 Pac. 443, 448; *Terre Haute v. Hudnut*, 112 Ind. 542, 13 N. E. 686.

9. Evidence of other accidents.

The frequency of accident at a particular place is good evidence of its dangerous character, and, therefore, in an action against a municipal corporation to recover damages for injuries received from a fall caused by a defective sidewalk, proof that other accidents of the same character have happened there is admissible.¹ So, in an action for the death of a person who in the night stepped off an approach to a bridge while it was swinging around to enable a vessel to pass,—it being alleged that the accident was caused by the neglect of the city to supply sufficient light—it was held competent to prove that another

person had under the same circumstances met with a similar accident.² And in an action for damages from fire set out by railroad engines, evidence that other fires had been repeatedly set out by defendant's engines is admissible.³ But it has been held that the evidence must be limited to fires set by the particular locomotive which it is alleged set the fire for which action is brought.⁴

¹District of Columbia v. Armes, 107 U. S. 519, 27 L. ed. 618, 2 Sup. Ct. Rep. 840; Quinlan v. Utica, 11 Hun, 217, affirmed in 74 N. Y. 603; Goshen v. England, 119 Ind. 368, 5 L.R.A. 253, 21 N. E. 977; Thompson v. Quincy, 83 Mich. 173, 10 L.R.A. 734, 47 N. W. 114.

²Chicago v. Powers, 42 Ill. 169, 89 Am. Dec. 418.

³Henderson v. Philadelphia & R. R. Co. 144 Pa. 461, 16 L.R.A. 299, 27 Am. St. Rep. 652, 22 Atl. 851; Campbell v. Missouri P. R. Co. 121 Mo. 340, 25 L.R.A. 175, 42 Am. St. Rep. 530, 25 S. W. 936.

⁴Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co. 27 Fla. 1, 157, 17 L.R.A. 33, 65, 9 So. 661, 689.

10. Precautions.

a. In general.—A person charged with negligence may show that he employed extraordinary care and circumspection;¹ and for this purpose it is proper to ask a qualified witness whether it was usual to provide such safeguards as are shown to have been provided in the case at bar;² or to show by a qualified witness the omission of precautions which universal experience has shown were necessary.³

And it may also be shown by proper evidence other than expert, that he omitted to employ precautions which he could and should have employed;⁴ but he in turn may show that in doing as he did, he did only what was customary under the circumstances.⁵

¹Losee v. Buchanan, 51 N. Y. 476, 10 Am. Rep. 623 (boiler explosion; competent to show that the boiler was purchased of reputable manufacturers, as tending to justify use), Distinguished in Mullen v. St. John, 57 N. Y. 567, 15 Am. Rep. 530; Day v. H. C. Akeley Lumber Co. 54 Minn. 522, 23 L.R.A. 513, 56 N. W. 243 (fire from sawdust burner; competent to show that the owner, upon complaint before the fire of the condition of the burner, had directed a competent man to examine it, and see if anything could be done to make it safer).

- ² *Hart v. Hudson River Bridge Co.* 84 N. Y. 56, 60 (not error to allow defendant, charged with negligence in leaving gate on drawbridge open, to show by an expert that it was not customary to have gates of any kind on such bridges so far as he knew).
- ³ *Flynt Bldg. & Constr. Co. v. Brown*, 14 C. C. A. 308, 35 U. S. App. 41, 67 Fed. 68.
- ⁴ *Duer v. Allen*, 96 Iowa, 36, 64 N. W. 682; *Clampit v. Chicago, St. P. & K. C. R. Co.* 84 Iowa, 71, 50 N. W. 673; *Hohl v. Chicago, M. & St. P. R. Co.* 61 Minn. 321, 52 Am. St. Rep. 598, 63 N. W. 742; *Union P. R. Co. v. Erickson*, 41 Neb. 1, 29 L.R.A. 137, 59 N. W. 349; *Kaminitsky v. Northeastern R. Co.* 25 S. C. 53; *Abbot v. Dwinnell*, 74 Wis. 514, 43 N. W. 496; *Union P. R. Co. v. Gilland*, 4 Wyo. 395, 34 Pac. 953.
- ⁵ *Burns v. Sennett*, 99 Cal. 363, 33 Pac. 916 (competent to show that a strap sustaining a hoisting apparatus was put up in the manner in which such straps are usually put up); *Standard Oil Co. v. Tierney*, 92 Ky. 367, 14 L.R.A. 677, 36 Am. St. Rep. 595, 17 S. W. 1025 (competent to show that wooden barrels are safe for shipping naphtha, and that it is ordinarily so shipped); *Rand v. Johns*, — Tex. App. —, 15 S. W. 200 (action for negligently loaning money on forged note; competent to show that other business men under the same circumstances acted as the defendant acted); *Bridger v. Asheville & S. R. Co.* 27 S. C. 456, 13 Am. St. Rep. 653, 3 S. E. 860 (competent for defendant charged with negligence in not properly fastening a turntable to show the general custom of railroads in regard to turntables after plaintiff has proved that one railroad company locks its turntables).

b. Subsequent to the fact.—But evidence to show precautions taken subsequent to the fact is not competent to show an antecedent want of care.¹

- ¹ *Isaacs v. Southern P. Co.* 49 Fed. 797 (braces used in reconstructing bridge); *Hager v. Southern P. Co.* 98 Cal. 309, 33 Pac. 119 (automatic bell at railroad crossing); *Hodges v. Percival*, 132 Ill. 53, 23 N. E. 423 (air cushions on elevator); *Chicago & E. R. Co. v. Lee*, 17 Ind. App. 215, 46 N. E. 543 (covering trench in which signal wires under railroad track were strung); *Georgia Southern & F. R. Co. v. Cartledge*, 116 Ga. 164, 59 L.R.A. 118, 42 S. E. 405; *Louisville & N. R. Co. v. Bowen*, 18 Ky. L. Rep. 1099, 39 S. W. 31; *Standard Oil Co. v. Tierney*, 92 Ky. 367, 14 L.R.A. 677, 36 Am. St. Rep. 595, 17 S. W. 1025; *Shinners v. Locks & Canals*, 154 Mass. 168, 12 L.R.A. 554, 26 Am. St. Rep. 226, 28 N. E. 10; *Downey v. Sawyer*, 157 Mass. 418, 32 N. E. 654; *Fox v. Peninsular White Lead & Color Works*, 84 Mich. 676, 48 N. W. 203; *Aldrich v. Concord &*

M. R. Co. 67 N. H. 250, 29 Atl. 408; Missouri P. R. Co. v. Hennessey, 75 Tex. 155, 12 S. W. 608; Green v. Ashland Water Co. 101 Wis. 258, 43 L.R.A. 117, 70 Am. St. Rep. 911, 77 N. W. 722, and cases cited; Terre Haute & I. R. Co. v. Clem, 123 Ind. 15, 7 L.R.A. 588, 18 Am. St. Rep. 303, 23 N. E. 965. See also, for other cases on this question, Shinnors v. Locks & Canals, 12 L.R.A. 554, and note thereto.

But such evidence is competent for the purpose of showing what could have been done. Willey v. Boston Electric Light Co. 168 Mass. 40, 37 L.R.A. 723, 46 N. E. 395. Or to show that the defect was one the defendant was bound to repair. Mitchell v. Plattsburg, 33 Mo. App. 555.

And in Kansas evidence of precautions taken immediately after the fact is admissible as part of the *res gestæ*. Consolidated Kansas City Smelting & Ref. Co. v. Tinchert, 5 Kan. App. 130, 48 Pac. 889.

And according to Jenkins v. Hooper Irrig. Co. 13 Utah, 100, 44 Pac. 829, evidence that after suit was brought against an irrigating company for damage caused by water, from its ditches, the head gate was lowered, and that the water then flowed down and ceased to stand in the manner which caused the damage, is admissible as tending to show negligence in not lowering the gate before.

Subsequent repair or removal of defect or obstruction in street as evidence of negligence is discussed in note in 20 L.R.A.(N.S.) 667.

11. Variance.

a. In general.—A person charging another with want of care or prudence is restricted in his proof to the facts alleged by him as constituting the negligence charged.¹

¹Mayer v. Thompson-Hutchison Bldg. Co. 116 Ala. 634, 22 So. 859; Acme Coal Min. Co. v. McIver, 5 Colo. App. 267, 38 Pac. 596; Harrington v. Hamburg, 85 Iowa, 272, 52 N. W. 201; Cherokee & P. Coal & Min. Co. v. Wilson, 47 Kan. 460, 28 Pac. 178; Greer v. Louisville & N. R. Co. 94 Ky. 169, 21 S. W. 649; State use of Brady v. Consolidated Gas Co. 85 Md. 637, 37 Atl. 263; Fairman v. Boston & A. R. Co. 169 Mass. 170, 47 N. E. 613; Gardner v. Detroit Street R. Co. 99 Mich. 182, 58 N. W. 49; McCarty v. Rood Hotel Co. 144 Mo. 397, 46 S. W. 172; Murray v. Silver City, D. & P. R. Co. 3 N. M. 580, 9 Pac. 369; New York, L. E. & W. R. Co. v. Atlantic Ref. Co. 129 N. Y. 597, 29 N. E. 829; Knahtla v. Oregon Short-Line & U. N. R. Co. 21 Or. 136, 27 Pac. 91; Jenkins v. McCarthy, 45 S. C. 278, 22 S. E. 883; Missouri P. R. Co. v. Hennessey, 75 Tex. 156, 12 S. W. 608; State v. Paggett, 8 Wash. 579, 36 Pac. 487; Snyder v. Wheeler Electrical Co. 43 W. Va. 661, 39 L.R.A. 499, 28 S. E. 733.

But the fact that evidence having a material bearing upon one or more of the charges of negligence alleged tends also to support a charge

not alleged does not render it improper. *North Chicago Street R. Co. v. Cotton*, 140 Ill. 486, 29 N. E. 899.

And under a general allegation of negligence any circumstance or mere incident tending to show negligence may be proved without any specific allegation thereof. *International & G. N. R. Co. v. Dyer*, 76 Tex. 156, 13 S. W. 377; *Fisher v. Golladay*, 38 Mo. App. 531; *Cunningham v. Union P. R. Co.* 4 Utah, 206, 7 Pac. 795; *Omaha & R. Valley R. Co. v. Wright*, 49 Neb. 456, 68 N. W. 618.

And under a statute providing that the fact that fire is scattered or thrown from an engine or cars is prima facie evidence of negligence of employees or defects in the engine, the complaint need not distinguish between negligence of employees and defects in the engine; and an allegation that the company negligently permitted the engine to drop and scatter coals and sparks of fire is sufficient to admit evidence of negligence in the condition of the engine or the operation thereof. *Weber v. Winona & St. P. R. Co.* 63 Minn. 66, 65 N. W. 93. (See Minn. Gen. Stats. 1913, § 4426, p. 986, showing that the statute of 1894 above referred to has been amended but that its effect is apparently the same.)

b. Degree of negligence.—The degree of negligence need not be alleged. An allegation that an act was negligently done will admit proof of gross negligence.¹

¹ *Shumacher v. St. Louis & S. F. R. Co.* 39 Fed. 174; *Louisville & N. R. Co. v. Mitchell*, 87 Ky. 327, 8 S. W. 706; *Louisville & N. R. Co. v. Webb*, 97 Ala. 308, 12 So. 374.

12. Circumstantial evidence.

The exercise or want of care or prudence may be established by circumstantial as well as by direct evidence.¹

¹ *Illinois C. R. Co. v. Cozby*, 174 Ill. 109, 50 N. E. 1011; *Carver v. Detroit & S. Pl. Road Co.* 69 Mich. 616, 25 N. W. 183; *Rine v. Chicago & A. R. Co.* 100 Mo. 228, 12 S. W. 640; *Washington & G. R. Co. v. Grant*, 11 App. D. C. 107; *Gerke v. Fancher*, 57 Ill. App. 651.

So held, also, of proof to show freedom from contributory negligence. *Gorman v. Minneapolis & St. L. R. Co.* 78 Iowa, 509, 43 N. W. 303; *Chisholm v. State*, 141 N. Y. 246, 36 N. E. 184; *Harper v. Delaware, L. & W. R. Co.* 22 App. Div. 273, 47 N. Y. Supp. 933.

13. Presumptions and burden of proof.

a. In general.—Want of care or prudence is an affirmative fact to be established by proof;¹ and he who charges another therewith has the burden of proving the fact.²

¹ The general rule is that negligence is not to be presumed or imputed;

but there are certain exceptions which will be found noted in the next two succeeding sections.

* *Denver & R. G. R. Co. v. Ryan*, 17 Colo. 98, 28 Pac. 79; *Chielinsky v. Hoopes & T. Co.* 1 Marv. (Del.) 273, 40 Atl. 1127; *Padgett v. Atchison, T. & S. F. R. Co.* 7 Kan. App. 736, 52 Pac. 579; *Gordon v. Louisville R. Co.* 19 Ky. L. Rep. 1959, 44 S. W. 972; *Baltimore & R. Turnp. Road v. State*, 71 Md. 573, 18 Atl. 884; *Smith v. American Exp. Co.* 108 Mich. 572, 66 N. W. 479; *Rutledge v. Missouri P. R. Co.* 123 Mo. 121, 24 S. W. 1053, affirmed in 123 Mo. 140, 27 S. W. 327; *Fulp v. Roanoke & S. R. Co.* 120 N. C. 525, 27 S. E. 74; *Pawling v. Hoskins*, 132 Pa. 617, 19 Atl. 301; *Lynn v. Ralpho Twp.* 186 Pa. 420, 40 Atl. 568; *Saunders v. Chicago & N. W. R. Co.* 6 S. D. 40, 60 N. W. 148; *Melendy v. Ames*, 62 Vt. 14, 20 Atl. 161; *Richmond & D. R. Co. v. Yeamans*, 86 Va. 860, 12 S. E. 946; *Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co.* 27 Fla. 157, 17 L.R.A. 65, 9 So. 661; *Allen v. Union P. R. Co.* 7 Utah, 239, 26 Pac. 297.

And the difficulty of proving how a thing happened does not change the rule. *Miller v. Lebanon & A. Street R. Co.* 186 Pa. 190, 40 Atl. 413.

Nor does a statute providing that where one suing a railroad company for personal injuries and the agents of the company are both at fault the plaintiff may still recover relieve him of the burden, but his damages shall be diminished in proportion to fault attributable to him. *Wilkinson v. Pensacola & A. R. Co.* 35 Fla. 82, 17 So. 71. (Rev. Stats. of Fla. 1920, § 4965, vol. 2, p. 2465.)

But the law does not cast on him the burden of proving, not only fault or negligence, but also what that fault or negligence was; and when he has proved that the other caused the injury, the burden is then thrown on the latter to show that he was not guilty of negligence. *Treadwell v. Whittier*, 80 Cal. 574, 5 L.R.A. 498, 22 Pac. 266.

In an action against a physician or surgeon for malpractice, the plaintiff has the burden of proving negligence or unskillfulness. *Pettigrew v. Lewis*, 46 Kan. 78, 26 Pac. 458; *Robinson v. Campbell*, 47 Iowa, 625; *Leighton v. Sargent*, 31 N. H. 119, 64 Am. Dec. 323.

As to proof necessary to discharge this burden, see note in 15 L.R.A. (N.S.) 416.

So, the party charging negligence as a ground of action for injuries caused by the escape and explosion of gas must prove it. *Washington Gaslight Co. v. Eckloff*, 22 Wash. L. Rep. 656; *Nitro-glycerine Case (Parrott v. Wells)* 15 Wall. 524, 21 L. ed. 206; *Holly v. Boston Gaslight Co.* 8 Gray, 123, 69 Am. Dec. 233; *Adams v. Carlisle*, 21 Pick. 146; *White v. Winnisimmet Co.* 7 Cush. 155.

He must allege facts showing that the injury was due to the defendant's negligence. *McGahan v. Indianapolis Natural Gas Co.* 140 Ind. 335, 29 L.R.A. 355, 49 Am. St. Rep. 199, 37 N. E. 601.

For other cases, see note in 29 L.R.A. 345.

And in an action against a master for injury to a servant caused by the incompetence of a fellow servant, the burden of proof is on the plaintiff to establish the fact that the master did not use due care in the selection of the employee causing the injury. *Roblin v. Kansas City, St. J. & C. B. R. Co.* 119 Mo. 476, 24 S. W. 1011; *Stafford v. Chicago, B. & Q. R. Co.* 114 Ill. 244, 2 N. E. 185.

As to master's duty of care with respect to employment of servants generally, see note in 48 L.R.A. 369.

b. Presumption of want of care from fact of loss or injury.—

(1) *In general.*—The rule is that the mere fact of a loss or injury occurring by the act or omission of another does not raise a presumption of want of care on the part of either,¹ unless the occurrence is one which would not ordinarily have happened if due care and diligence had been used,² or unless a special obligation of care arising out of the relationship existing between the parties rests upon the one charged with the wrongdoing, toward the sufferer.

The most notable instance of this last exception is the presumption of negligence which arises in the case of injury to a passenger. The cases generally recognize the rule that an inference of negligence may arise when a passenger is injured through some defect in the carrier's instrumentalities and appliances or some act or omission of the carrier's servant which might have been prevented by the exercise of the care due to the passenger from the carrier by reason of the contractual obligation by which the carrier agrees safely to carry the passenger to his destination. By a decided weight, however, the decisions uphold the doctrine that proof of mere injury to a passenger, without more, does not raise a presumption of negligence against the carrier. It is necessary for the plaintiff to show an accident from which the injury resulted or circumstances of such a character as to impute negligence.⁴ The main distinction which regulates the raising of a presumption of negligence against the carrier is whether the act or thing causing the injury was within the carrier's control. If it was not, no presumption arises.⁵ If it was, and was not one of the ordinary operations of the road or a usual and necessarily existing condition, and the passenger was not contributorily negligent, the presumption arises.⁶ The same rules seem to be applied in case of injuries to

passengers on elevators or as to injuries on street or steam railways.⁷

As to carriers of freight, the rule is that, if good in the custody of a common carrier are lost or damaged, the presumption is that the loss or damage was occasioned by the carrier's default, and the burden is upon the carrier to prove that it arose from a cause for which he cannot be held responsible.⁸ Where the carrier seeks to excuse itself on the ground that the loss occurred through an act of God or irresistible superhuman cause, inevitable accident or the public enemy, it is well settled that the burden rests upon the carrier to establish such defense,⁹ and the weight of authority holds that the carrier is bound to establish not only that the act of God ultimately occasioned the loss, but that the same was not due in any manner to its negligence.¹⁰

And the rule *res ipsa loquitur* which is applied as between carrier and passenger has also been applied as between storekeeper and customer.¹¹

Another class of cases within this exception to the general rule are cases of injury to a guest at an inn or to his property. In jurisdictions in which the ancient rule of the common law that an innkeeper is the insurer of the safety of the property of his guests has been so far modified as to require negligence upon the part of the innkeeper to be shown before he can be held liable, the rule is almost universal that the mere fact of the loss will raise a presumption of negligence on the part of the innkeeper.¹² So, also, in case of injury to a guest by the fall upon him of the upper portion of a folding bed which he was occupying a presumption of negligence on the part of the innkeeper was held to arise.¹³

¹In no case can the bare fact that a loss or injury has been suffered, of itself, and divorced from all surrounding circumstances, justify an inference of negligence. True, direct proof is not necessary; and unquestionably there are instances in which the circumstances surrounding an occurrence, and giving a character to it, are held, if unexplained, to indicate the antecedent or coincident existence of negligence as the efficient cause of the occurrence. These are the instances where the doctrine of *res ipsa loquitur* is applied.

The doctrine embodied in this maxim may be said to be applicable to two classes of cases only, viz., (1) where the loss or injury arises

from some condition or event that is in its very nature so obviously destructive of the safety of person or property, and is so tortious in its quality as, in the first instance at least, to permit no inference save that of negligence on the part of the person in control of the injurious agency (for cases instancing the application of this exception, see next succeeding note); (2) where there is a special obligation of care resting on the person in control of the injurious agency toward the sufferer (see the second succeeding note for cases falling within this exception).

But it is obvious in both instances more than the mere isolated, single, segregated fact of a loss or injury must be known. Loss or injury, without more, does not necessarily speak or indicate its cause; but the act that produced it being made apparent may, in the instances indicated, furnish ground for the presumption that negligence set that act in motion.

This is unquestionably the extent and true application of the doctrine embodied in the maxim *res ipsa loquitur*. *Benedick v. Potts*, 88 Md. 52, 41 L.R.A. 478, 40 Atl. 1067 (where a person who was on a car when it entered a tunnel on a mimic railway, operated as an amusement, was not on the car when it emerged, but was found in the tunnel in an unconscious state, with a wound on his head). See also, for other cases affirming this doctrine: *Bahr v. Lombard*, 53 N. J. L. 233, 21 Atl. 190, 23 Atl. 167; *Dobbins v. Brown*, 119 N. Y. 188, 23 N. E. 537; *John Morris Co. v. Southworth*, 154 Ill. 118, 39 N. E. 1099 (explosion of stationary boiler).

As to relation of doctrine *res ipsa loquitur* to burden of proof see *Page v. Camp Mfg. Co.* 180 N. C. 330, 104 S. E. 667; *Sweeney v. Erving*, 228 U. S. 233, 57 L. ed. 815, 33 Sup. Ct. Rep. 416, Ann. Cas. 1914D, 905; and notes in 16 L.R.A.(N.S.) 527; L.R.A.1916A, 930; and 19 Mich. L. Rev. 451.

As to the applicability of rule *res ipsa loquitur* in the absence of contractual relations see note in 6 L.R.A.(N.S.) 800.

So held of the mere fact of loss or injury resulting from a horse running away. *Creamer v. McIlvain*, 89 Md. 343, 45 L.R.A. 531, 43 Atl. 935. Otherwise, however, where it appears that it was the third time the horse had run away. *Thane v. Douglass*, 102 Tenn. 307, 52 S. W. 155.

For the conflicting authorities on the question whether negligence may be inferred from the mere fact that a horse runs away, see notes in 23 L.R.A.(N.S.) 171, and 39 L.R.A.(N.S.) 574.

Leaving horse unhitched in highway as prima facie evidence of negligence, see note in 10 L.R.A.(N.S.) 850.

Where it is established that a loss to a passenger occurs while he is asleep in a sleeping car, the burden of proof is shifted to the defendant company, and it is bound to show that it exercised reasonable diligence to prevent the loss. *Pullman Co. v. Schaffner*, 126 Ga. 609, 9 L.R.A.

(N.S.) 407, 55 S. E. 933; Pullman Palace Car Co. v. Frendenstein, 3 Colo. App. 540, 34 Pac. 578; Lewis v. New York Sleeping Car Co. 143 Mass. 267, 58 Am. Rep. 135, 9 N. E. 615; Robinson v. Southern R. Co. 40 App. D. C. 549, L.R.A.1915B, 621, Ann. Cas. 1914C, 959.

Proof of the loss of money by a passenger while occupying a berth in a sleeping car does not make out a prima facie case against the carrier operating the car. Falls Rivet & Mach. Co. v. Pullman Palace Car Co. 4 Ohio N. P. 26, 6 Ohio S. & C. P. Dec. 85; Dings v. Pullman Co. 171 Mo. App. 643, 154 S. W. 446; Pullman Co. v. Franks, — Tex. Civ. App. —, 187 S. W. 501; Whicher v. Boston & A. R. Co. 176 Mass. 275, 79 Am. St. Rep. 314, 57 N. E. 601, 8 Am. Neg. Rep. 48; Hillis v. Chicago, R. I. & P. R. Co. 72 Iowa, 228, 33 N. W. 643.

For additional cases and full discussion of presumption and burden of proof as to care or negligence in respect to bailment, see note in 43 L.R.A.(N.S.) 1168, and Stone v. Case, 34 Okla. 5, 43 L.R.A.(N.S.) 1168, 124 Pac. 960.

²Lennon v. Rawitzer, 57 Conn. 583, 19 Atl. 334; Stearns v. Ontario Spinning Co. 184 Pa. 519, 39 L.R.A. 842, 39 Atl. 292; Cunningham v. Union P. R. Co. 4 Utah, 206, 7 Pac. 795; Hill v. Scott, 38 Mo. App. 370. See also Bouker v. Smith, 40 Fed. 839 (holding that stranding in fair weather and a calm sea, in a buoyed channel, presumably occurs only through lack of care of some kind); Trenton Pass. R. Co. v. Cooper, 60 N. J. L. 219, 38 L.R.A. 637, 37 Atl. 730 (holding that the escape of electricity from a street railway is presumptive proof of negligence in the operation of the railway); Snyder v. Wheeling Electrical Co. 43 W. Va. 661, 39 L.R.A. 499, 28 S. E. 733 (holding that the breaking of a live electric wire, and its fall to the ground, presume negligence); Judson v. Giant Powder Co. 107 Cal. 549, 29 L.R.A. 718, 40 Pac. 1020 (holding that the mere fact of the explosion of nitro-glycerine in process of manufacturing into dynamite raises the presumption of negligence, in the absence of any explanation of the real cause of the explosion. In this case will be found an extended discussion of this question, and many cases which are cited, followed, distinguished, and disapproved).

That a mistake in a telegram, made in course of transmission, raises a presumption of negligence on the part of the company, see Redd v. Western U. Teleg. Co. 135 Mo. 661, 34 L.R.A. 492, 37 S. W. 904; Pearsall v. Western U. Teleg. Co. 124 N. Y. 256, 26 N. E. 534; Western U. Teleg. Co. v. Harper, 15 Tex. Civ. App. 37, 39 S. W. 599.

That the presumption is that property lost while in charge of the bailee for hire is lost through his negligence, see Davis v. Hurt, 114 Ala. 146, 21 So. 468; Donlon v. Clark, 23 Nev. 203, 45 Pac. 1; Clark v. Shrimski, 77 Mo. App. 166; Davis v. Tribune Job-Printing Co. 70 Minn. 95, 72 N. W. 808; Knights v. Piella, 111 Mich. 9, 69 N. W. 92. *Contra*: Lancaster Mills v. Merchants' Cotton-Press & Storage Co. 89 Tenn. 1,

14 S. W. 317 (that no presumption arises from the mere showing of destruction by fire).

So where the property is damaged while in the hands of the bailee there is a similar presumption of negligence on his part. *Davis v. A. O. Taylor & Son*, 92 Neb. 769, 139 N. W. 687; note in 13 Columbia L. Rev. 542 and cases cited.

Upon the question whether the setting of a fire by a locomotive engine raises the presumption of negligence on the part of the railroad company, in the absence of a statute, the authorities are in conflict. That it does, see *Galveston, H. & H. R. Co. v. Burnett*, — Tex. Civ. App. —, 37 S. W. 779; *Patterson v. Chesapeake & O. R. Co.* 94 Va. 16, 26 S. E. 393. See also, for other cases, note to *Barnowski v. Helson*, 15 L.R.A. 40. That it does not, see *Flinn v. New York C. & H. R. R. Co.* 142 N. Y. 11, 36 N. E. 1046, and cases collected in note to *Barnowski v. Helson*, 15 L.R.A. 41.

As to whether the presumption of negligence arising from the fact that a fire was set by a railroad company's locomotive necessarily makes the question of negligence one for the jury, see note in 5 L.R.A.(N.S.) 99.

As to validity of statute making railroad company absolutely liable for damage by fire, see notes in 25 L.R.A. 161, and 35 L.R.A.(N.S.) 1016.

Many of the states now have statutes controlling the question. See, for instance, *Hemmi v. Chicago G. W. R. Co.* 102 Iowa, 25, 70 N. W. 746; *Louisville, N. O. & T. R. Co. v. Natchez, J. & C. R. Co.* 67 Miss. 399, 7 So. 350. See also cases in note to *Barnowski v. Helson*, 15 L.R.A. 41.

There is also conflict of opinion as to whether the mere fact of a collision by a person with a moving train raises a presumption of negligence on the part of the railroad company. That it does not, see *Gulf, C. & S. F. R. Co. v. Shieder*, 88 Tex. 152, 28 L.R.A. 538, 30 S. W. 902. And the mere fact that a dead body was found on the track supports no inference of negligence. *Welsh v. Erie & W. Valley R. Co.* 181 Pa. 461, 37 Atl. 513. Even though the body indicates that two wheels have passed over it. *Bryant v. Illinois C. R. Co.* — La. —, 22 So. 799. But even though otherwise permissible, no such presumption may be indulged where the evidence on the part of the sufferer shows that he himself was negligent. *Parish v. Western & A. R. Co.* 102 Ga. 285, 40 L.R.A. 364, 29 S. E. 715; *St. Louis, I. M. & S. R. Co. v. Jordan*, 65 Ark. 429, 47 S. W. 115. But where a railway occupies a portion of a public street for its tracks, and a pedestrian is injured by a door falling from a moving freight train, the presumption of negligence on the part of the company may be indulged. *St. Louis, I. M. & S. R. Co. v. Neely*, 63 Ark. 636, 37 L.R.A. 616, 40 S. W. 130.

The courts are practically unanimous that in the absence of a statute a presumption of negligence does not arise against a railway company

from the mere fact of injury to live stock by its trains. See, for instance, *Atchison, T. & S. F. R. Co. v. Walton*, 3 N. M. 530, 9 Pac. 351, and cases cited; *Volkman v. Chicago, St. P. M. & O. R. Co.* 5 Dak. 69, 37 N. W. 731 (*dictum*); and cases cited in note to *Barnowski v. Helson*, 15 L.R.A. 39. See also title **LOSS OR DAMAGE TO FREIGHT**, post.

As to power of legislature to make killing of stock *prima facie* evidence of negligence, see post, § 13, b, (2).

The case of violation of a duty imposed by statute, as, for instance, fencing a railroad track, giving signals on approaching a grade crossing, and the like, resulting in loss or injury for which one suing establishes a *prima facie* right of recovery by merely showing the violation of the duty, hardly presents a case of negligence within the scope of this work.

That a servant suing his master for personal injuries does not raise a presumption of negligence on the part of his master by showing merely that he has sustained an injury, see *Brymer v. Southern P. Co.* 90 Cal. 496, 27 Pac. 371; *Brownfield v. Chicago, R. I. & P. R. Co.* 107 Iowa, 254, 77 N. W. 1038; *Voigt v. Michigan Peninsular Car Co.* 112 Mich. 504, 70 N. W. 1103, 2 Am. Neg. Rep. 725; *Oglesby v. Missouri P. R. Co.* 150 Mo. 137, 51 S. W. 758; *Chicago, B. & Q. R. Co. v. Kellogg*, 55 Neb. 748, 76 N. W. 462; *Foss v. Baker*, 62 N. H. 247; *Soderman v. Kemp*, 145 N. Y. 427, 40 N. E. 212; *Piehl v. Albany R. Co.* 30 App. Div. 166, 51 N. Y. Supp. 755; *Stearns v. Ontario Spinning Co.* 184 Pa. 519, 39 L.R.A. 842, 39 Atl. 292; *Melchert v. Smith Brewing Co.* 140 Pa. 448, 21 Atl. 755; *Texas & N. O. R. Co. v. Crowder*, 76 Tex. 499, 13 S. W. 381.

But for cases following the maxim, see *Puget Sound Iron Co. v. Lawrence*, 3 Wash. Terr. 226, 14 Pac. 869 (machinery breaking in performance of work for which it is provided, held to be *prima facie* evidence of negligence in its selection); *Grimsley v. Hankins*, 46 Fed. 400 (explosion of steam boiler on tug, *prima facie* evidence of negligence on part of officer and owner); *The Joseph B. Thomas*, 30 C. C. A. 333, 56 U. S. App. 619, 86 Fed. 658 (keg falling on stevedore working in hold of vessel, from inadvertent stepping by employee of vessel on a pile of hatch covers upon which such keg was placed); *Winkelmann & B Drug Co. v. Colladay*, 88 Md. 78, 40 Atl. 1078 (falling of unloaded dumb-waiter from fifth floor, and injuring employee who had put his head in the shaft to hear orders from another floor as customary); *Browning v. Wabash Western R. Co.* 124 Mo. 55, 24 S. W. 731, 27 S. W. 644 (using heavily loaded cars within the vicinity of steep grade without brakes to control their movement).

As to applicability of maxim *res ipsa loquitur* as between master and servant, see also notes in 6 L.R.A.(N.S.) 337; 16 L.R.A.(N.S.) 214; 28 L.R.A.(N.S.) 586; and L.R.A.1917E, 4.

The applicability of the doctrine of *res ipsa loquitur* to automobile accidents is discussed in notes in 5 A.L.R. 1240, and 12 A.L.R. 668.

The applicability of doctrine of *res ipsa loquitur* to explosion of gases or chemicals is discussed in note in 8 A.L.R. 500.

The applicability of doctrine of *res ipsa loquitur* to fall of person is discussed in note in 5 A.L.R. 282.

Presumption of negligence from injury by X-ray is discussed in note in 13 A.L.R. 1415.

As to presumption of negligence of master from unexplained starting of machinery, injuring servant, see note in 1 L.R.A.(N.S.) 298.

The rule *res ipsa loquitur* is generally held applicable to accidents on highway due to disordered electrical appliances. Thus, where a high current of electricity is transmitted by means of overhead wires along the highway, and a traveler, without fault on his part, comes into contact with one of the wires hanging in, or lying on, the street, a prima facie case of negligence is held to be established. *Walter v. Baltimore Electric Co.* 109 Md. 513, 22 L.R.A.(N.S.) 1178, 71 Atl. 953; *Denver Consol. Electric Co. v. Simpson*, 21 Colo. 371, 31 L.R.A. 566, 41 Pac. 499; *Hebert v. Lake Charles Ice, Light & Waterworks Co.* 111 La. 522, 64 L.R.A. 101, 100 Am. St. Rep. 505, 35 So. 731; *Gannon v. Laclede Gaslight Co.* 145 Mo. 502, 43 L.R.A. 505, 46 S. W. 968, 47 S. W. 907; *Newark Electric Light & P. Co. v. Ruddy*, 62 N. J. L. 505, 57 L.R.A. 624, 41 Atl. 712, affirmed in 63 N. J. L. 357, 57 L.R.A. 624, 46 Atl. 1100; *Gordon v. Ashley*, 191 N. Y. 186, 83 N. E. 686; *Haynes v. Raleigh Gas Co.* 114 N. C. 203, 26 L.R.A. 810, 41 Am. St. Rep. 786, 19 S. E. 344; *Potera v. Brookhaven*, 95 Miss. 774, 49 So. 617; *Citizens Electric R. Light & P. Co. v. Bell*, 26 Ohio C. C. 691, affirmed without opinion in 70 Ohio St. 482, 72 N. E. 1155; *Boyd v. Portland General Electric Co.* 40 Or. 126, 57 L.R.A. 619, 66 Pac. 577; *Norfolk R. & Light Co. v. Spratley*, 103 Va. 379, 49 S. E. 502; *Snyder v. Wheeling Electrical Co.* 43 W. Va. 661, 39 L.R.A. 499, 64 Am. St. Rep. 922, 28 S. E. 733.

So, a prima facie case is established by showing that a traveler was injured by coming in contact with a guy wire, which had become charged with a heavy current of electricity. *Owensboro v. Knox*, 116 Ky. 451, 76 S. W. 191; *Shawnee Light & P. Co. v. Sears*, 21 Okla. 13, 95 Pac. 449. Or by receiving an electric shock from a trolley pole belonging to, and in the control of, defendant. *Moglia v. Nassau Electric R. Co.* 127 App. Div. 243, 111 N. Y. Supp. 70. Or by receiving a shock from a telephone wire which had fallen across a dangerously charged wire. *Citizens' Teleph. Co. v. Thomas*, 45 Tex. Civ. App. 20, 99 S. W. 879; *Western U. Teleg. Co. v. State*, 82 Md. 293, 31 L.R.A. 572, 51 Am. St. Rep. 464, 33 Atl. 763.

For other cases on this subject, see notes in 22 L.R.A.(N.S.) 1178, and 32 L.R.A.(N.S.) 1043.

And injury to a property owner whose building an electric company has contracted to light by means of a harmless voltage through incandescent electric lights, the equipment being furnished by the company, by the escape of the current from the wires when he attempts to turn on the light at a particular lamp, raises a presumption of negligence on the part of the company. *Alexander v. Nanticoke Light Co.* 209 Pa. 571, 67 L.R.A. 475, 58 Atl. 1068, and *Crowe v. Nanticoke Light Co.* 209 Pa. 580, 58 Atl. 1071.

And this is the rule applied, although the company is not responsible for the inferior installation of the electric wires and fixtures. *Reynolds v. Narragansett Electric Light Co.* 26 R. I. 457, 59 Atl. 393, and *Royal Electric Co. v. Heve*, Rap. Jud. Quebec 11 B. R. 436.

So, in *Giraudi v. Electric Improv. Co.* 107 Cal. 120, 28 L.R.A. 596, 48 Am. St. Rep. 114, 40 Pac. 108, it was held that the accident itself proved that a wire was not so covered that there was no danger in coming in contact with it, where plaintiff, while on a roof, accidentally came in contact therewith and was severely shocked.

Again in *Guinn v. Delaware & A. Teleph. Co.* 72 N. J. L. 276, 3 L.R.A. (N.S.) 988, 111 Am. St. Rep. 668, 62 Atl. 412, it was held that the jury could infer that the defendant telephone company was negligent, where it appeared that one of its guy wires broke, and, there being no guard wire beneath it, fell across an electric light wire belonging to another company, one end dropping into an open field across which people were accustomed to travel, where decedent came in contact with it and was killed.

But the doctrine of *res ipsa loquitur* was held, in *Western Coal & Min. Co. v. Garner*, 87 Ark. 190, 22 L.R.A. (N.S.) 1183, 112 S. W. 392, not to apply in case of injury to a mine employee by explosion of powder through the crossing of electric wires, where they were properly insulated and there was no reason to contemplate that they could become crossed in so short a time after they were erected, and there is nothing to show that they were in such a condition before the accident that the exercise of ordinary care in their inspection would have disclosed a defect.

And in *Minneapolis General Electric Co. v. Cronon*, 20 L.R.A. (N.S.) 816, 92 C. C. A. 345, 166 Fed. 651, where it appeared that the inside wiring of a private house was done by the electric company under an independent contract with the owner of the house, three years prior to an injury resulting directly from the imperfect insulation and condition of the wiring, and when completed was inspected by the city authorities and accepted as sufficient, it was held that the doctrine of *res ipsa loquitur* could not be invoked to hold the electric company liable for the injury, merely because it produced and furnished the electric current under a contract with the owner of the building.

For other cases as to applicability of rule *res ipsa loquitur* to accidents on

private property, due to escape of electricity from disordered electric appliances, see notes in 22 L.R.A.(N.S.) 1183, and 32 L.R.A.(N.S.) 848.

³ *Augusta & S. R. Co. v. Randall*, 79 Ga. 304, 4 S. E. 674; *Florida, C. & P. R. Co. v. Rudolph*, 113 Ga. 143, 38 S. E. 328; *Miller v. Ocean S. S. Co.* 118 N. Y. 199, 23 N. E. 462; *Gilmore v. Brooklyn Heights R. Co.* 6 App. Div. 117, 39 N. Y. Supp. 417; *Bassett v. Los Angeles Traction Co.* 6 Cal. Unrep. 700, 65 Pac. 470; *Stembridge v. Southern R. Co.* 65 S. C. 447, 43 S. E. 968; *Fleming v. Pittsburgh, C. C. & St. L. R. Co.* 158 Pa. 130, 22 L.R.A. 351, 38 Am. St. Rep. 835, 27 Atl. 858; *Zemp v. Wilmington & M. R. Co.* 9 Rich. L. 84, 64 Am. Dec. 763; *Baltimore & O. R. Co. v. Wightman*, 29 Gratt. 431, 26 Am. Rep. 384; and cases in notes in 15 L.R.A. 35, 13 L.R.A.(N.S.) 601, 29 L.R.A.(N.S.) 808, and L.R.A.1916C, 364.

⁴ *McDonald v. Montgomery Street R. Co.* 110 Ala. 161, 20 So. 317 *arguendo*; *Yarnell v. Kansas City, Ft. S. & M. R. Co.* 113 Mo. 570, 18 L.R.A. 599, 21 S. W. 1; *Reiss v. Wilmington City R. Co.* — Del. —, 67 Atl. 153; *Birmingham Union R. Co. v. Hale*, 90 Ala. 11, 24 Am. St. Rep. 748, 8 So. 142; *Benedick v. Potts*, 88 Md. 52, 41 L.R.A. 478, 40 Atl. 1067; *Western Maryland R. Co. v. State*, 95 Md. 637, 53 Atl. 969.

In the absence of statute there is no presumption of negligence from the mere fact of injury to a passenger. *Sullivan v. Capital Traction Co.* 34 App. D. C. 358; *McKittrick v. Greenville Traction Co.* 88 S. C. 91, 70 S. E. 414; *Wright v. Sioux Falls Traction System*, 28 S. D. 379, 133 N. W. 696, at least, where there are no facts relating to the cause of the injury that are peculiarly within the knowledge of the carrier. *Chapman v. Capital Traction Co.* 37 App. D. C. 479.

Thus, evidence of a mere fall from a street car, without any evidence as to how it happened, is not sufficient to raise a presumption of negligence against the carrier. *Paynter v. Bridgeton & M. Traction Co.* 67 N. J. L. 619, 52 Atl. 367; *Jarrell v. Charleston & W. C. R. Co.* 58 S. C. 491, 36 So. 910; *State use of Charles v. United R. & Electric Co.* 101 Md. 183, 60 Atl. 249.

And evidence of a "fearful shock" to a passenger, resulting in his fall and injury, is not sufficient proof to raise a presumption of negligence. *Saunders v. Chicago & N. W. R. Co.* 6 S. D. 40, 60 N. W. 148.

⁵ *Hawkins v. Front Street Cable R. Co.* 3 Wash. 592, 16 L.R.A. 808, 28 Am. St. Rep. 72, 28 Pac. 1021; *Chicago City R. Co. v. Rood*, 163 Ill. 477, 54 Am. St. Rep. 478, 45 N. E. 238; *Thomas v. Philadelphia & R. R. Co.* 148 Pa. 183, 15 L.R.A. 416, 23 Atl. 989.

Presumption of negligence on the part of the carrier does arise upon proof of injury to a passenger, caused by the conduct of the business of the carrier, or through some agency or instrumentality of the carrier. *Louisville & N. R. Co. v. Miller*, 186 Ala. 65, 65 So. 169; *Broom v. Atlantic Coast Line R. Co.* 96 S. C. 368, 80 S. E. 616; *Steele v. Pacific*

Electric R. Co. 168 Cal. 375, 143 Pac. 718; *Wayne v. St. Louis & N. E. R. Co.* 165 Ill. App. 353.

Accordingly a presumption of negligence on the part of the carrier arises from injury to a passenger, caused by the operation of one of its trains or cars. *Midland Valley R. Co. v. Connor*, 133 C. C. A. 628, 217 Fed. 956; *Louisville & N. R. Co. v. Miller*, 186 Ala. 65, 65 So. 169; *Dillahunt v. Chicago, R. I. & P. R. Co.* 119 Ark. 392, 178 S. W. 420; *Bond v. United R. Co.* 24 Cal. App. 157, 140 Pac. 982; *Wayne v. St. Louis & N. E. R. Co.* 165 Ill. App. 353.

And an event so disconnected with the business of the carrier as not to involve the safety or sufficiency of the instrumentalities, or the care or prudence of the servants of the carrier, does not bring the case within the rule; as where a rock became detached and fell upon the track at a point where a hill descended precipitously to the track. *Fleming v. Pittsburgh, C. C. & St. L. R. Co.* 158 Pa. 130, 22 L.R.A. 351, 27 Atl. 858.

As to presumption of negligence in case of injury to passenger by missile thrown from outside, see note in 7 L.R.A.(N.S.) 231.

Nor is the inference permitted where the cause of the accident by which the passenger was injured was known as well to the passenger as to the carrier; as the existence of snow, during a storm causing it, on the deck of a ferry boat. *Fearn v. West Jersey Ferry Co.* 143 Pa. 122, 13 L.R.A. 366, 22 Atl. 708.

⁶ This rule has been applied in the following cases:

Derailments.—*Electric R. Co. v. Carson*, 98 Ga. 652, 27 S. E. 156; *Ohio & M. R. Co. v. Voight*, 122 Ind. 288, 23 N. E. 774; *Terre Haute & I. R. Co. v. Sheeks*, 155 Ind. 74, 56 N. E. 434; *Atchison, T. & S. F. R. Co. v. Elder*, 57 Kan. 312, 46 Pac. 310; *Furnish v. Missouri P. R. Co.* 102 Mo. 438, 22 Am. St. Rep. 781, 13 S. W. 1044; *Chicago, R. I. & P. R. Co. v. Young*, 58 Neb. 678, 79 N. W. 556; *Webster v. Elmira, C. & N. R. Co.* 85 Hun, 167, 65 N. Y. S. R. 628, 32 N. Y. Supp. 590; *Adams v. Union R. Co.* 80 App. Div. 136, 12 N. Y. Anno. Cas. 386, 80 N. Y. Supp. 264; *Minahan v. Grand Trunk Western R. Co.* 70 C. C. A. 463, 138 Fed. 37; *Dampman v. Pennsylvania R. Co.* 166 Pa. 520, 31 Atl. 244; *Illinois C. R. Co. v. Kuhn*, 107 Tenn. 106, 64 S. W. 202; *Buckland v. New York, N. H. & H. R. Co.* 181 Mass. 3, 62 N. E. 955; and cases in notes in 15 L.R.A. 36; 13 L.R.A.(N.S.) 606; and L.R.A. 1916C, 371.

Collisions of cars or trains.—*Ayles v. Southeastern R. Co.* L. R. 3 Exch. 146, 37 L. J. Exch. N. S. 104, 18 L. T. N. S. 332, 16 Week. Rep. 709; *Georgia P. R. Co. v. Love*, 91 Ala. 432, 24 Am. St. Rep. 927, 8 So. 714; *Green v. Pacific Lumber Co.* 130 Cal. 435, 62 Pac. 747; *North Chicago Street R. Co. v. Cotton*, 140 Ill. 486, 29 N. E. 899; *Louisville, N. A. & C. R. Co. v. Faylor*, 126 Ind. 126, 25 N. E. 869; *Southern R. Co. v. Lee*, 30 Ky. L. Rep. 1360, 10 L.R.A.(N.S.) 837, 101

S. W. 307; *Savage v. Marlborough Street R. Co.* 186 Mass. 203, 71 N. E. 531; *Anderson v. Brooklyn Heights R. Co.* 32 App. Div. 266, 52 N. Y. Supp. 984; *Fredericks v. Northern C. R. Co.* 157 Pa. 103, 22 L.R.A. 306, 27 Atl. 689; *Simone v. Rhode Island Co.* 28 R. I. 186, 9 L.R.A. (N.S.) 740, 66 Atl. 203; *Carter v. Kansas City Cable R. Co.* 42 Fed. 37; *New Jersey R. & Transp. Co. v. Pollard*, 22 Wall. 341, 22 L. ed. 877. Even though the collision is with the car of another company. *Loudon v. Eighth Ave. R. Co.* 162 N. Y. 380, 56 N. E. 988, reversing 16 App. Div. 152, 44 N. Y. Supp. 742; *Kansas City, Ft. S. & M. R. Co. v. Stoner*, 1 C. C. A. 231, 4 U. S. App. 109, 49 Fed. 209.

As to presumption of negligence from collision of car with wagon or other vehicle, there is a decided conflict. *Chicago Union Traction Co. v. Mee*, 218 Ill. 9, 2 L.R.A. (N.S.) 725, 75 N. E. 800, 4 Ann. Cas. 7; *Fagan v. Rhode Island Co.* 27 R. I. 51, 60 Atl. 672; *Hawkins v. Front Street Cable R. Co.* 3 Wash. 592, 16 L.R.A. 808, 28 Am. St. Rep. 72, 28 Pac. 1021; *Black v. Boston Elev. R. Co.* 187 Mass. 172, 68 L.R.A. 799, 72 N. E. 970; *Thurston v. Detroit United R. Co.* 137 Mich. 231, 100 N. W. 395 (denying existence of presumption); *Maher v. Metropolitan Street R. Co.* 102 App. Div. 517, 92 N. Y. Supp. 825; *Houghton v. Market Street R. Co.* 1 Cal. App. 576, 82 Pac. 972; *Chicago City R. Co. v. Rood*, 62 Ill. App. 550; *Shay v. Camden & S. R. Co.* 66 N. J. L. 334, 49 Atl. 547; *Paterson v. Philadelphia Rapid Transit Co.* 218 Pa. 359, 12 L.R.A. (N.S.) 839, 67 Atl. 616; *North Jersey Street R. Co. v. Purdy*, 74 C. C. A. 125, 142 Fed. 955 (holding that presumption does arise).

As to presumption of carrier's negligence when passenger is injured by collision with vehicle under control of third person, see also note in 68 L.R.A. 799.

Breaking of running gear.—*Dawson v. Manchester, S. & L. R. Co.* 7 Hurlst. & N. 1037; *Hegeman v. Western R. Corp.* 16 Barb. 353, 13 N. Y. 9, 64 Am. Dec. 517; *Edgerton v. New York & H. R. Co.* 35 Barb. 193, 39 N. Y. 227; *Toledo, W. & W. R. Co. v. Beggs*, 85 Ill. 80, 28 Am. Rep. 613; *Meier v. Pennsylvania R. Co.* 64 Pa. 230, 3 Am. Rep. 581.

Acts of employees.—*Whalen v. Consolidated Traction Co.* 61 N. J. L. 606, 41 L.R.A. 836, 68 Am. St. Rep. 728, 40 Atl. 645; *Kohner v. Capital Traction Co.* 22 App. D. C. 181, 62 L.R.A. 875.

Falling objects.—*Och v. Missouri, K. & T. R. Co.* 130 Mo. 27, 36 L.R.A. 442, 31 S. W. 962 (fall of ventilating window); *Horn v. New Jersey S. B. Co.* 23 App. Div. 302, 48 N. Y. Supp. 348 (fall of upper berth); *Allen v. United Traction Co.* 67 App. Div. 363, 73 N. Y. Supp. 737 (fall of fire extinguisher); *Horowitz v. Hamburg-American Packet Co.* 18 Misc. 24, 41 N. Y. Supp. 54 (fall of baggage); *Cramblet v. Chicago & N. W. R. Co.* 82 Ill. App. 542 (fall of lantern); *Keator v.*

Scranton Traction Co. 191 Pa. 102, 44 L.R.A. 546, 71 Am. St. Rep. 758, 43 Atl. 86 (fragment from trolley pole).

Escape of electricity.—Eickhof v. Chicago North Shore Street R. Co. 77 Ill. App. 196; Davis v. Paducah R. & Light Co. 113 Ky. 267, 68 S. W. 140; Denver Tramway Co. v. Reid, 4 Colo. App. 53, 35 Pac. 269; D'Arcy v. Westchester Electric R. Co. 82 App. Div. 263, 81 N. Y. Supp. 952; Black v. Metropolitan Street R. Co. 162 Mo. App. 90, 144 S. W. 131; McDonough v. Boston Elev. R. Co. 208 Mass. 436, 94 N. E. 809; Blumenthal v. Brooklyn Union Elev. R. Co. 158 App. Div. 558, 143 N. Y. Supp. 811, 4 N. C. C. A. 451.

For full discussion see note in L.R.A.1916C, 376.

Applicability of rule *res ipsa loquitur* in case of injury to servant by electrical appliances. General view that rule does not apply between master and servant. Western Coal & Min. Co. v. Garner, 87 Ark. 190, 22 L.R.A.(N.S.) 1183, 112 S. W. 392; Wing v. Savannah Guano Co. 17 Ga. App. 534, 87 S. E. 827; Chicago Teleph. Co. v. Schulz, 121 Ill. App. 573; Looney v. Metropolitan R. Co. 200 U. S. 480, 50 L. ed. 564, 26 Sup. Ct. Rep. 303, 19 Am. Neg. Rep. 627, and for full discussion see L.R.A.1917E, 249. ✓

Overturning of stage coach.—Stokes v. Saltonstall, 13 Pet. 181, 10 L. ed. 115; Boyce v. California Stage Co. 25 Cal. 460; Wall v. Livezey. 6 Colo. 465; Sanderson v. Frazier, 8 Colo. 79, 54 Am. Rep. 544, 5 Pac. 632; Payne v. Halstead, 44 Ill. App. 97.

Sudden starts or stops.—Martin v. Second Ave. R. Co. 3 App. Div. 448, 73 N. Y. S. R. 714, 38 N. Y. Supp. 220; Langley v. Metropolitan Street R. Co. 36 Misc. 804, 74 N. Y. Supp. 857; Birmingham Union R. Co. v. Hale, 90 Ala. 11, 24 Am. St. Rep. 748, 8 So. 142; United R. & Electric Co. v. Beidelman, 95 Md. 480, 52 Atl. 913; Cody v. Market Street R. Co. 148 Cal. 90, 82 Pac. 666; Redman v. Metropolitan Street R. Co. 185 Mo. 1, 105 Am. St. Rep. 558, 84 S. W. 26; St. Louis & S. F. R. Co. v. Burrows, 62 Kan. 89, 61 Pac. 439; Clow v. Pittsburgh Traction Co. 158 Pa. 410, 27 Atl. 1004. See also other cases cited in note in L.R.A.1916C, 374.

Jolts.—Wabash R. Co. v. Jellison, 124 Ill. App. 652; North Chicago Street R. Co. v. Schwartz, 82 Ill. App. 493; Baltimore & P. R. Co. v. Swann, 81 Md. 400, 31 L.R.A. 313, 32 Atl. 175; Dixey v. Philadelphia Traction Co. 180 Pa. 401, 36 Atl. 924; New Jersey R. & Transp. Co. v. Pollard, 22 Wall. 341, 22 L. ed. 877.

There is considerable difference of opinion as to whether, when injury results from a jerk of the train or car, a presumption of negligence against the carrier arises. The tendency of the decision seems to be that if the jerk is of such violence that it would not be likely to occur, or necessary, in the ordinary operations of transportation, a presumption of negligence will arise. Chicago City R. Co. v. Morse, 98 Ill. App. 662; Southern R. Co. v. Cunningham, 123 Ga. 90, 50 S.

South Carolina R. Co. 29 S. C. 96, 6 S. E. 936; *Fentiman v. Atchison*, T. & S. F. R. Co. 44 Tex. Civ. App. 455, 98 S. W. 939.

Contra: *Memphis & C. R. Co. v. Reeves*, 10 Wall. 176, 19 L. ed. 909; *Jones v. Minneapolis & St. L. R. Co.* 91 Minn. 229, 103 Am. St. Rep. 507, 97 N. W. 893; *Wolf v. American Exp. Co.* 43 Mo. 421, 97 Am. Dec. 406; *Armstrong B. & Co. v. Illinois C. R. Co.* 26 Okla. 352, 29 L.R.A.(N.S.) 671, 109 Pac. 216; *Hubbard v. Harnden Exp. Co.* 10 R. I. 244.

The rule as to burden of proof enunciated in the first class of cases seems to find support also in *Long v. Pennsylvania R. Co.* 147 Pa. 343, 14 L.R.A. 741, 30 Am. St. Rep. 732, 23 Atl. 459, though the court apparently voices also the opposite rule.

For an analysis of the cases on this subject, see notes in 29 L.R.A.(N.S.) 633, and L.R.A.1915D, 547.

¹¹ *Higgins v. Ruppert*, 124 App. Div. 530, 108 N. Y. Supp. 919; *Klitzke v. Webb*, 120 Wis. 254, 97 N. W. 901; *Anderson v. McCarthy Dry Goods Co.* 49 Wash. 398, 16 L.R.A.(N.S.) 931, 126 Am. St. Rep. 870, 95 Pac. 325.

But the rule was held not applicable in State use of *Arnold v. Green*, 95 Md. 217, 52 Atl. 673.

¹² *Sasseen v. Clark*, 37 Ga. 242; *Coskery v. Nagle*, 83 Ga. 696, 6 L.R.A. 483, 20 Am. St. Rep. 333, 10 S. E. 491; *Sheffer v. Willoughby*, 163 Ill. 518, 34 L.R.A. 464, 45 Am. St. Rep. 483, 45 N. E. 253; *Laird v. Eichold*, 10 Ind. 212, 71 Am. Dec. 323; *Fowler v. Dorlon*, 24 Barb. 384; *Murray v. Clarke*, 2 Daly, 102; *Hoyt v. Clinton Hotel Co.* 35 Pa. Super. Ct. 297; *McDaniels v. Robinson*, 26 Vt. 316, 62 Am. Dec. 574; *Watt v. Kilbury*, 53 Wash. 446, 102 Pac. 403; *Jalie v. Cardinal*, 35 Wis. 118; *Dawson v. Chamney*, 5 Q. B. 164, 114 Eng. Reprint, 1210, 13 L. J. Q. B. N. S. 33, Dav. & M. 348, 7 Jur. 1037.

But see *Burnham v. Young*, 72 Me. 273, in which the innkeeper was held not to be liable for the loss of the guest's goods by a fire which also destroyed the inn, where no want of ordinary or reasonable care was shown; *Trulock v. Willey*, 112 C. C. A. 1, 187 Fed. 956. See also note in 43 L.R.A.(N.S.) 662.

¹³ *Lyttle v. Denny*, 222 Pa. 395, 20 L.R.A.(N.S.) 1027, 128 Am. St. Rep. 814, 71 Atl. 841, 15 Ann. Cas. 924; *Morris v. Zimmerman*, 138 App. Div. 114, 122 N. Y. Supp. 900; *Gilbert v. Hoffman*, 66 Iowa, 205, 55 Am. Rep. 263, 23 N. W. 632; *West v. Thomas*, 97 Ala. 622, 11 So. 768.

For additional cases and full discussion see note in 43 L.R.A.(N.S.) 662.

But see *Weeks v. McNulty*, 101 Tenn. 495, 43 L.R.A. 185, 70 Am. St. Rep. 693, 48 S. W. 809.

(2) *Statutes making injury prima facie evidence of negligence.*—Statutory provisions making the occurrence of injuries

to persons or property from the operations of railroads prima facie evidence of negligence of the railroad company are valid.¹ So, a statute providing that the killing of stock on any railroad track shall be prima facie evidence that it was done by the trains, and the onus to prove the reverse shall be upon the railroad company, is valid.² And a statute making failure of a railroad company to fence its tracks prima facie evidence of negligence in an action against it for killing stock is constitutional.³ And the legislature may constitutionally pass a statute providing that the occurrence of a fire caused by the operation of a railroad shall be prima facie evidence of negligence on the part of the railroad company.⁴

¹ *St. Louis, I. M. & S. R. Co. v. Neely*, 63 Ark. 636, 37 L.R.A. 616, 40 S. W. 130, 2 Am. Neg. Rep. 492; *Augusta & S. R. Co. v. Randall*, 79 Ga. 305, 4 S. E. 674; *Pennsylvania Co. v. McCann*, 54 Ohio St. 10, 31 L.R.A. 651, 56 Am. St. Rep. 695, 42 N. E. 768; *Louisville & N. R. Co. v. Burke*, 6 Coldw. 45; *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U. S. 35, 55 L. ed. 78, 32 L.R.A. (N.S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912A, 463.

And this rule has been held to apply to a receiver operating a railroad. See note to *Lamb v. Floyd*, 1 A.L.R. 1180.

² *Little Rock & Ft. S. R. Co. v. Payne*, 33 Ark. 816, 34 Am. Rep. 55.

For cases indulging such a presumption by virtue of a statute, but in which the validity of the statute is not discussed, see *St. Louis, I. M. & S. R. Co. v. Taylor*, 57 Ark. 136, 20 S. W. 1083; *Louisville & N. R. Co. v. Barker*, 96 Ala. 435, 11 So. 453; *Forkner v. Kean*, 17 Ky. L. Rep. 654, 32 S. W. 265; *Louisville, N. O. & T. R. Co. v. Smith*, 67 Miss. 15, 7 So. 212; *Molair v. Port Royal & A. R. Co.* 31 S. C. 510, 10 S. E. 243; *Volkman v. Chicago, St. P. M. & O. R. Co.* 5 Dak. 69, 37 N. W. 731; *Randall v. Richmond & D. R. Co.* 107 N. C. 748, 11 L.R.A. 460, 12 S. E. 605 (extending the presumption to case of oxen hitched to a cart suddenly frightened at the headlight of a train, and jumping on the track from a highway along which they were being driven); and cases cited in note to *Barnowski v. Helson*, 15 L.R.A. 40.

For constitutionality of statute imposing absolute liability for injury to animals on railroad track, see notes in 25 L.R.A. 162, and 35 L.R.A. (N.S.) 1016.

³ *Jolliffe v. Brown*, 14 Wash. 155, 53 Am. St. Rep. 868, 44 Pac. 149.

As to constitutionality of statutes generally requiring railroad company to fence tracks and build cattle guards, see note in 31 L.R.A. (N.S.)

⁴ *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; *Missouri P. R. Co. v. Merrill*, 40 Kan. 404, 19 Pac. 793; *Baltimore, O. & S. W. R. Co. v. Tripp*, 175 Ill. 251, 51 N. E. 833.

As to validity of statutes making railroad company absolutely liable for damage by fire, see notes in 25 L.R.A. 161 and 35 L.R.A.(N.S.) 1016.

c. Contributory negligence.—(1) *Burden of proof.*—The doctrine that contributory negligence is not a part of the plaintiff's cause of action, but is a defense to be alleged and proved like any other defense, is maintained in England ¹ and in Canada ² and in by far the greater number of states in this country.³ And the rule is not varied by the fact that the plaintiff avers that he was in the exercise of due care, or by any other state of the pleadings,⁴ though where the plaintiff's own evidence, or other evidence adduced, shows that he did so contribute to the injury, the defendant is relieved of the burden of proof.⁵

In a few of the older states, however, the rule was early adopted that the plaintiff must show as part of his own case, not only the defendant's wrong, but that he himself was free from contributory negligence.⁶

¹ *Wakelin v. London & S. W. R. Co.* L. R. 12 App. Cas. 41, 55 L. T. N. S. 709, 35 Week. Rep. 141, 51 J. P. 404, 56 L. J. Q. B. N. S. 229.

² *Morrill v. Canadian P. R. Co.* 21 Ont. App. Rep. 149; *Shannahan v. Ryan*, 20 N. S. 142.

³ Federal.—*Washington & G. R. Co. v. Gladmon*, 15 Wall. 401, 21 L. ed. 114; *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 35 L. ed. 270, 11 Sup. Ct. Rep. 653; *Texas & P. R. Co. v. Volk*, 151 U. S. 73, 38 L. ed. 78, 14 Sup. Ct. Rep. 239. And this rule governs irrespective of the decisions in courts of the states where the Federal courts are held. *Hemingway v. Illinois C. R. Co.* 52 C. C. A. 477, 114 Fed. 843.

To warrant a directed verdict for the defendant the contributory negligence must be conclusively established. *Maher v. Chicago, M. & St. P. R. Co. National Corp.* Rep. June 29, 1922, Vol. 64, p. 579.

Alabama.—*Alabama G. S. R. Co. v. Frazier*, 93 Ala. 45, 30 Am. St. Rep. 28, 9 So. 303; *McDonald v. Montgomery Street R. Co.* 110 Ala. 161, 20 So. 317.

Arizona.—*Maricopa & P. & S. R. Valley R. Co. v. Dean*, 7 Ariz. 104, 60 Pac. 871; *De Amando v. Friedman*, 11 Ariz. 56, 89 Pac. 588.

Arkansas.—*Jones v. Malvern Lumber Co.* 58 Ark. 125, 23 S. W. 679; *Choctaw, O. & G. R. Co. v. Doughty*, 77 Ark. 1, 91 S. W. 768; *Aluminum Co. v. Ramsey*, 89 Ark. 522, 117 S. W. 568.

California.—*McQuilken v. Central P. R. Co.* 50 Cal. 7; *Fujise v. Los Angeles R. Co.* 12 Cal. App. 207, 107 Pac. 317; *Smith v. Occidental & O. S. S. Co.* 99 Cal. 462, 34 Pac. 84.

Colorado.—*Western U. Teleg. Co. v. Eyser*, 2 Colo. 141; *Kansas P. R. Co. v. Twombly*, 3 Colo. 125; *Big Five Tunnel Ore Reduction & Transp. Co. v. Johnson*, 44 Colo. 236, 99 Pac. 63.

Dakota.—*Sanders v. Reister*, 1 Dak. 151, 46 N. W. 680.

Delaware.—*Philadelphia, B. & W. R. Co. v. Buchanan*, 2 Boyce (Del.) 202, 78 Atl. 776. The rule was originally otherwise in this state. *Huber v. Jackson & S. Co.* 1 Marv. (Del.) 374, 41 Atl. 92.

District of Columbia.—*Harmon v. Washington & G. R. Co.* 7 Mackey, 255; *Atchison v. Wills*, 21 App. D. C. 548.

Florida.—*Louisville & N. R. Co. v. Yniestra*, 21 Fla. 700; *Atlantic Coast Line R. Co. v. Peeples*, 56 Fla. 145, 47 So. 392. But the question in this state is to some extent governed by statute. *Florida C. & P. R. Co. v. Mooney*, 40 Fla. 17, 24 So. 148; *Morris v. Florida C. & P. R. Co.* 43 Fla. 10, 29 So. 541.

Georgia.—*Augusta v. Hudson*, 88 Ga. 599, 15 S. E. 678. Here also the question is to some extent governed by statute. *Park's Anno. Code (Ga.)* 1914 § 2781-83, vol. 2, pp. 1310 et seq.

Idaho.—The early decisions of Idaho were against the plaintiff on this issue (*Holt v. Spokane & P. R. Co.* 4 Idaho, 443, 40 Pac. 56; *Haner v. Northern P. R. Co.* 7 Idaho, 305, 62 Pac. 1028) but in *Crawford v. Bonners Ferry Lumber Co.* 12 Idaho, 678, 87 Pac. 998, 10 Ann. Cas. 1, without referring to the earlier decisions, the rule that the burden of proving contributory negligence is on the defendant was approved.

This rule has since been embodied in a statute: *Idaho Comp. Stat.* 1919, § 6721, vol. 2, p. 1876; *Goure v. Storey*, 17 Idaho, 352, 105 Pac. 794; *Staab v. Rocky Mountain Bell Teleph. Co.* 23 Idaho, 314, 129 Pac. 1078.

Indiana.—In Indiana the rule in the early cases placed the burden of proof on the plaintiff (*Nichols v. Baltimore & O. S. W. R. Co.* 33 Ind. App. 229, 70 N. E. 183, 71 N. E. 170; *Cincinnati, H. & I. R. Co. v. Duncan*, 143 Ind. 524, 42 N. E. 37; *Baltimore & O. S. W. R. Co. v. Young*, 146 Ind. 374, 45 N. E. 479; *Boswell v. Wakley*, 149 Ind. 64, 48 N. E. 637); but the rule has been changed by statute. (Acts 1899, p. 58, § 1.) *Burns's Ind. Stat. Ann.* 1914, § 362, vol. 1, p. 241. See also *Michigan City v. Werner*, 186 Ind. 149, 114 N. E. 636, 14 N. C. C. A. 744.

Indian Territory.—*Chicago, R. I. & P. R. Co. v. Pounds*, 1 Ind. Terr. 51, 25 S. W. 249.

- Kansas.**—*Kansas P. R. Co. v. Pointer*, 14 Kan. 37; *St. Louis & S. F. R. Co. v. Weaver*, 35 Kan. 412, 57 Am. Rep. 176, 11 Pac. 408; *Reading Twp. v. Telfer*, 57 Kan. 798, 57 Am. St. Rep. 355, 48 Pac. 134.
- Kentucky.**—*Paducah & M. R. Co. v. Hoehl*, 12 Bush. '41; *Bogenschutz v. Smith*, 84 Ky. 330, 1 S. W. 578; *Lexington R. Co. v. Cropper*, 142 Ky. 39, 133 S. W. 968.
- Louisiana.**—*Buechner v. New Orleans*, 112 La. 599, 66 L.R.A. 334, 104 Am. St. Rep. 455, 36 So. 603; *Robertson v. Jennings*, 128 La. 795, 55 So. 375, 3 N. C. C. A. 882. But the early rule in this state placed the burden of proof on the plaintiff. *Moore v. Shreveport*, 3 La. Ann. 645.
- Maryland.**—*Jones v. United R. & Electric Co.* 99 Md. 64, 57 Atl. 620; *State use of Bacon v. Baltimore & P. R. Co.* 58 Md. 482; *Baltimore & O. R. Co. v. Stumpf*, 97 Md. 78, 54 Atl. 978. The early rule in this state was to the contrary. *Baltimore v. Marriott*, 9 Md. 160, 66 Am. Dec. 326. And see also *Baltimore Traction Co. v. Helms*, 84 Md. 515, 36 L.R.A. 215, 36 Atl. 119.
- Massachusetts.**—In 1914 Massachusetts passed a statute shifting the burden of proof in contributory negligence cases from the plaintiff to the defendant. The statute provided that the person injured or killed should be presumed to be in the exercise of due care and that contributory negligence on his or her part must be set up and proved as an affirmative defense. This statute was upheld as constitutional in *Duggan v. Bay State Street R. Co.* 230 Mass. 370, L.R.A.1918E, 680, 119 N. E. 757.
- Minnesota.**—*St. Anthony Falls Water Power Co. v. Eastman*, 20 Minn. 277, Gil. 249; *Wilson v. Northern P. R. Co.* 26 Minn. 278, 37 Am. Rep. 410, 3 N. W. 333; *Schutt v. Adair*, 99 Minn. 7, 108 N. W. 811.
- Mississippi.**—It was originally held in this state that the burden was on the plaintiff (*Vicksburg v. Hennessy*, 54 Miss. 391, 28 Am. Rep. 354), but in *Hickman v. Kansas City, M. & B. R. Co.* 66 Miss. 154, 5 So. 225, the contrary rule was established. See also *Simms v. Forbes*, 86 Miss. 412, 38 So. 546.
- Missouri.**—*Thompson v. North Missouri R. Co.* 51 Mo. 191, 11 Am. Rep. 443; *Crane v. Missouri P. R. Co.* 87 Mo. 588; *Fulks v. St. Louis & S. F. R. Co.* 111 Mo. 335, 19 S. W. 818.
- Nebraska.**—*Vertrees v. Gage County*, 81 Neb. 213, 115 N. W. 863.
- New Jersey.**—*New Jersey Exp. Co. v. Nichols*, 32 N. J. L. 166; *Danskin v. Pennsylvania R. Co.* 79 N. J. L. 526, 76 Atl. 975.
- North Carolina.**—*Russell v. Monroe*, 116 N. C. 720, 47 Am. St. Rep. 823, 21 S. E. 550; *Wilkie v. Raleigh & C. F. R. Co.* 127 N. C. 203, 37 S. E. 204; *Goforth v. Southern R. Co.* 144 N. C. 569, 57 S. E. 209; *Ives v. Gring*, 150 N. C. 137, 63 S. E. 609. The rule has now been embodied in a statute in this state. *Wallace v. Western North Carolina R. Co.* 104 N. C. 442, 10 S. E. 552; *Stewart v. Raleigh & A. Air Line R. Co.*

137 N. C. 687, 50 S. E. 312. Consol. Laws of N. C. 1919, § 523, vol. 1, p. 204.

North Dakota.—Ouverson v. Grafton, 5 N. D. 281, 65 N. W. 676.

Ohio.—Street R. Co. v. Nolthenius, 40 Ohio St. 376; Strong v. Pickering Hardware Co.'9 Ohio C. C. 249, 6 Ohio C. D. 212.

Oklahoma.—Guthrie v. Nix, 3 Okla. 136, 41 Pac. 343; Oklahoma City v. Reed, 17 Okla. 518, 33 L.R.A.(N.S.) 1083, 87 Pac. 645.

Oregon.—Johnston v. Oregon Short Line R. Co. 23 Or. 94, 31 Pac. 283, limiting the decision in Walsh v. Oregon R. & Nav. Co. 10 Or. 250, which appeared to lay down the contrary rule, to the facts of that particular case. See also Edlefson v. Portland R. Light & P. Co. 69 Or. 18, 136 Pac. 832.

Pennsylvania.—Bush v. Johnston, 23 Pa. 209; Erie City v. Schwingle, 22 Pa. 384, 60 Am. Dec. 87; Brown v. White, 206 Pa. 106, 55 Atl. 848.

South Carolina.—Kaminitsky v. Northeastern R. Co. 25 S. C. 53; Joyner v. South Carolina R. Co. 26 S. C. 49, 1 S. E. 52; Whaley v. Bartlett, 42 S. C. 454, 20 S. E. 745.

South Dakota.—Whaley v. Vidal, 27 S. D. 642, 182 N. W. 248.

Tennessee.—Burke v. Citizens' Street R. Co. 102 Tenn. 409, 52 S. W. 170; Tennessee C. R. Co. v. Herb, 134 Tenn. 397, 183 S. W. 1011.

Texas.—The Texas court took a strong position at first in favor of the doctrine that the burden of proving absence of contributory negligence is on the plaintiff. But, after considerable wavering, receded therefrom, adopting the rule that the burden is on the defendant. Hogan v. Missouri, K. & T. R. Co. 88 Tex. 679, 32 S. W. 1035; Houston & T. C. R. Co. v. White, 23 Tex. Civ. App. 280, 56 S. W. 204; San Antonio & A. P. R. Co. v. Lindsey, 27 Tex. Civ. App. 316, 65 S. W. 668; Gulf, C. & S. F. R. Co. v. Shieder, 88 Tex. 152, 28 L.R.A. 538, 30 S. W. 902, affirming — Tex. Civ. App. —, 26 S. W. 509.

Utah.—Holland v. Oregon Short Line R. Co. 26 Utah, 209, 72 Pac. 940.

Virginia.—Baltimore & O. R. Co. v. McKenzie, 81 Va. 71; Norfolk & W. R. Co. v. Burge, 84 Va. 63, 4 S. E. 21; Norfolk & W. R. Co. v. Gilman, 88 Va. 242, 13 S. E. 475.

Washington.—Northern P. R. Co. v. O'Brien, 1 Wash. 599, 21 Pac. 32; Spurrier v. Front Street Cable R. Co. 3 Wash. 659, 29 Pac. 346; Norman v. Bellingham, 46 Wash. 205, 89 Pac. 559.

West Virginia.—Riley v. West Virginia C. & P. R. Co. 27 W. Va. 146; Comer v. Consolidated Coal & Min. Co. 34 W. Va. 533, 12 S. E. 476; Parfitt v. Sterling Veneer & Basket Co. 68 W. Va. 438, 69 S. E. 985.

Wisconsin.—The rule that the burden is on the plaintiff was originally applied in Wisconsin (Chamberlain v. Milwaukee & M. R. Co. 7 Wis. 425; Dressler v. Davis, 7 Wis. 527), but these cases have not been followed. (See Pfeiffer v. Radke, 142 Wis. 512, 125 N. W. 934.) And the rule is now firmly established that the burden is on the defendant. Bessex v. Chicago & N. W. R. Co. 45 Wis. 477; Valin v. Milwaukee &

N. R. Co. 82 Wis. 6, 33 Am. St. Rep. 17, 51 N. W. 1084; *Randall v. Northwestern Teleg. Co.* 54 Wis. 140, 41 Am. Rep. 17, 11 N. W. 419.

For an elaborate discussion of this question, reviewing all the authorities at length, see note to *Oklahoma City v. Reed*, 33 L.R.A.(N.S.) 1085.

On question of burden of proof as to contributory negligence in action against municipality on account of defects and obstructions in streets, see note in 21 L.R.A.(N.S.) 673.

As to presumption and burden of proof as to capacity of minor servant to comprehend and avoid danger, see ante, CAPACITY, § 3.

⁴ *Fitchburg R. Co. v. Nichols*, 29 C. C. A. 500, 50 U. S. App. 297, 85 Fed. 945; *McDonald v. Montgomery Street R. Co.* 110 Ala. 161, 20 So. 317; *Mulville v. Pacific Mut. L. Ins. Co.* 19 Mont. 95, 47 Pac. 650

⁵ *St. Louis & S. F. R. Co. v. Whittle*, 20 C. C. A. 196, 40 U. S. App. 23, 74 Fed. 296; *North Birmingham Street R. Co. v. Calderwood*, 89 Ala. 247, 7 So. 360; *Clements v. Louisiana Electric Light Co.* 44 La. Ann. 692, 16 L.R.A. 43, 11 So. 51; *Chicago, B. & Q. R. Co. v. Landauer*, 39 Neb. 803, 58 N. W. 434; *Browne v. Raleigh & G. R. Co.* 108 N. C. 34, 12 S. E. 958; *Myers v. Baltimore & O. R. Co.* 150 Pa. 386, 24 Atl. 747; *Stewart v. Nashville*, 96 Tenn. 50, 33 S. W. 613; *Waterman v. Chicago & A. R. Co.* 82 Wis. 613, 52 N. W. 247, 1136.

⁶ *Connecticut*.—*Clarke v. Connecticut Co.* 83 Conn. 219, 76 Atl. 523; *O'Connor v. Connecticut R. & Lighting Co.* 82 Conn. 170, 72 Atl. 934; *Cottle v. New York, N. H. & H. R. Co.* 82 Conn. 142, 72 Atl. 727.

Illinois.—*Stack v. East St. Louis & Suburban R. Co.* 245 Ill. 308, 137 Am. St. Rep. 318, 92 N. E. 241, 1 N. C. C. A. 687; *West Chicago Street R. Co. v. Liderman*, 187 Ill. 463, 52 L.R.A. 655, 79 Am. St. Rep. 226, 58 N. E. 367; *Chicago v. Major*, 18 Ill. 349, 68 Am. Dec. 553; *Casey v. Adams*, 137 Ill. App. 404, affirmed on another point in 234 Ill. 350. 17 L.R.A.(N.S.) 776, 123 Am. St. Rep. 105, 84 N. E. 933. And it has been held in this state that plaintiff is bound to prove more than enough to raise a fair presumption of negligence on the part of the defendant. *Price v. Henagan*, 5 Ill. App. 234.

Iowa.—*Greenleaf v. Illinois C. R. Co.* 29 Iowa, 14, 4 Am. Rep. 181; *Donaldson v. Mississippi & M. R. Co.* 18 Iowa, 280, 87 Am. Dec. 391; *Wissler v. Atlantic*, 123 Iowa, 11, 98 N. W. 131; *Duffey v. Consolidated Block Coal Co.* 147 Iowa, 225, 30 L.R.A.(N.S.) 1067, 124 N. W. 609.

Maine.—*Kennard v. Burton*, 25 Me. 39, 43 Am. Dec. 249; *Benson v. Titcomb*, 72 Me. 31; *Day v. Boston & M. R. Co.* 96 Me. 207, 90 Am. St. Rep. 335, 52 Atl. 771; *Colomb v. Portland & B. Street R. Co.* 100 Me. 418, 61 Atl. 898.

Massachusetts.—In 1914 a statute was passed in Massachusetts shifting the burden of proof as to contributory negligence from the plaintiff to

the defendant. *Duggan v. Bay State Street R. Co.* 230 Mass. 370, L.R.A.1918E, 680, 119 N. E. 757.

See note 3 *supra*.

The cases interpreting the former rule where the burden was on the plaintiff follow: *Wilson v. Charlestown*, 8 Allen, 137, 85 Am. Dec. 693; *Warren v. Fitchburg R. Co.* 8 Allen, 227, 85 Am. Dec. 700; *Mayo v. Boston & M. R. Co.* 104 Mass. 137; *Brown v. New York, N. H. & H. R. Co.* 181 Mass. 365, 63 N. E. 941; *Prince v. Lowell Electric Light Corp.* 201 Mass. 276, 87 N. E. 558; *Lundergan v. New York C. & H. R. R. Co.* 205 Mass. 460, 89 N. E. 625. In an action by a woman to recover for injuries received because of the unsafe condition of a highway, it was held that the burden of proof was not on the defendant to show that the plaintiff was violating a city ordinance at the time of the accident. *Tuttle v. Lawrence*, 119 Mass. 276. And in the case of injury to a child, the burden of showing due care on the part of the parents was held to be on the plaintiff. *Wright v. Malden & M. R. Co.* 4 Allen, 289. Michigan.—*Daniels v. Clegg*, 28 Mich. 32; *LeBaron v. Joslin*, 41 Mich. 313, 2 N. W. 36; *Tracey v. South Haven Twp.* 132 Mich. 492, 93 N. W. 1065; *Gillett v. Michigan United Traction Co.* 205 Mich. 410, 171 N. W. 536.

New Hampshire.—*Hutchins v. Macomber*, 68 N. H. 473, 44 Atl. 602; *Waldron v. Boston & M. R. Co.* 71 N. H. 362, 52 Atl. 443; *Gahagan v. Boston & M. R. Co.* 70 N. H. 441, 55 L.R.A. 426, 50 Atl. 146.

New York.—In a few of the earlier cases of New York it was held that the burden of proving contributory negligence was on the defendant. *Curran v. Warren Chemical & Mfg. Co.* 36 N. Y. 153, 3 Abb. Pr. N. S. 240; *Robinson v. New York C. & H. R. R. Co.* 65 Barb. 146; *Johnson v. Hudson River R. Co.* 5 Duer, 21; *Hackford v. New York C. R. Co.* 6 Lans. 381, affirmed in 53 N. Y. 654. But the courts of that state very soon allied themselves with the jurisdictions placing the burden upon the plaintiff, and, in the absence of statute, this has ever since remained the rule. *Button v. Hudson River R. Co.* 18 N. Y. 248; *Connolly v. Knickerbocker Ice Co.* 114 N. Y. 104, 11 Am. St. Rep. 617, 21 N. E. 101; *Weston v. Troy*, 139 N. Y. 281, 34 N. E. 780; *Lyman v. Potsdam*, 228 N. Y. 398, 127 N. E. 312; *Butler v. Buffalo, R. & P. R. Co.* 142 App. Div. 282, 126 N. Y. Supp. 823; *Aubrey v. Hudson Valley R. Co.* 139 App. Div. 318, 123 N. Y. Supp. 1052; *Peaslee v. Chatham*, 69 Hun, 389, 23 N. Y. Supp. 628.

Rhode Island.—*Judge v. Narragansett Electric Lighting Co.* 21 R. I. 128, 42 Atl. 507.

Vermont.—In Vermont, although the rule is that the burden is on the plaintiff (*Bovee v. Danville*, 53 Vt. 183; *Boyden v. Fitchburg R. Co.* 72 Vt. 89, 47 Atl. 409), the courts have endeavored to soften it somewhat. Thus, in an action to recover for injuries resulting from the insufficiency of a highway, it is not necessary that the plaintiff

should prove affirmatively that he was acting carefully and prudently at the time of the accident, the court saying that evidence which proves affirmatively that an injury was caused by a defect in a highway must necessarily to a certain extent show negatively that it was not caused by anything else. *Hill v. New Haven*, 37 Vt. 501, 88 Am. Dec. 613.

(2) *Presumptions*.—As to the presumption of care or negligence on the part of an injured person—which is a question distinct from the question of burden of proof¹—the courts in jurisdictions where the burden of proving contributory negligence is held to be on the defendant usually do not stop with saying that there is no presumption that the injured party was guilty of contributory negligence, but hold that a positive presumption exists that he was, at the time of the accident, in the exercise of due care.² And even in jurisdictions where it is held that the burden of proving absence of contributory negligence is on the plaintiff a presumption is nevertheless entertained under certain circumstances that the injured person was in the exercise of due care. For instance, in an action for negligently killing, where the defendant's negligence is established, there were no eyewitnesses to the accident, and the evidence does not disclose how the deceased met his death, or the degree of care and caution exercised by him, it is held in these jurisdictions, that a presumption will be indulged, upon which the plaintiff may rely in order to prevent a nonsuit, that the deceased exercised, for the preservation of his life, that degree of reasonable care and precaution which the natural and inherent love of life and the instinct of self-preservation, which is possessed by every sober, sane man, would dictate under similar conditions and circumstances.³

¹ See discussion in note in 33 L.R.A.(N.S.) 1097.

² *Fairgrieve v. Moberly*, 29 Mo. App. 142; *Collins v. Star Paper Mill Co* 143 Mo. App. 333, 127 S. W. 641; *Stewart v. Raleigh & A. Seaboard Air Line R. Co.* 141 N. C. 253, 53 S. E. 877; *Gordon v. Richmond*, 83 Va. 436, 2 S. E. 727; *Little Rock & Ft. S. R. Co. v. Eubanks*, 48 Ark. 460, 3 Am. St. Rep. 245, 3 S. W. 808; *Cox v. Wilmington City R. Co.* 4 Penn. (Del.) 162, 53 Atl. 569; *Hoyt v. Hudson*, 41 Wis. 105, 22 Am. Rep. 714. See also cases in note in 16 L.R.A. 261.

As to presumption of care on part of one killed at a railroad crossing, see note in 4 L.R.A.(N.S.) 349.

¹ *Adams v. Bunker Hill & S. Min. Co.* 12 Idaho, 637, 11 L.R.A.(N.S.) 844, 89 Pac. 624; *Broadbent v. Chicago & G. T. R. Co.* 64 Ill. App. 231; *Hopkinson v. Knapp & S. Co.* 92 Iowa, 328, 60 N. W. 653; *Cleveland, C. C. & St. L. R. Co. v. Keenan*, 190 Ill. 217, 60 N. E. 107; *Adams v. Iron Cliffs Co.* 78 Mich. 271, 18 Am. St. Rep. 441, 44 N. W. 270; *Lyman v. Boston & M. R. Co.* 66 N. H. 200, 11 L.R.A. 364, 20 Atl. 976; *Johnson v. Hudson River R. Co.* 20 N. Y. 65, 75 Am. Dec. 375. This last case has apparently been qualified by the later decisions in *Reynolds v. New York C. & H. R. R. Co.* 58 N. Y. 248, and *Wiwirowski v. Lake Shore & M. S. R. Co.* 124 N. Y. 420, 26 N. E. 1023, though these cases are, to a certain extent, distinguishable, on their facts, from the Johnson Case.

It has been held, however, that, where no negligence on the part of the defendant is shown, there being no eyewitnesses to the fatality and nothing appears as to the degree of care exercised by the deceased, the presumption of due care on his part will not be sufficient to overcome the burden of proof that rests upon the plaintiff to establish freedom of the deceased from contributory negligence. *Pittsburgh, C. & St. L. R. Co. v. Bennett*, 9 Ind. App. 92, 35 N. E. 1033; *McLane v. Perkins*, 92 Me. 39, 43 L.R.A. 487, 42 Atl. 255; *Chase v. Maine C. R. Co.* 77 Me. 62, 52 Am. Rep. 744; *Lauster v. Chicago, M. & St. P. R. Co.* 43 Ill. App. 534; *Chicago & A. R. Co. v. Crowder*, 49 Ill. App. 154. For other cases, see notes in 11 L.R.A.(N.S.) 844, and 33 L.R.A.(N.S.) 1111.

(3) *Care required of children.*—In many jurisdictions a conclusive presumption of incapacity for contributory negligence is held to exist as to all children, under a certain age, ranging from four to eight depending on the jurisdiction,¹ and that a tentative presumption of such incapacity exists as to all children between such age and fourteen years.² Other courts decide each such case on its merits wherein age is only one factor³ in which event the abilities and experience of each child may be offered in evidence to aid in determining the degree of care required of him.⁴ Statutes have been passed in some states prohibiting the employment of children under fourteen, or some similar age, and in construing these statutes the courts have generally held that contributory negligence could neither be set up as a defense nor offered in evidence.⁵

¹ Incapacity presumed under four years of age: *Hamilton v. Morgan's*

L. & T. R. & S. S. Co. 42 La. Ann. 824, 8 So. 586; *De Amado v. Friedman*, 11 Ariz. 56, 89 Pac. 588; *Miles v. St. Louis, I. M. & S. R. Co.* 90 Ark. 485, 119 S. W. 837; *Louisville & N. R. Co. v. Arp*, 136 Ga. 489, 71 S. E. 867; *Anderson v. Great Northern R. Co.* 15 Idaho, 513, 99 Pac. 91; *Gibson v. Huntington*, 38 W. Va. 177, 22 L.R.A. 561, 45 Am. St. Rep. 853, 18 S. E. 447.

Under five years: *Eskilden v. Seattle*, 29 Wash. 583, 70 Pac. 64, 12 Am. Neg. Rep. 366; *Sheffield Co. v. Harris*, 183 Ala. 357, 61 So. 88; *Newport v. Lewis*, 155 Ky. 832, 160 S. W. 507; *Johnson v. Bay City*, 164 Mich. 251, 129 N. W. 29, Ann. Cas. 1912B, 866; *Dow v. Atlantic Shore Line R. Co.* 76 N. H. 160, 80 Atl. 336.

Under six years: *Pascagoula Street R. & Power Co. v. Brondum*, 96 Miss. 28, 50 So. 97; See also *Jacobs v. Koehler Sporting Goods Co.* 208 N. Y. 416, 418, L.R.A.1917F, 7, 102 N. E. 519.

Under seven years: *Dood v. Spartanburg R. Gas & E. Co.* 95 S. C. 9, 78 S. E. 525; *Richardson v. Nelson*, 221 Ill. 254, 77 N. E. 583, 20 Am. Neg. Rep. 297; *Casper v. Geck*, 185 Ill. App. 155; *Connizzarri v. Philadelphia & R. R. Co.* 248 Pa. 474, 94 Atl. 134; *McDermott v. Consolidated Ice Co.* 44 Pa. Super. Ct. 445, 450; *Levine v. Metropolitan Street R. Co.* 78 App. Div. 426, 429, 80 N. Y. Supp. 48. *Contra*, in construing a New Jersey Statute, *Erie R. Co. v. Hilt*, 247 U. S. 97, 62 L. ed. 1003, 38 Sup. Ct. Rep. 435, 18 N. C. C. A. 556.

Under eight years: *Erie R. Co. v. Swiderski*, 117 C. C. A. 17, 197 Fed. 521.

For numerous other cases and extensive discussion of contributory negligence of children generally, see note in L.R.A.1917F, 10 at p. 42. For discussion of cases of children on or about railroad tracks, see note in L.R.A.1917F, 123. For cases involving children crossing street car tracks, see note in L.R.A.1917F, 172. And for cases of children on or about elevators, see note in L.R.A.1917F, 195.

See also note in 21 Columbia L. Rev. 697.

See also title CAPACITY, § 3, ante.

² *Chicago, R. I. & P. R. Co. v. Wright*, 62 Okla. 134, 161 Pac. 1070, where a child of nine was injured and an instruction was held to be proper which stated that a child under seven cannot be guilty of contributory negligence, and that a child between seven and fourteen years of age is not presumed to be guilty of more than technical trespass.

Cedar Creek Store Co. v. Stedham, 187 Ala. 622, 65 So. 984; *United States Natural Gas Co. v. Hicks*, 134 Ky. 12, 23 L.R.A.(N.S.) 249, 135 Am. St. Rep. 407, 119 S. W. 166; *Tucker v. Buffalo Cotton Mills*, 76 S. C. 539, 121 Am. St. Rep. 957, 57 S. E. 626; *Ewing v. Lanark Fuel Co.* 65 W. Va. 726, 29 L.R.A.(N.S.) 487, 65 S. E. 200.

See also extensive note in L.R.A.1917F, 50.

³ *Thomas v. Oregon Short Line R. Co.* 47 Utah, 394, 154 Pac. 777, child

of eight injured. Held age, experience and intelligence all properly to be considered in deciding amount of care required.

See also cases cited in note L.R.A.1917F, 31.

⁴ *Illinois Iron & Metal Co. v. Weber*, 196 Ill. 526, 63 N. E. 1008. A boy of eleven was injured. Held that "Age is not the only element to be considered, but that intelligence, capacity, and experience are also to be taken into account." *Farrand v. Houston & T. C. R. Co.* — Tex. Civ. App. —, 205 S. W. 845. Child of thirteen injured. Held that evidence of capacity of child to appreciate danger of his act in exploding dynamite cap properly admitted, particularly where plaintiff offered evidence of boy's scholarship and knowledge of right and wrong. Note 32 *Harvard L. Rev.* 434.

⁵ *Strafford v. Republic Iron & Steel Co.* 238 Ill. 371, 20 L.R.A.(N.S.) 876, 128 Am. St. Rep. 129, 87 N. E. 358; *Karpeles v. Heine*, 227 N. Y. 74, 124 N. E. 101, in which a boy of fourteen was injured where the statute prohibited employment of anyone under sixteen; *Lenahan v. Pittston Coal Min. Co.* 218 Pa. 311, 12 L.R.A.(N.S.) 461, 120 Am. St. Rep. 885, 67 Atl. 642, where the statutory age was set at fifteen; note in 33 *Harvard L. Rev.* 109. *Contra*, *Berdos v. Tremont & S. Mills*, 209 Mass. 489, 95 N. E. 876, 879, Ann. Cas. 1912B, 797.

14. Cogency of evidence.

The rule of evidence is respect to proof of want of care or prudence requires only that it be proved by a preponderance of the evidence, and not that it be proved to a moral certainty, to the exclusion of a reasonable doubt.¹

But if the proof be merely circumstantial, the inference must be the logical, probable, and reasonable deduction from the facts proved or stated.²

¹ *Cameron v. Vandergriff*, 53 Ark. 381, 13 S. W. 1092.

It is sufficient, however, if the fact be established by convincing presumptive or circumstantial evidence. *Dolby v. Hearn*, 1 Marv. (Del.) 153, 37 Atl. 45. See also next note.

But the proof of contributory negligence must be clear and decisive, not leaving room for impartial and unbiased minds to arrive at any other conclusion in order to warrant a nonsuit or an absolute direction to the jury on the ground of contributory negligence. *Crites v. New Richmond*, 98 Wis. 55, 73 N. W. 322.

² *Kearney Canal & Water Supply Co. v. Akeyson*, 45 Neb. 635, 63 N. W. 921.

Mere surmise, conjecture, or possibility is not enough. *Harrison v. Chicago, M. & St. P. R. Co.* 6 S. D. 100, 60 N. W. 405, 62 N. W. 376; *Omaha*

Street R. Co. v. Leigh, 49 Neb. 782, 69 N. W. 111; Kirby v. Delaware & H. Canal Co. 20 App. Div. 473, 46 N. Y. Supp. 777; Atchison, T. & S. F. R. Co. v. Aderhold, 58 Kan. 293, 49 Pac. 83; Baltimore & O. R. Co. v. State, 71 Md. 590, 18 Atl. 969; Schoepper v. Hancock Chemical Co. 113 Mich. 582, 71 N. W. 1081.

In Georgia, the presumption stated above is not permissible in an action by an employee against a railroad company to recover for personal injuries. Augusta Southern R. Co. v. McDade, 105 Ga. 134, 31 S. E. 420.

CAUSE.

1. Expert testimony.
 - a. Matter involving special knowledge, generally.
 - b. Common inference—conjecture.
 - c. Experiments to corroborate opinion.
 - d. As to cause of death, disease, or injury.
 - (1) In general.
 - (2) Form of question.
 - (3) Probable position.
 - (4) Exhibiting instrument.
 - (5) Cause of suicide.
 - e. Case unknown to expert.
 - f. What would have been.
2. Nonexpert testimony.
3. Direction of blow, force, or fluid.
4. Other similar occurrences or injuries.
5. Suggestion of another cause.
 - a. In general.
 - b. Cross-examination.
 - c. Rebutting evidence of other cause.
6. Demonstrative evidence.
7. Declarations as part of *res gestæ*.
8. Admissions.
9. Findings of coroner to show cause of death.
10. Repairs after injury as proof of causation and possibility of prevention.

See also CARE; CONDITION; EFFECT; INDUCEMENT; MOTIVE; OPINION.

1. Expert testimony.

a. Matter involving special knowledge, generally.—On any subject not within the common knowledge and experience of men of common education in the ordinary walks of life, an expert witness may be asked his opinion as to the cause of an occurrence, accident, or casualty,¹ or of a defect in a machine or structure.² Such opinions are admissible on the ground that the witnesses, because of their peculiar knowledge, are competent to reach an intelligent conclusion while inexperienced persons are likely to prove incapable of forming a correct judgment without such skilled assistance.³ So the opinion of an expert has been held admissible where such opinion was formed from facts personally observed, but which could not be fully presented by the witness;⁴ and where the evidence has left the cause of the occurrence in doubt, an expert may give his opinion as to the cause after making a particular inspection.⁵ The majority of courts hold that the admission of such evidence is not an invasion of the province of the jury even though it may involve the precise question upon which the jury is to pass,⁶ particularly if the opinion is in the form of an answer to a hypothetical question⁷ or of a statement as to what “might” or “could” have occurred.⁸ Some jurisdictions however, hold that if the expert attempts to give an opinion as to what actually did cause the particular occurrence or accident, such testimony is inadmissible.⁹

¹ *Seaver v. Boston & M. R. Co.* 14 Gray, 466 (question for employee of road concerning injury when car derailed; held, that the question what threw the car off when the axle broke so far involved the application of force as to be proper for an expert); *Murphy v. New York C. & H. R. R. Co.* 66 Barb. 125 (witness familiar with the elementary principles of mechanics, and who has testified to the condition of a track on a curve, may be asked how he accounted for the cars running off on the inside of the curve instead of on the outside. Such a question does not require an expert in building railroads); *Brownfield v. Chicago, R. I. & P. R. Co.* 107 Iowa, 254, 77 N. W. 1038 (whether a broken axle on an engine might have derailed the train).

In *Webster Mfg. Co. v. Mulvanny*, 168 Ill. 311, 48 N. E. 168, steamfitters who had had some experience in running engines, although slight, and who were present when the steam pipe connecting an engine and

boilers exploded, were allowed to give their opinion as to the cause of the explosion.

And in *Ohio & M. R. Co. v. Webb*, 142 Ill. 404, 32 N. E. 527, testimony that an overflow of a stream was due to natural causes, and not to the construction of a railway embankment, was held not to be incompetent as relating to a matter of common knowledge.

But the witness must be qualified to speak as an expert on the subject. *Zinn v. Rice*, 161 Mass. 571, 37 N. E. 747; *Lineoski v. Susquehanna Coal Co.* 157 Pa. 153, 27 Atl. 577. Thus, a newspaper editor, who has visited the scenes of numbers of railroad accidents, and examined into their causes, for the purpose of reporting them, is not thereby qualified, as an expert, to testify to his opinion as to the cause of the breaking of a particular rail. *Hoyt v. Long Island R. Co.* 57 N. Y. 678.

² *Lotz v. Scott*, 103 Ind. 155, 2 N. E. 560 (action for nuisance; error to refuse to allow expert in brick-laying, who built the wall, to give his opinion as to what caused its damp condition); *Hand v. Brookline*, 126 Mass. 324, 326 (cause of leak in water pipes); *Chandler v. Thompson*, 30 Fed. 38 (whether defective work of mill was caused by defective construction or bad management).

³ *Barney v. Quaker Oats Co.* 85 Vt. 372, 82 Atl. 113; *Beunk v. Valley City Desk Co.* 128 Mich. 562, 87 N. W. 793; *Cochrell v. Langley Mfg. Co.* 5 Ga. App. 317; 63 S. E. 244; *Pfeifer v. Eastern Metal Works*, 258 Ill. 427, 101 N. E. 548; *Chicago G. W. R. Co. v. Price*, 38 C. C. A. 239, 97 Fed. 423; *Parsons v. Manufacturers' Ins. Co.* 16 Gray, 466; *Patrick v. Smith*, 75 Wash. 407, 48 L.R.A.(N.S.) 740, 134 Pac. 1076, 6 N. C. C. A. 108; *Texas & P. R. Co. v. Cochrane*, 29 Tex. Civ. App. 383, 69 S. W. 984; *Ball v. Hardesty*, 38 Kan. 540, 16 Pac. 809. For additional cases and full discussion see note in L.R.A.1915A, 1045.

In *Sprague v. General Electric Co.* 213 Mass. 375, 100 N. E. 628, the opinion was admitted on the ground that it might be of some assistance to the jury.

⁴ *Alabama G. S. R. Co. v. McKenzie*, 139 Ga. 410, 45 L.R.A.(N.S.) 18, 77 S. E. 647; *Webster Mfg. Co. v. Mulvanny*, 168 Ill. 311, 48 N. E. 168; *Long v. Sweeten*, 123 Md. 88, 90 Atl. 782; *Underwood v. Waldron*, 33 Mich. 232; *Ft. Worth & D. C. R. Co. v. Thompson*, 75 Tex. 501, 12 S. W. 742.

⁵ *Camp Point Mfg. Co. v. Ballou*, 71 Ill. 417; *Clark v. Willett*, 35 Cal. 534, 4 Mor. Min. Rep. 628.

⁶ In *State v. Baldwin*, 36 Kan. 1, 12 Pac. 318, experts in wood-working were allowed to testify that a panel cut out of a door was cut by a skilled hand, the accused being a carpenter, and that a knife found in his pocket fitted the mark of the cut.

And in *Quigley v. Johns Mfg. Co.* 26 App. Div. 434, 50 N. Y. Supp. 98. 4 Am. Neg. Rep. 546, an action against a landlord for the death of

a tenant occasioned by the fall of a building in a violent storm, experts were allowed to testify as to the cause of its fall, and how the force of the storm affected the building.

Where the opinions are admitted because they concern matters of skill or science, there is no invasion of the province of the jury even though the question calls for an opinion on a question to be decided by the jury, because the matter is one with which the jury are not supposed to be competent to deal without the aid of such opinions. *Bettys v. Denver Twp.* 115 Mich. 228, 73 N. W. 138 (loosening of timbers forming a brace as cause of fall of bridge); *Patrick v. Smith*, 75 Wash. 407, 48 L.R.A.(N.S.) 740, 134 Pac. 1076, 6 N. C. C. A. 108 (explosion as cause of loss of water in well).

See also for other cases and full discussion of the question of invasion of the province of the jury notes in L.R.A.1915A, 1051 and 1068.

⁷ *Goddard v. Enzler*, 222 Ill. 462, 78 N. E. 805; *McClaren v. Weber Bros. Shoe Co.* 92 C. C. A. 386, 166 Fed. 714; *American Towing & Lightering Co. v. Baker-Whiteley Coal Co.* 117 Md. 660, 84 Atl. 182, Ann. Cas. 1914A, 46; *Turner v. Cocheco Mfg. Co.* 75 N. H. 521, 77 Atl. 999; *Comeau v. C. C. Manuel & Sons Co.* 84 Vt. 501, 80 Atl. 51. For additional cases see note in L.R.A.1915A, 1047.

⁸ *Frederick Mfg. Co. v. Devlin*, 62 C. C. A. 53, 127 Fed. 71; *Brownfield v. Chicago, R. I. & P. R. Co.* 107 Iowa, 254, 77 N. W. 1038, 5 Am. Neg. Rep. 331; *Hand v. Brookline*, 126 Mass. 324; *Maitland v. Gilbert Paper Co.* 97 Wis. 476, 65 Am. St. Rep. 137, 72 N. W. 1124.

⁹ *Cumberland Teleph. & Teleg. Co. v. Peacher Mill Co.* 129 Tenn. 374, L.R.A.1915A, 1045, 164 S. W. 1145; *State v. Hyde*, 234 Mo. 200, 186 S. W. 316, Ann. Cas. 1912D, 191; *Sever v. Minneapolis & St. L. R. Co.* 156 Iowa, 664, 44 L.R.A.(N.S.) 1200, 137 N. W. 937.

b. Common inference—conjecture.—An opinion which is matter of common inference, not requiring skill,¹ or which is obviously matter of conjecture upon the facts,² should be excluded.

¹ *People v. Bodine*, 1 Denio, 281, 311. (Here a corpse was found partially burned, and parts covered with loose clothing were not burned. Held, that an expert's inference that the person must have been dead before the fire broke out, as otherwise the covering would have been disturbed, was inadmissible.) The trial of this case is reported in 1 Edm. Sel. Cas. 37. See also *National Union v. Thomas*, 10 App. D. C. 277 (whether deceased committed suicide); *Convery v. Conger*, 53 N. J. L. 658 (whether marks on ballots were produced by a marking apparatus attached to certain ballot-box machines); *Peyton v. New York Elev. R. Co.* 62 Hun, 536, 17 N. Y. Supp. 244

(a change in the character of tenants on a street, and that rentals thereon were less than on another street, because of the presence of an elevated railroad in the street). And that a witness may not give his opinion as to the cause of a derailment of a train, see *Hoffman v. Delaware & H. Canal Co.* 16 App. Div. 572, 44 N. Y. Supp. 949; *Erb v. Popritz*, 59 Kan. 264, 52 Pac. 871; *Roberts v. Chicago & G. T. R. Co.* 78 Ill. App. 526.

² As whether a mortally wounded man could have sufficient strength left to give a blow which would have a certain effect. *Cowen, J.*, in *People v. Rector*, 19 Wend. 569, 577, citing *Selfridge's Trial*, 2d ed. 60, and holding the matter a question for the jury. So, also, of the question whether in a certain relative position, and in a particular manner, or by a particular motion, certain muscular strength could inflict a specified wound. Citing *Goodwin's Case*, 5 N. Y. City Hall Rec. 11, 25, 26.

So, also, whether a fracture of the skull, the body being found six months after death, was old or recent. *Linsday v. People*, 63 N. Y. 143, affirming 5 Hun, 104; s. c. more fully, 67 Barb. 548.

And whether a collision of a cable train with a cart containing two people, the train carrying them over 200 feet in the top of the cart, which had been torn off, would cause the injuries found on one of the persons. *Chicago City R. Co. v. Smith*, 69 Ill. App. 69.

c. Experiments to corroborate opinion.—An expert who has made experiments to qualify him to give an opinion as to cause may be allowed, against objection, to state the details of such experiments on his direct examination, or they must be left to the discretion of the court to be called for on cross-examination.¹

¹ The contrary was held in *Ingledew v. Northern R. Co.* 7 Gray, 86 (negligent freezing of ink. Details of experiments as to whether temperature like that at the time in question would freeze such ink, excluded on direct examination).

That ruling is discredited in *Lincoln v. Taunton Copper Mfg. Co.* 9 Allen, 181. The better opinion is that it is in the discretion of the court to allow such evidence. See also *Com. v. Leach*, 156 Mass. 99, 102, 30 N. E. 163; *Com. v. Russ*, 232 Mass. 58, 72, 122 N. E. 176.

Experimental evidence as affected by similarity or dissimilarity of conditions is discussed in note in 8 A.L.R. 18.

d. As to cause of death, disease, or injury.—(1) *In general.*—The opinions of medical experts as to the causes of a death,

injury or other particular physical condition are admissible as evidence upon the ground that such witnesses have peculiar knowledge or skill with reference to the particular subject-matter in question.¹ Such opinions are therefore admissible where they are inferences of skill derived either from observation or from scientific deductions from given facts.²

So an expert³ who has examined an injured person, or the body of one deceased, may state his opinion as to what was the cause of the wound or other injury thereon,⁴ or the cause of death.⁵

And an expert who has not made an examination may state his opinion on an hypothetical question.⁶

The same principle applies to injuries, etc., to animals.⁷ But a question for this purpose must not propound an hypothesis for which there is no basis of fact.⁸ Nor must it propound an hypothesis based only on testimony as to one cause of the injury, while there is also evidence as to another cause.⁹

¹ *American Agri. Chemical Co. v. Hogan*, 130 C. C. A. 52, 213 Fed. 416; *Lovelady v. Birmingham R. Light & P. Co.* 161 Ala. 494, 50 So. 96; *Fuhry v. Chicago City R. Co.* 239 Ill. 548, 88 N. E. 221; *State v. Morphy*, 33 Iowa, 270, 11 Am. Rep. 122; *Roark v. Greeno*, 61 Kan. 299, 59 Pac. 655; *Davis v. State*, 38 Md. 15; *State v. James*, 123 Minn. 487, 144 N. W. 216; *Redmon v. Metropolitan Street R. Co.* 185 Mo. 1, 105 Am. St. Rep. 558, 84 S. W. 26; *Horst v. Lewis*, 71 Neb. 370, 98 N. W. 1046, 103 N. W. 460; *State v. Powell*, 7 N. J. L. 244; *Tracey v. Metropolitan Street R. Co.* 49 App. Div. 197, 63 N. Y. Supp. 242, affirmed without opinion in 168 N. Y. 653, 61 N. E. 1135; *Tullis v. Rankin*, 6 N. D. 44, 35 L.R.A. 449, 66 Am. St. Rep. 586, 68 N. W. 187; *St. Louis & S. F. R. Co. v. Shepard*, 40 Okla. 589, 139 Pac. 833; *State v. Glass*, 5 Or. 73; *Piollet v. Simmers*, 106 Pa. 95, 51 Am. Rep. 496; *State v. Toney*, 15 S. C. 409; *Knights of Pythias v. Steele*, 108 Tenn. 624, 69 S. W. 336; *St. Louis, I. M. & S. R. Co. v. J. H. White & Co.* — Tex. Civ. App. —, 76 S. W. 947; *Lewis v. Crane*, 78 Vt. 216, 62 Atl. 60; *Johnson v. Com.* 111 Va. 877, 69 S. E. 1104; *Bowen v. Huntington*, 35 W. Va. 682, 14 S. E. 217; *Kortendick v. Waterford*, 142 Wis. 413, 125 N. W. 945; *Davis v. State*, 38 Md. 15.

Expert opinion as to the cause of a particular death or physical condition is admissible where the facts are stated to or by the witness and there is no direct evidence, and no evidence other than expert is possible because the question is so within the range of scientific knowl-

edge. *People v. Bowers*, 2 Cal. Unrep. 878, 18 Pac. 660; *Willet v. Johnson*, 13 Okla. 563, 76 Pac. 174; *Smith v. State*, 43 Tex. 643.

Expert opinion as to the cause of a particular physical condition is admissible upon the ground that such evidence is in some cases the best evidence. *Jacksonville Electric Co. v. Cabbage*, 58 Fla. 287, 51 So. 139; *Gulf, C. & S. F. R. Co. v. Booth*, — Tex. Civ. App. —, 97 S. W. 128; *Bowen v. Huntington*, 35 W. Va. 682, 14 S. E. 217. For additional cases see note in L.R.A.1915A, 1060.

² *Southern P. Co. v. Arnett*, 50 C. C. A. 17, 111 Fed. 849; *St. Louis & S. F. R. Co. v. Savage*, 163 Ala. 55, 50 So. 113; *Newton v. State*, 21 Fla. 53; *Lanier v. State*, 141 Ga. 17, 80 S. E. 5; *Shaughnessy v. Holt*, 236 Ill. 485, 21 L.R.A. (N.S.) 826, 86 N. E. 256; *Louisville, N. A. & C. R. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197, 3 Am Neg. Cas. 197; *Bird v. Hart-Parr Co.* 165 Iowa, 542, 146 N. W. 74; *Georgetown v. Groff*, 136 Ky. 662, 124 S. W. 888; *State v. Voorhies*, 115 La. 200, 38 So. 964; *Williams v. State*, 64 Md. 384, 7 Atl. 889, 5 Am. Crim. Rep. 512; *Miller v. Michigan C. R. Co.* 167 Mich. 21, 132 N. W. 483; *White v. Farmers' Mut. F. Ins. Co.* 97 Mo. App. 590, 71 S. W. 707; *Proctor v. Irvin*, 22 Mont. 547, 57 Pac. 183; *South Omaha v. Sutcliffe*, 72 Neb. 746, 101 N. W. 997; *Bruss v. Metropolitan Street R. Co.* 66 App. Div. 554, 73 N. Y. Supp. 256; *State v. Wilcox*, 132 N. C. 1120, 44 S. E. 625; *Schaeffer v. Philadelphia & R. R. Co.* 168 Pa. 209, 47 Am. St. Rep. 884, 31 Atl. 1088; *Riser v. Southern R. Co.* 67 S. C. 419, 46 S. E. 47; *Stegner v. Modern Brotherhood*, 24 S. D. 371, 123 N. W. 842; *St. Louis & S. F. R. Co. v. Knox*, — Tex. Civ. App. —, 151 S. W. 902; *Murray v. Salt Lake City R. Co.* 16 Utah, 356, 52 Pac. 596; *McKinstry v. Collins*, 74 Vt. 147, 52 Atl. 438; *Welch v. Fransioli*, 46 Wash. 530, 90 Pac. 644; *Depow v. Chicago & N. W. R. Co.* 151 Wis. 109, 138 N. W. 42.

See also note in L.R.A.1915A, 1060.

³ The opinion of one not an expert is not competent. *Lewis v. Bell*, 109 Mich. 189, 66 N. W. 1091; *Harris v. Panama R. Co.* 3 Bosw. 7 (error to allow the question whether a wound which the witness saw inflicted on a horse was sufficient to cause death, because the witness was not proved to be skilled as to such wounds, nor to have treated such injuries); *American Acci. Co. v. Fidler*, 18 Ky. L. Rep. 161, 35 S. W. 905, 36 S. W. 528 (error to allow persons not experts in medical science, but who have nursed two or three cases of typhoid fever, amongst which was the person, the cause of whose death was questioned, to give an opinion as to whether the person died from typhoid fever or from the effects of a fall); *International & G. N. R. Co. v. Kuehn*, 11 Tex. Civ. App. 21, 31 S. W. 322 (the wife of a person who dies suddenly a year after an injury cannot, without qualifying as an expert, testify as to the cause of his death).

Compare *People v. Sullivan*, 2 Cal. Unrep. 552, 8 Pac. 520 (to effect that a witness experienced with wounds, though not a professional expert, may testify whether a wound was caused by a sharp or dull instrument); *Seckinger v. Philibert & J. Mfg. Co.* 129 Mo. 590, 31 S. W. 957 (that a physician of twenty-five years' practice is competent to testify to the cause of disease, although not a specialist for that disease). To similar effect, *Hardiman v. Brown*, 162 Mass. 585, 39 N. E. 192. And *Robinson v. Marino*, 3 Wash. 434, 28 Pac. 753, holds that a physician and surgeon of twenty years' practice will be presumed competent to give an opinion of the probable cause of injuries which he has treated.

⁴ *Turner v. Newburgh*, 109 N. Y. 301, 16 N. E. 344 (civil case); *Stouter v. Manhattan R. Co.* 127 N. Y. 661, 27 N. E. 805; *Tullis v. Rankin*, 6 N. D. 44, 35 L.R.A. 449, 68 N. W. 187; *Texas C. R. Co. v. Burnett*, 80 Tex 536, 16 S. W. 320; *Illinois C. R. Co. v. Treat*, 179 Ill. 576, 54 N. E. 290; *McClain v. Brooklyn City R. Co.* 116 N. Y. 459, 22 N. E. 1062; *People v. Willson*, 109 N. Y. 345, 16 N. E. 540 (criminal case); *Chicago v. Didier*, 131 Ill. App. 406, affirmed in 227 Ill. 595, 81 N. E. 698; *West Chicago Street R. Co. v. Dougherty*, 209 Ill. 241, 70 N. E. 586.

So, medical experts may testify as to the power of resistance of the skull, and the force requisite to break it. *Kennedy v. People*, 39 N. Y. 245, 5 Abb. Pr. N. S. 147; *Com. v. Piper*, 120 Mass. 185 (whether all the injuries to deceased's head could have resulted from the same blow). *Miller v. Michigan C. R. Co.* 167 Mich. 21, 132 N. W. 483; *Lyons v. Metropolitan Street R. Co.* 253 Mo. 143, 161 S. W. 726, Ann. Cas. 1915B, 508. For additional cases see note in L.R.A.1915A, 1062.

⁵ *Eggler v. People*, 56 N. Y. 642, affirming 3 Thomp. & C. 796 (which of two wounds, either by itself necessarily fatal, actually caused death. Opinion not reported); *State v. Clark*, 15 S. C. 403 (whether body found on track was dead before train passed); *People v. Barker*, 60 Mich. 277, 27 N. W. 539 (whether death of one found in the water was caused by drowning or other means).

People v. Hagenow, 236 Ill. 514, 86 N. E. 370; *Foley v. Northern California Power Co.* 165 Cal. 103, 130 Pac. 1183; *McCleary v. State*, 122 Md. 394, 89 Atl. 1100; *Morrow v. National Masonic Acci. Asso.* 125 Iowa, 633, 101 N. W. 468. For additional cases see note in L.R.A.1915A, 1062.

⁶ *People v. Foley*, 64 Mich. 149, 31 N. W. 94 (indictment of father for murder of infant child; not error to allow hypothetical question to physician, as to what caused its death, for the purpose of showing that violence was the cause); *McClain v. Brooklyn City R. Co.* 116 N. Y. 459, 22 N. E. 1062; *McKeon v. Chicago, M. & St. P. R. Co.* 94 Wis. 477, 35 L.R.A. 252, 69 N. W. 175; *Flaherty v. Powers*, 167 Mass. 61, 44 N. E. 1074; *Rabe v. Sommerbeck*, 94 Iowa, 656, 63

N. W. 458; *Bowen v. Huntington*, 35 W. Va. 682, 14 S. E. 217; *State v. Kammel*, 23 S. D. 465, 122 N. W. 420; *Lovelady v. Birmingham R. Light & P. Co.* 161 Ala. 494, 50 So. 96; *Chicago v. Saldman*, 225 Ill. 625, 80 N. E. 349; *Hilmer v. Western Travelers Acci. Asso.* 86 Neb. 285, 27 L.R.A.(N.S.) 319, 125 N. W. 535. For additional cases see note in L.R.A.1915A, 1067.

He can be asked what might have caused it, but not what did cause it, according to *People v. Hare*, 57 Mich. 505, 24 N. W. 843, 846, and *Illinois C. R. Co. v. McCollum*, 122 Ill. App. 531. But this distinction is criticized in *Donnelly v. St. Paul City R. Co.* 70 Minn. 278, 73 N. W. 157, and it is held proper to ask the witness what did cause it.

Where evidentiary facts upon which the fact in issue depends are in dispute, opinion evidence as to the ultimate fact must be given upon a hypothetical case. *Luning v. State*, 2 Pinney, 215, 1 Am. Rep. 153; *Wright v. Hardy*, 22 Wis. 348; *Kreuziger v. Chicago & N. W. R. Co.* 73 Wis. 158, 40 N. W. 657. This rule is that questions put to experts for opinion evidence must be so framed as not to pass upon the credibility of any other evidence in the case, else it will usurp the province of the jury or the court. *Maitland v. Gilbert Paper Co.* 97 Wis. 484, 72 N. W. 1124.

⁷ *Goodrich v. People*, 19 N. Y. 574, 577 (supreme court affirmed by court of appeals without questioning this point).

⁸ *People v. Rogers*, 13 Abb. Pr. N. S. 370 (proper to ask if wound could have been produced by the club, use of which was in evidence; but not proper to ask if it might have been produced by a stone thrown); *Davis v. Travelers' Ins. Co.* 59 Kan. 74, 52 Pac. 67; *Foster v. Fidelity & C. Co.* 99 Wis. 447, 40 L.R.A. 833, 75 N. W. 69.

But a question which asks for the opinion of a physician as to the cause of an injury or physical condition, assuming the "statement" made by the attending physician upon the witness stand to be true, is not objectionable as calling for an opinion of one expert based on that of another, although the attending physician had, in connection with a description of the injuries sustained by the patient, expressed his opinion that the condition was produced thereby. *Howland v. Oakland Consol. Street R. Co.* 110 Cal. 513, 42 Pac. 983.

⁹ *Vosburg v. Putney*, 80 Wis. 523, 14 L.R.A. 226, 50 N. W. 403. Compare *Quinn v. O'Keeffe*, 9 App. Div. 68, 41 N. Y. Supp. 116 (that the question may assume the absence of other causes for the condition of plaintiff than the injury for which he sues, where plaintiff testifies that he knows of no other cause).

(2) *Form of question.*—The question may be either as to the cause of the injury or condition, or conversely, what would

be the effect on the body of such a force or blow,¹ or, in the presence of a given effect, of what causes it was or might be the result.²

¹ Williams v. State, 64 Md. 384, 1 Atl. 887; Maitland v. Gilbert Paper Co. 97 Wis. 477, 72 N. W. 1124.

Or whether the condition described might be caused by the injury shown. Bush v. St. Joseph & B. H. Street R. Co. 113 Mich. 513, 71 N. W. 851 (but not that it would probably be caused by such an injury. The degree of probability is a proper subject for cross-examination, and need not be indicated in the question).

Or whether a cause alleged to exist would be sufficient to produce the physical condition claimed to have resulted therefrom. Lacas v. Detroit City R. Co. 92 Mich. 412, 52 N. W. 745; Griffith v. Utica & M. R. Co. 43 N. Y. S. R. 835, 17 N. Y. Supp. 692; Pennsylvania Co. v. Frund, 4 Ind. App. 469, 30 N. E. 1116.

Or whether the condition was what it would have been if the claimed cause was a fact. Manufacturers' Acci. Indemnity Co. v. Dorgan, 22 L.R.A. 620, 7 C. C. A. 581, 16 U. S. App. 290, 58 Fed. 945.

Or could the injury have been caused by a certain force or occurrence? Smalley v. Appleton, 75 Wis. 18, 43 N. W. 826. To similar effect, Block v. Milwaukee Street R. Co. 89 Wis. 371, 27 L.R.A. 365, 61 N. W. 1101; Montgomery v. Long Island R. Co. 29 N. Y. S. R. 822, 8 N. Y. Supp. 811; Hunter v. Third Ave. R. Co. 21 Misc. 1, 46 N. Y. Supp. 1010.

Or that a given force or blow will have a certain effect. Cannon v. Brooklyn City R. Co. 9 Misc. 282, 29 N. Y. Supp. 722.

² Moyer v. New York C. & H. R. R. Co. 98 N. Y. 645.

(3) *Probable position*.—The questions, what position a body was in when a blow to which a wound is attributed was probably struck,¹ and whether such a blow could have been struck when the persons concerned were in specified relative positions,² do not involve science or skill, and are not proper subjects for opinion evidence.

¹ Kennedy v. People, 39 N. Y. 245, 5 Abb. Pr. N. S. 147.

At least until evidence has been given as to the kind of weapon used. Trial of Lindsay (Syracuse, 1874); conviction affirmed, without discussing this point, in 63 N. Y. 143, affirming 5 Hun, 104, s. c. more fully, 67 Barb. 548.

² People v. Rector, 19 Wend. 569.

(4) *Exhibiting instrument*.—After testimony of an expert that a wound was caused by a designated kind of instrument has been properly received, it is competent to show the witness an instrument unquestionably proved to have been in the hand of the accused, and ask if such an instrument would produce such wounds.¹

¹ *People v. Carpenter*, 102 N. Y. 238, 249, 6 N. E. 584; *Gardiner v. People*, 6 Park. Crim. Rep. 155, 202; *Kennedy v. People*, 39 N. Y. 245, 5 Abb. Pr. N. S. 147.

Compare *Wilson v. People*, 4 Park. Crim. Rep. 619.

(5) *Cause of suicide*.—Whether the suicide of a person hypothetically regarded as subject to melancholia might be attributed to the disease is not a question for an expert witness, but for the jury.¹

¹ *Van Zandt v. Mutual Ben. L. Ins. Co.* 55 N. Y. 169, 14 Am. Rep. 215. Otherwise of an expert's testimony as to effect of melancholia upon one who was his own patient. *Koenig v. Globe Mut. L. Ins. Co.* 10 Hun, 558.

e. Case unknown to expert.—To show the improbability of an imputed cause, an expert may be asked whether he has ever known a case.¹

¹ *Doyle v. New York Eye & Ear Infirmary*, 80 N. Y. 631, 633.

f. What would have been.—As to whether, and how, you may prove what would have been, see the following:¹

¹ Opinion of bystanders as to whether buildings would have been destroyed by fire if they had not been blown up by order of the city authorities. *New York v. Pentz*, 24 Wend. 668 (not admitted).

What effect a log floating down as drift wood and caught on the point of a bridge had in changing the current and causing the bridge to be washed out. *Cooper v. Mills County*, 69 Iowa, 350, 28 N. W. 633 (not admitted because witness not qualified as expert).

Expert testimony as to the effect of a bridge as an obstruction to river. *Gault v. Concord R. Co.* 63 N. H. 356 (admitted).

Expert opinion as to probable action of waters of stream upon adjoining land as affected by alleged obstruction. *Moyer v. New York C. & H. R. R. Co.* 12 N. Y. Week. Dig. 188 (admitted).

Expert testimony as to effect of erection of milldam upon channel of stream above dam, and as to whether dam backs water up so as to affect the operation of mill above dam. *Ball v. Hardesty*, 38 Kan. 540, 16 Pac. 808.

Expert testimony as to whether a collision could have been avoided by turning bow of defendant's vessel other way. *McKerchnie v. Standish*, 6 N. Y. Week. Dig. 433.

Expert testimony as to whether, considering the condition and situation of the vessel, and all the circumstances, goods, for whose loss from negligent stowing and conveying recovery is sought, could have been broken to pieces in the hold, or washed out of the hold, if they had been stowed therein as testified to. *New England Glass Co. v. Lovell*, 7 Cush. 319 (inadmissible because not subject for expert testimony).

Whether it was the act of a careful and prudent man to leave a horse on the street unhitched. *Stowe v. Bishop*, 58 Vt. 498, 56 Am. Rep. 569, 3 Atl. 494 (held properly excluded as not being matter for expert testimony).

Expert testimony as to whether a person could have been injured unless he was careless. *Buxton v. Somerset Potters' Works*, 121 Mass. 446.

Expert testimony as to whether defective work and condition of machinery set up and examined by witness was due to defective construction or want of skill in its management. *Chandler v. Thompson*, 30 Fed. 38 (competent).

Whether, at the distance at which a person was standing, a street car could have passed safely. *McDermott v. Third Ave. R. Co.* 44 Hun, 107.

Testimony that goods lost through collision of steamboat and flat ferry boat could have been saved if the steamboat had returned to the flat boat's assistance when requested. *Otis v. Thom*, 23 Ala. 469, 58 Am. Dec. 303, and note.

Expert testimony as to whether blast covered in manner prescribed by city ordinance could throw portions of rock a certain distance. *Koster v. Noonan*, 8 Daly, 231 (admitted).

How much a given field will produce of a certain kind of grain. *Sickles v. Gould*, 51 How. Pr. 22 (competent if witness qualified to speak as expert).

Question as to whether or not piles should not be driven in so deeply that they could not be pressed out by ordinary use of bridge. *Cooper v. Mills County*, 69 Iowa, 350, 28 N. W. 633 (admission held error without prejudice, as it is matter of common knowledge that piles should be so driven in).

2. Nonexpert testimony.

A nonexpert witness, who knows the facts personally, may

give his opinion as to the cause of an occurrence, accident or casualty after stating the facts on which his opinion is based,¹ or, if the matter is one which cannot be fully reproduced and made intelligible to the jury except by an expression of opinion as to the impression made on the mind of the witness.² The reason for this rule has been stated to be that where the facts are stated and are such as to permit a nonexpert to reach an intelligent opinion, such opinion would be more satisfactory than those of scientific men who were unacquainted with the facts.³ So nonexperts may express an opinion as to whether certain wounds caused death where the evidence of medical experts cannot be obtained, provided the witness describes the wounds, and states the reasons for his conclusion.⁴ A person suffering from common ailments may testify as to the cause thereof, even though he is a nonexpert, but he cannot so testify as to the cause of a disease or serious ailment.⁵ Nonexperts may express an opinion as to the cause of a particular physical condition, where the facts upon which the opinion is formed have been personally observed and cannot be adequately reproduced by a mere statement thereof.⁶

So opinion evidence of nonexperts has been held admissible as to what caused a building to fall,⁷ rock strata to slip,⁸ the failure of a street car to stop,⁹ a horse to run away,¹⁰ a woman to fall,¹¹ the wreck of a train,¹² the overflow of a river,¹³ or stream,¹⁴ the damage done to cotton,¹⁵ a depression in the earth,¹⁶ the fright of a horse,¹⁷ a change in the channel of a stream,¹⁸ bloody spots on a fence rail,¹⁹ and a break in a buggy wheel.²⁰

¹ *Gulf, C. & S. F. R. Co. v. Harbison*, — Tex. Civ. App. —, 88 S. W. 452.

² *Estes v. Chicago, B. & Q. R. Co.* 159 Iowa, 666, 141 N. W. 49; *Newport News & M. Valley Co. v. Wilson*, 16 Ky. L. Rep. 262; *Merritt v. Kinloch Teleph. Co.* 215 Mo. 299, 115 S. W. 19; *Multnomah County v. Willamette Towing Co.* 49 Or. 204, 89 Pac. 389; *Piollet v. Simmers*, 106 Pa. 95, 51 Am. Rep. 496; *Hand v. Catawba Power Co.* 90 S. C. 267, 73 S. E. 187; *McCabe v. San Antonio Traction Co.* 39 Tex. Civ. App. 614, 88 S. W. 387; *Walker v. Strosnider*, 67 W. Va. 39, 67 S. E. 1087, 21 Ann. Cas. 1.

Ohio & M. R. Co. v. Long, 52 Ill. App. 670; *Foster v. East Jordan Lumber Co.* 141 Mich. 316, 104 N. W. 617; *McLeod v. Lee*, 17 Nev. 103, 28 Pac. 124; *Kirby Lumber Co. v. Williams*, — Tex. Civ. App. —,

159 S. W. 309; *Park v. Northport Smelting & Ref. Co.* 47 Wash. 597, 92 Pac. 442. For additional cases see note in L.R.A.1915A, 1055.

- ³ *International & G. N. R. Co. v. Klaus*, 64 Tex. 293; *Gulf, C. & S. F. R. Co. v. Locker*, 78 Tex. 279, 14 S. W. 611; *Gulf, C. & S. F. R. Co. v. John*, 9 Tex. Civ. App. 342, 29 S. W. 558, and cases cited; *Galveston, H. & S. A. R. Co. v. Daniels*, 1 Tex. Civ. App. 695, 20 S. W. 955; *Ethridge v. San Antonio & A. P. R. Co.* — Tex. Civ. App. —, 39 S. W. 204; *Gulf, C. & S. F. R. Co. v. Richards*, 83 Tex. 203, 18 S. W. 611.

For other citations see note in L.R.A.1915A, 1053 et seq.

- ⁴ *Revels v. State*, 64 Fla. 432, 59 So. 951; *Everett v. State*, 62 Ga. 65.

- ⁵ *Central of Georgia R. Co. v. Clements*, 2 Ala. App. 520, 57 So. 52; *North Chicago Street R. Co. v. Cook*, 145 Ill. 551, 33 N. E. 958, 2 Am. Neg. Cas. 702; *Missouri, K. & T. R. Co. v. Davis*, 53 Tex. Civ. App. 547, 116 S. W. 423; *Georgia R. Co. v. Bryans*, 77 Ga. 429; *Suddeth v. Boone*, 121 Iowa, 258, 96 N. W. 853; *Louisville & N. R. Co. v. Braymer*, 18 Ky. L. Rep. 1098, 39 S. W. 24, 1 Am. Neg. Rep. 443; *Lindley v. Detroit*, 131 Mich. 8, 90 N. W. 665.

- ⁶ *Lanier v. State*, 141 Ga. 17, 80 S. E. 5.

For other cases and full discussion of nonexpert opinions as to cause of death, disease or injury, see note in L.R.A.1915A, 1076.

- ⁷ *Walker v. Strosnider*, 67 W. Va. 39, 67 S. E. 1087, 21 Ann. Cas. 1.

- ⁸ *Kunst v. Grafton*, 67 W. Va. 20, 26 L.R.A.(N.S.) 1201, 67 S. E. 74.

- ⁹ *Sears v. Seattle Consol. Street R. Co.* 6 Wash. 227, 33 Pac. 389, 1081, 7 Am. Neg. Cas. 86.

- ¹⁰ *Dublin Gas & E. Co. v. Frazier*, 46 Tex. Civ. App. 288, 103 S. W. 197.

- ¹¹ *McCabe v. San Antonio Traction Co.* 39 Tex. Civ. App. 614, 88 S. W. 389.

- ¹² *Gulf, C. & S. F. R. Co. v. John*, 9 Tex. Civ. App. 342, 29 S. W. 558.

- ¹³ *Gulf, C. & S. F. R. Co. v. Locker*, 78 Tex. 279, 14 S. W. 611; *Noe v. Chicago, B. & Q. R. Co.* 76 Iowa, 360, 41 N. W. 42.

- ¹⁴ *International & G. N. R. Co. v. Klaus*, 64 Tex. 293.

- ¹⁵ *Virginia-Carolina Chemical Co. v. Kirven*, 57 S. C. 445, 35 S. E. 745.

- ¹⁶ *Merritt v. Kinloch Teleph. Co.* 215 Mo. 299, 115 S. W. 19.

- ¹⁷ *Schmidt v. Dubuque County*, 136 Iowa, 401, 113 N. W. 820; *Foster v. East Jordan Lumber Co.* 141 Mich. 316, 104 N. W. 617.

- ¹⁸ *Newport News & M. Valley Co. v. Wilson*, 16 Ky. L. Rep. 262.

- ¹⁹ *Richardson v. State*, 7 Tex. App. 486.

- ²⁰ *State v. Rainsbarger*, 71 Iowa, 746, 31 N. W. 865.

For additional cases and full discussion see note in L.R.A.1918A, 689.

3. Direction of blow, force, or fluid.

A witness who observed the traces left by a physical force or movement may state the direction in which the force appeared to have been applied.¹

¹ *State v. Rainsbarger*, 71 Iowa, 746, 31 N. W. 865 (murder. Not error to allow witness to testify that the buggy of the deceased appeared to have been broken by force applied at the top of the wheel; and by pulling the shaft outward by force applied at the forward end; and that the buggy was strong enough to carry two ordinary sized men without breaking); *Com. v. Sturtivant*, 117 Mass. 122, 132, 19 Am. Rep. 401 (a witness upon the trial of an indictment for murder, who is familiar with blood, and examined with a lens a blood stain upon a coat when it was fresh, is competent to state that the appearance then indicated the direction from which it came, and that it came from below upward, although he has never experimented with blood or other fluid in this respect); *Hopt v. Utah*, 120 U. S. 430, 30 L. ed. 708, 7 Sup. Ct. Rep. 614 (direction of blow by which fatal wound on head was caused. This does not require expert testimony).

These rulings are well supported by the principle which allows testimony to a collective fact, the knowledge of which is derived from minutiae (see *CARE*, § 6). Thus considered, they are not inconsistent with §§ 1, b, 1, d (3), this title.

On the Trial of Lindsay (Syracuse, 1874) 63 N. Y. 143, affirming 5 Hun, 104, 67 Barb. 548, the people offered to show, by opinion of a physician, that the fracture in the skull which an accomplice of the accused testified the accused caused with an ax, was produced by a right-hand blow, such as the accused always struck, while the accomplice it was claimed always struck a left-hand blow with an ax held in both hands. Held, not admissible in the absence of expert proof of the situation of the deceased when the blow was struck.

4. Other similar occurrences or injuries.

Evidence of other occurrences or injuries prior or subsequent to, or at or about the same time as, the occurrence or injury under investigation, caused by the same or similar machine, force, blow, etc., as is alleged to be the cause of the occurrence or injury in question, is admissible as tending to show that that occurrence or injury was so caused,¹ provided, however, that if the inquiry be not limited to the same time² there must be evidence that the condition meanwhile continued the same,³ and if not limited to the same place, there must be evidence of similarity of condition.⁴

Evidence that no similar accidents or injuries ever occurred previously is generally held inadmissible as having no bearing on whether an accident or injury occurred in the case in suit,

the courts holding that conditions may have been unsafe for a long time without any accident or injury occurring.⁵

The presumption that the same defective condition of a machine continued⁶ does not avail to let in evidence of other injuries occurring after a considerable lapse of time, unless the party shows either that the defect was one of construction, or that the structure was in the same condition as to nonrepair.⁷

¹ For general instances of the application of this rule, see *Scott v. New Orleans*, 21 C. C. A. 402, 41 U. S. App. 498, 75 Fed. 373; *Richmond R. & Electric Co. v. Bowles*, 92 Va. 738, 24 S. E. 388; *Rogers v. New York & B. Bridge*, 11 App. Div. 141, 42 N. Y. Supp. 1046; *Shea v. Glendale Elastic Fabrics Co.* 162 Mass. 463, 38 N. E. 1123. Compare, however, *Willett v. St. Albans*, 69 Vt. 330, 38 Atl. 72 (that other cases of sickness had been caused by a nuisance is admissible in an action for damages on account thereof in which the principal injury alleged is sickness of plaintiff's wife caused thereby). *Soderburg v. Chicago, St. P. M. & O. R. Co.* 167 Iowa, 123, 149 N. W. 82, holding evidence as to effect of smoke, gas and soot on other persons and premises admissible as establishing existence and character of a nuisance. See also note in 15 Columbia L. Rev. 76.

So similar accidents may be shown where the injuries occurred from defects in the street or highway. *Chicago v. Jarvis*, 226 Ill. 614, 80 N. E. 1079, involving a coal hole in the middle of the sidewalk; *Covington v. Visse*, 158 Ky. 134, 164 S. W. 332, where a water box projected two inches above the sidewalk; *Hall v. Shenandoah*, 167 Iowa, 735, 149 N. W. 831; *Chickasha v. White*, 45 Okla. 631, 146 Pac. 578. See also note in 15 Columbia L. Rev. 551. *Contra*, *Williams v. Winthrop*, 213 Mass. 581, 100 N. E. 1101.

In *Branch v. Klatt*, 173 Mich. 31, 138 N. W. 263, it was held that prior accidents were admissible, but not subsequent ones.

Thus, in the case of a fire shown to have been caused by some passing locomotive engine, which cannot be fully identified, evidence of other fires kindled by different locomotives prior or subsequent to, or about the same time, is admissible. *Gulf, C. & S. F. R. Co. v. Johnson*, 4 C. C. A. 447, 10 U. S. App. 629, 54 Fed. 474; *Louisville, N. A. & C. R. Co. v. Lange*, 13 Ind. App. 337, 41 N. E. 609; *Dunning v. Maine C. R. Co.* 91 Me. 87, 39 Atl. 352, and cases cited; *Thatcher v. Maine C. R. Co.* 85 Me. 502, 27 Atl. 519; *Campbell v. Missouri P. R. Co.* 121 Mo. 340, 25 L.R.A. 175, 25 S. W. 936; *Van Steuben v. Central R. Co.* 178 Pa. 367, 34 L.R.A. 577, 35 Atl. 992; *Galveston, H. & S. A. R. Co. v. Hertzog*, 3 Tex. Civ. App. 296, 22 S. W. 1013; *New York, P. & N. R. Co. v. Thomas*, 92 Va. 606, 24 S. E. 264.

But where the injury in question is shown to have been caused, or, in the nature of the case, could only have been caused, by sparks from an engine which is known and identified, or from one or the other of two locomotives, the evidence as to fires set by the particular engine is proper. *Lake Erie & W. R. Co. v. Gould*, 18 Ind. App. 275, 47 N. E. 941; *Brown v. Benson*, 101 Ga. 753, 29 S. E. 215, and cases cited; *Baltimore & O. S. W. R. Co. v. Tripp*, 175 Ill. 251, 51 N. E. 833; *Lake Side & M. R. Co. v. Kelly*, 10 Ohio C. C. 322, 6 Ohio C. D. 555; *Thomas v. New York, C. & St. L. R. Co.* 182 Pa. 538, 38 Atl. 413. But it should be confined to evidence of fires kindled by the particular engine said to have caused the fire in controversy. *First Nat. Bank v. Lake Erie & W. R. Co.* 174 Ill. 36, 50 N. E. 1023, and cases cited.

But the fact that other fires had occurred, without proof that they were caused by the railway, is not competent. *St. Louis & S. F. R. Co. v. Jones*, 59 Ark. 105, 26 S. W. 595; *Tribette v. Illinois C. R. Co.* 71 Miss. 212, 13 So. 899.

§ According to *Martz v. Cincinnati, H. & D. R. Co.* 12 Ohio C. C. 144, 5 Ohio C. D. 451, where no engine has been identified as the cause of the fire, the plaintiff may offer testimony showing the condition of the locomotives on defendant's road, and their action as to the emission of sparks near the vicinity where the fire in question was started, and about the time of the fire, either a short time before or after, and the witness will not be confined to a day or two, but will be allowed to testify to a reasonable limit, and a month preceding the fire would not exceed that limit.

§ *Dillingham v. Whitaker*, — Tex. Civ. App. —, 25 S. W. 723; *Matthews v. Missouri P. R. Co.* 142 Mo. 645, 44 S. W. 802; *Menominee River Sash & Door Co. v. Milwaukee & N. R. Co.* 91 Wis. 447, 65 N. W. 176; *Hunt v. Dubuque*, 96 Iowa, 314, 65 N. W. 319; *Schmidt v. Coney Island & B. R. Co.* 26 App. Div. 391, 49 N. Y. Supp. 777; *Louisville & N. R. Co. v. Malone*, 109 Ala. 509, 20 So. 33.

In *Birmingham v. Starr*, 112 Ala. 98, 20 So. 424, testimony that the witness had known other persons to be injured at the point in a sidewalk at which plaintiff sustained her injuries was held inadmissible, as was also like testimony of another witness, which failed to show how long previously the accident had happened, or whether the conditions were the same; while testimony of a third witness that he had been injured at the same time and place as plaintiff was admitted.

In *Van Buren v. Bethlehem*, 178 App. Div. 254, 164 N. Y. Supp. 964 occurrences ten years before were held too long past to show dangerous condition of footpath. In *Perrine v. Southern Bitulithic Co.* 190 Ala. 96, 66 So. 705, it was held that the similar occurrences must be at the same spot.

⁴ *Brady v. Manhattan R. Co.* 127 N. Y. 46, 27 N. E. 368.

⁵ *Smith v. Milford*, 89 Conn. 24, 92 Atl. 675; *Canney v. Rochester Agri. & Mechanical Asso.* 76 N. H. 60, 79 Atl. 517; *Garske v. Ridgeville*, 123 Wis. 503, 102 N. W. 22, 3 Ann. Cas. 747; *Anderson v. Taft*, 20 R. I. 362, 39 Atl. 191. *Contra*, *Kansier v. Billings*, 56 Mont. 250, 184 Pac. 630; *Butler v. Oxford*, 186 N. Y. 444, 79 N. E. 712; *Fulton Iron & Engine Works v. Kimball Twp.* 52 Mich. 146, 17 N. W. 733. See also note in 68 Univ. Pa. L. Rev. 293.

⁶ For cases to the rule as to the presumption of continuance of condition, etc., see note to *Re Huss*, 12 L.R.A. 620.

⁷ *Collins v. New York C. & H. R. R. Co.* 109 N. Y. 243, 16 N. E. 50.

5. Suggestion of another cause.

a. In general.—To negative the inference that the effect was due to the cause to which it is attributed, the adverse party may show that it might have proceeded from some other cause,¹ and for this purpose may prove the results of experiments made with such other cause.²

¹ *Quinn v. Higgins*, 63 Wis. 664, 53 Am. Rep. 305, 24 N. W. 482 (malpractice in setting broken limb. Held, error to exclude question, though leading, whether nonunion after fracture might take place under the best of treatment); *Chandler v. Thompson*, 30 Fed. 38 (whether defective work of mill was due, as alleged, to defective construction, or to unskilful use); *Creek v. McManus*, 17 Mont. 445, 43 Pac. 497 (action upon injunction bond; proper to show that damage was caused otherwise than by injunction). *S. P. State v. Morgan*, 95 N. C. 641 (causes of death without leaving external mark); *Rowell v. Lowell*, 11 Gray, 420 (injury to person, without leaving external manifestation); *Moyer v. New York C. & H. R. R. Co.* 98 N. Y. 645 (action for injury by current upon river bank).

Otherwise as to evidence of a cause not raised by the issues. *Reizenstein v. Clark*, 104 Iowa, 287, 73 N. W. 588.

² *Lincoln v. Taunton Copper Mfg. Co.* 9 Allen, 181, 192. Such evidence may also be competent as tending to reduce the damages for which the defendant is liable. *Doyle v. New York Eye & Ear Infirmary*, 80 N. Y. 631, 633.

In *Beckett v. Northwestern Masonic Aid Asso.* 67 Minn. 298, 69 N. W. 923, an action on a life insurance policy, it was held competent, in rebuttal of a defense of suicide, to prove experiments in discharging the same revolver found in the hand of the deceased loaded with similar cartridges, noting at what distance from the muzzle the object fired at was found to be singed or powder burned.

b. Cross-examination.—For the purpose of controverting the opinion of a witness as to the cause, inferred from certain appearances, proved to exist, he may be asked on cross-examination what he would think if, under similar appearances, the existence of another specified cause should be also proved;¹ or what would have been the indications if another specified cause had operated.²

¹ Com. v. Mullins, 2 Allen, 295 (cause of death).

² Erickson v. Smith, 2 Abb. App. Dec. 64, 38 How. Pr. 454 (cause of death).

c. Rebutting evidence of other cause.—After evidence showing another possible cause has been given, rebutting evidence is then competent to show the condition of what is thus claimed to have been the cause as negating that claim.¹ But if the inquiry is not limited to the same time, there must be evidence that the condition meanwhile continued the same.²

¹ Collins v. New York C. & H. R. R. Co. 23 N. Y. Week. Dig. 154 (defendants being sued for firing plaintiff's building, having claimed that an engine of another company was the cause, evidence of the good condition of that engine becomes competent).

² Collins v. New York C. & H. R. R. Co. 109 N. Y. 243, 16 N. E. 50, reversing the above decision for error in not applying this qualification. See also § 4, supra.

6. Demonstrative evidence.

On the question as to the cause of an injury or occurrence, it is proper to exhibit to the jury any physical object which tends to establish that fact,¹ but there must first be preliminary evidence that such object is in substantially the same condition as it was at the time in issue.²

¹ As, for instance, the clothing worn by one when injured, as tending to show which of two conflicting theories as to the cause of the accident is correct. Senn v. Southern R. Co. 108 Mo. 142, 18 S. W. 1007.

So bloodstained garments of deceased held properly submitted to jury as bearing on conflicting testimony as to how close defendant was to deceased when fatal shot was fired. People v. Morris, 254 Ill. 559, 98 N. E. 975; note in 7 Ill. L. Rev. 252.

So bombs found at various points in Chicago were admitted in the Haymarket riot case as bearing on the kind of bombs alleged to have been used by the defendant. *Spies v. People*, 122 Ill. 1, 236, 3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898, 6 Am. Crim. Rep. 570.

Or the sparks shown to have come from the engine claimed to have caused the fire sued for. *Cleveland, C. C. & St. L. R. Co. v. McKelvey*, 12 Ohio C. C. 426, 5 Ohio C. D. 561.

So, on the issue whether the breaking of a raft line furnished to plaintiffs by defendant was caused by its decayed condition, a piece of the line which shows the break is admissible in evidence. *Stevenson v. Michigan Log Towing Co.* 103 Mich. 412, 61 N. W. 536.

Otherwise, where the object merely is an appeal to the sympathies and feelings of the jury. *Louisville & N. R. Co. v. Pearson*, 97 Ala. 211, 12 So. 176.

²*State v. Goddard*, 146 Mo. 177, 48 S. W. 82; *Com. v. Bentley*, 97 Mass. 551; *State v. Hossack*, 116 Iowa, 194, 89 N. W. 1077; note in 12 Mich. L. Rev. 307.

7. Declarations as part of *res gestæ*.

Declarations of a person as to the cause of his injury, made immediately after the occurrence and in connection with it, are admissible as part of the *res gestæ* to show such cause,¹ even though they are in his own favor.²

¹*Chielinsky v. Hoopes & T. Co.* 1 Marv. (Del.) 273, 40 Atl. 1127; *Louisville, E. & St. L. R. Co. v. Berry*, 2 Ind. App. 427, 28 N. E. 714; *Louisville & N. R. Co. v. Earl*, 94 Ky. 368, 22 S. W. 607; *Yazoo & M. Valley R. Co. v. Jones*, 73 Miss. 229, 19 So. 91; *Helman v. Pittsburgh, C. C. & St. L. R. Co.* 58 Ohio St. 400, 41 L.R.A. 860, 50 N. E. 986.

²*Travelers' Ins. Co. v. Mosley*, 8 Wall. 397, 19 L. ed. 427 (an extreme case in favor of admissibility); *Washington & G. R. Co. v. McLane*, 11 App. D. C. 220, and cases cited; *O'Keefe v. Eighth Ave. R. Co.* 33 App. Div. 324, 53 N. Y. Supp. 940; *Means v. Carolina C. R. Co.* 124 N. C. 574, 45 L.R.A. 164, 32 S. E. 960; *Sullivan v. Salt Lake City*, 13 Utah, 122, 44 Pac. 1039; *North America Acci. Asso. v. Woodson*, 12 C. C. A. 392, 24 U. S. App. 364, 64 Fed. 689; *Heckle v. Southern P. Co.* 123 Cal. 441, 56 Pac. 56; *Keyes v. Cedar Falls*, 107 Iowa, 509, 78 N. W. 227; *International & G. N. R. Co. v. Anderson*, 82 Tex. 516, 17 S. W. 1039.

So held, even though they are not spontaneous, but are in response to inquiries. *Springfield Consol. R. Co. v. Heffner*, 175 Ill. 634, 51 N. E. 884; *Stevens v. Walpole*, 76 Mo. App. 213; *Houston & T. C. R. Co. v. Loeffler*, — Tex. Civ. App. —, 51 S. W. 536.

Otherwise, however, whether against or in favor of the declarant, where they are mere narratives of past occurrences. *National Masonic Acci. Asso. v. Shryock*, 20 C. C. A. 3, 36 U. S. App. 658, 73 Fed. 774; *Louisville & N. R. Co. v. Pearson*, 97 Ala. 211, 12 So. 176; *Ft. Smith Oil Co. v. Slover*, 58 Ark. 168, 24 S. W. 106; *Lissak v. Crocker Estate Co.* 119 Cal. 442, 51 Pac. 688, and cases cited; *Electric R. Co. v. Carson*, 98 Ga. 652, 27 S. E. 156; *Atchison, T. & S. F. R. Co. v. Consolidated Cattle Co.* 59 Kan. 111, 52 Pac. 71; *Roseberry v. Newport News & M. Valley R. Co.* 19 Ky. L. Rep. 194, 39 S. W. 407; *Eastman v. Boston & M. R. Co.* 165 Mass. 342, 43 N. E. 115; *Norfolk & C. R. Co. v. Suffolk Lumber Co.* 92 Va. 413, 23 S. E. 737.

8. Admissions.

The admissions of a party as to the cause of an injury are evidence against him.¹

¹ *Oliver v. Louisville & N. R. Co.* 43 La. Ann. 804, 9 So. 431.

Within this rule the certificate of a physician in the proof of death of an insured binds the beneficiary as an admission as to the cause of death.

Redmond v. Industrial Ben. Asso. 78 Hun, 101, 28 N. Y. Supp. 1075.

See also cases cited under title CHANGING RULES OF EVIDENCE, § 4, g, post.

9. Findings of coroner to show cause of death.

The question of the admissibility of the finding of a coroner or the verdict of his jury to show cause of death frequently arises in actions upon policies of life insurance, where the defendant company introduces the defense of suicide. There is some diversity of decision upon the subject, the courts of a few states holding that such evidence is admissible,¹ while the courts of a great majority of states reject it,² the former basing their decision upon the ancient rule of the common law of England,³ which is no longer the rule in that country.

Attempt has also been made in several instances to introduce the coroner's finding in actions for negligently causing the death of a person, but such evidence has invariably been rejected.⁴ In case of a prosecution for homicide it has been held that such evidence is not competent for any purpose,⁵ though in other cases it has been held admissible to prove the fact of

death.⁶ In an equity action to set aside a will it was held not error to admit the verdict of a coroner's jury for the purpose of showing, *prima facie*, that he committed suicide.⁷

The verdict of a coroner's jury is now held not to be admissible to show cause of death in workmen's compensation cases,⁸ in the absence of special statute,⁹ although some of the earlier cases held that it was admissible because the technical rules of evidence did not apply to compensation acts.¹⁰

¹ *Metzradt v. Modern Brotherhood*, 112 Iowa, 522, 84 N. W. 498; *Grand Lodge I. O. M. A. v. Wieting*, 168 Ill. 408, 61 Am. St. Rep. 123, 48 N. E. 59 citing and following *United States L. Ins. Co. v. Vocke* (*United States L. Ins. Co. v. Kielgast*), 129 Ill. 557, 6 L.R.A. 65, 22 N. E. 467. But see *Spiegel's House Furnishing Co. v. Industrial Commission*, 288 Ill. 422, 6 A.L.R. 540, 123 N. E. 606, practically overruling a long line of Illinois decisions; *Supreme Lodge, K. H. v. Fletcher*, 78 Miss. 377, 28 So. 872, 29 So. 523.

² *Germania L. Ins. Co. v. Ross Lewin*, 24 Colo. 43, 65 Am. St. Rep. 215, 51 Pac. 488; *Union Cent. L. Ins. Co. v. Hollowell*, 14 Ind. App. 611, 43 N. E. 277; *Ætna L. Ins. Co. v. Kaiser*, 115 Ky. 539, 74 S. W. 203; *Cox v. Royal Tribe of Joseph*, 42 Or. 365, 60 L.R.A. 620, 95 Am. St. Rep. 752, 71 Pac. 73; *Ætna L. Ins. Co. v. Milward*, 118 Ky. 716, 68 L.R.A. 285, 82 S. W. 364, 4 Ann. Cas. 1092; *Wasey v. Travelers' Ins. Co.* 126 Mich. 119, 85 N. W. 459; *Kane v. Supreme Tent, K. M.* 113 Mo. App. 104, 87 S. W. 547; *Walden v. Bankers Life Asso.* 89 Neb. 546, 131 N. W. 962; *Boehme v. Sovereign Camp, W. W.* 98 Tex. 376, 84 S. W. 422, 4 Ann. Cas. 1019; *Chambers v. Modern Woodmen*, 18 S. D. 173, 99 N. W. 1107; *Craiger v. Modern Woodmen*, 40 Ind. App. 279, 80 N. E. 429; *American Nat. Ins. Co. v. White*, 126 Ark. 483, 191 S. W. 25. For additional cases and full discussion, see notes in 68 L.R.A. 285; 45 L.R.A.(N.S.) 404; and L.R.A.1918E, 924.

³ See note to *Toomes v. Etherington*, 1 Wms' Saund. 362, 85 Eng. Reprint, 520. Although announced in other than insurance cases the rule in England seems now in accord with the majority of jurisdictions in this country that such evidence is inadmissible. *Bird v. Keep* [1918] 2 K. B. 692, 9 B. R. C. 691, 87 L. J. K. B. N. S. 1199, 118 L. T. N. S. 633, 34 Times L. R. 513, 62 Sol. Jo. 666, 11 B. W. C. C. 133; *Barnett v. Cohen* [1921] 2 K. B. 461 [1921] W. N. 143, 125 L. T. N. S. 733, 37 Times L. R. 629.

⁴ *Chicago, M. & St. P. R. Co. v. Staff*, 46 Ill. App. 499; *Cox v. Chicago & N. W. R. Co.* 92 Ill. App. 15; *State ex rel. Grice v. Cecil County*, 54 Md. 426; *District of Columbia v. Washington*, 44 App. D. C. 120. L.R.A.1916C, 379; *Sullivan v. Seattle Electric Co.* 51 Wash. 71, 130

Am. St. Rep. 1082, 97 Pac. 1109; *Rowe v. Such*, 134 Cal. 573, 86 Pac. 862, 67 Pac. 760; *Barnett v. Cohen*, [1921] 2 K. B. 461, [1921] W. N. 143, 125 L. T. N. S. 733, 37 Times L.R. 629. *Contra*, *National Wood-
enware & Cooperage Co. v. Smith*, 108 Ill. App. 477. For additional
cases and full discussion see note in 45 L.R.A. (N.S.) 404.

⁶ *Com. v. Ryan*, 134 Mass. 223; *State v. Coleman*, 186 Mo. 151, 69 L.R.A. 381, 84 S. W. 978, *Hedger v. State*, 144 Wis. 279, 128 N. W. 80.

⁸ *State v. Parker*, 7 La. Ann. 83; *State v. Johnson*, 10 La. Ann. 457.

⁷ *Pyle v. Pyle*, 158 Ill. 289, 41 N. E. 999.

For a full review of the cases on admissibility of finding of coroner to
show cause of death, see notes in 68 L.R.A. 285; 45 L.R.A. (N.S.) 404
and L.R.A.1918E, 924. And see note in 9 B. R. C. 705.

⁸ *Spiegel's House Furnishing Co. v. Industrial Commission*, 288 Ill. 422,
6 A.L.R. 540, 123 N. E. 606; *Peoria Cordage Co. v. Industrial Bd* 284
Ill. 90, L.R.A.1918E, 822, 119 N. E. 996, 17 N. C. C. A. 245; *Bird v.
Keep*, [1918] 2 K. B. 692, 9 B. R. C. 691, 118 L. T. N. S. 633, 34 Times
L. R. 513, 62 Sol. Jo. 666, 11 B. W. C. C. 133, 87 L. J. K. B. N. S. 1199.

⁹ Note 6 A.L.R. 548.

¹⁰ *Morris & Co. v. Industrial Bd* 284 Ill. 67, L.R.A.1918E, 919, 119 N. E.
944, and cases there cited.

10. Repairs after injury as proof of causation and possibility of prevention.

Subsequent repairs while not admissible to prove negligence may be shown as proof of causation¹ and possibility of prevention.²

¹ *Jensen v. Davis & W. Counties Canal Co.* 44 Utah, 10, 137 Pac. 635,
Kuhn v. Illinois C. R. Co. 111 Ill. App. 323; note in 27 Harvard L.
Rev. 683.

² *Lind v. Uniform Stave & Package Co.* 140 Wis. 183, 120 N. W. 839.

EVIDENCE.

II.—cont'd.

- 4. Particular contract clauses relating to rules of evidence.
 - a. Contracts to dispense with the presumption of death from seven years' absence.
 - b. Contracts requiring the testimony of an eyewitness to death or personal injury.
 - c. Contracts to accept the oath or certificate of a third person as conclusive evidence.
 - d. Contracts to accept obligee's statement as proof of amount due.
 - e. Contracts leaving the question of one party's satisfactory performance entirely to the discretion of the other party.
 - f. Contracts waiving the privilege against corporal inspection of the party.
 - g. Contracts waiving the privilege as to communications from a patient to a physician.

I. STATUTORY CHANGES.

1. In general.

Congress and the several state legislatures have power in their respective spheres to pass statutes modifying or altering the rules of evidence as they existed at common law or by previous statute,¹ provided they keep within their constitutional limitations.²

¹ *Shamlian v. Equitable Acci. Co.* 220 Mass. 67, 115 N. E. 46; *People v. McBride*, 234 Ill. 146, 123 Am. St. Rep. 82, 84 N. E. 865, 14 Ann. Cas. 994; *Waugh v. Glos*, 246 Ill. 604, 138 Am. St. Rep. 259, 92 N. E. 974.

² *Shellabarger Elevator Co. v. Illinois C. R. Co.* 278 Ill. 333, L.R.A.1917E. 1011, 116 N. E. 170.

2. Rules as to weight of evidence.

The authorities are agreed that it is within the constitutional power of a legislature to make certain proof admissible as prima facie evidence,¹ but there is a conflict as to whether it can declare such evidence conclusive. The Supreme Court of the United States and some state courts hold that statutes making such evidence conclusive are constitutional on the ground of estoppel.² Other jurisdictions hold such statutes unconstitutional as invasions of the powers of the judiciary³ and deprivation of property without due process.⁴

¹ *Shellabarger Elevator Co. v. Illinois C. R. Co.* 278 Ill. 333, L.R.A.1917E.

1011, 116 N. E. 170; *Missouri, K. & T. R. Co. v. Simonson*, 64 Kan. 802, 57 L.R.A. 765, 91 Am. St. Rep. 248, 68 Pac. 653.

² *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *Yazoo & M. Valley R. Co. v. Bent*, 94 Miss. 681, 22 L.R.A. (N.S.) 821, 47 So. 805; dissenting opinion in *Shellabarger Elevator Co. v. Illinois C. R. Co.* supra.

³ *People ex rel. Hillel Lodge v. Rose*, 207 Ill. 352, 69 N. E. 762.

⁴ *Vega S. S. Co. v. Consolidated Elevator Co.* 75 Minn. 308, 43 L.R.A. 843, 74 Am. St. Rep. 484, 77 N. W. 973; note in L.R.A. 1917E, 1022; *Shellabarger Case*, supra; *Taylor v. Anderson*, 40 Okla. 316, 51 L.R.A. (N.S.) 731, 137 Pac. 1183.

II. CONTRACTS CHANGING THE RULES OF EVIDENCE.

3. In general.

Contracts altering or waiving the general rules of evidence as to amount or character of proof are becoming more frequent. There is however a direct conflict among the authorities as to whether the provisions of such contracts are valid. On principle Professor Wigmore believes there is no good reason why such contracts should not be "effective to alter the usual rules of evidence."¹ One line of cases holds that the parties have a right to change the particular rule of evidence by contract and that such contracts are therefore effective² while many other jurisdictions hold such contracts void as against public policy.³

¹ Article entitled "Contracts to Alter or Waive the Rules of Evidence," by Prof. John H. Wigmore, 16 Ill. L. Rev. 87 (June, 1921).

² *Becker v. Interstate Business Men's Acci. Asso. (C. C. A.)* 265 Fed. 508; *Steen v. Modern Woodmen*, 296 Ill. 104, 17 A.L.R. 406, 129 N. E. 546. See also cases cited, *infra*.

³ *Nute v. Hamilton Mut. Ins. Co.* 6 Gray, 174, opinion by Chief Justice Shaw; *Haines v. Modern Woodmen*, — Iowa, —, 178 N. W. 1010. See additional cases cited *infra*.

4. Particular contract clauses relating to rules of evidence.

a. Contracts to dispense with the presumption of death from seven years' absence.—The type of contract relating to evidence which has been most often construed by the courts is the mutual benefit insurance policy which contains a clause eliminating the presumption of death arising from seven years absence unaccounted for and requiring that other proof of death must therefore be presented. The authorities are rather evenly

divided as to whether such a contract should be sustained. A few courts have held such provisions invalid as conflicting with specific statutes concerning the presumption of death from absence.¹ It so happens that in the majority of the instances where the original contract between the parties contained the clause in question such clause has been upheld.² Many other jurisdictions, however, in construing by-laws adopted subsequent to the dates of the original contracts of insurance have expressed the opinion that even if the clause in question had formed a part of the original contracts it would still have been invalid as against public policy.³

¹ *National Union v. Sawyer*, 42 App. D. C. 475; *Supreme Ruling*, F. M. C. v. Hoskins, — Tex. Civ. App. —, 171 S. W. 812; *Supreme Lodge, K. P. v. Wilson*, — Tex. Civ. App. —, 204 S. W. 891.

Courts holding such contracts valid: *Steen v. Modern Woodmen*, supra, 296 Ill. 104, 17 A. L. R. 406, 129 N. E. 546; *Cobble v. Royal Neighbors*, — Mo. App. —, 219 S. W. 118; *McGovern v. Brotherhood*, L. F. E. 85 Ohio St. 460, 98 N. E. 1128; affirming 31 Ohio C. C. 243; *Kelly v. Supreme Council*, C. M. B. A. 46 App. Div. 79, 61 N. Y. Supp. 394; *Porter v. Home Friendly Soc.* 114 Ga. 937, 41 S. E. 45.

Courts holding such contracts invalid: *Fleming v. Merchants' Life Ins. Co.* — Iowa, —, 180 N. W. 202; *Gaffney v. Royal Neighbors*, 31 Idaho, 549, 174 Pac. 1014.

³ *Haines v. Modern Woodmen*, — Iowa, —, 178 N. W. 1011; *Fryer v. Modern Woodmen*, — Iowa, —, 179 N. W. 160; *Hannon v. Grand Lodge A. O. U. W.* 99 Kan. 736, L.R.A.1917C, 1029, 163 Pac. 169; *Samberg v. Knights of Modern Maccabees*, 158 Mich. 568, 133 Am. St. Rep. 396, 123 N. W. 25; *Boynton v. Modern Woodmen*, 148 Minn. 150, 17 A.L.R. 401, 181 N. W. 327; *Garrison v. Modern Woodmen*, 105 Neb. 25, 178 N. W. 842; *Sweet v. Modern Woodmen*, 169 Wis. 462, 172 N. W. 143. See also additional cases cited in Prof. Wigmore's article 16 Ill. L. Rev. 87.

b. Contracts requiring the testimony of an eyewitness to death or personal injury.—Contracts which require the testimony of an eyewitness other than the insured as to the accidental character of a death or personal injury have in most jurisdictions been upheld as valid.¹ There is, however, a substantial minority of courts who have refused to accept this view, and therefore hold such contracts void as unreasonable interference with the judiciary.²

¹ *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661, 32 L. ed. 308, 8 Sup.

- Ct. Rep. 1360; Becker v. Interstate Business Men's Acci. Asso. (C. C. A.) 265 Fed. 508; Preferred Acci. Ins. Co. v. Barker, 35 C. C. A. 250, 93 Fed. 158; Lewis v. Brotherhood Acci. Co. 194 Mass. 1, 17 L.R.A.(N.S.) 714, 79 N. E. 802; Lundberg v. Interstate Business Men's Acci. Asso. 162 Wis. 474, 156 N. W. 482, Ann. Cas. 1916D, 667; Fiedler v. Iowa State Traveling Men's Asso. — Iowa, —, 179 N. W. 317; Ellis v. Interstate Business Men's Acci. Asso. 183 Iowa, 1279, L.R.A.1918F, 414, 168 N. W. 212; Roeh v. Business Men's Protective Asso. 164 Iowa, 199, 51 L.R.A.(N.S.) 221, 145 N. W. 479, Ann. Cas. 1915C, 813; Connell v. Iowa State Traveling Men's Asso. 139 Iowa, 444, 116 N. W. 820; Jenkins v. Pacific Mut. L. Ins. Co. 131 Cal. 121, 63 Pac. 180; Moses v. Illinois Commercial Men's Asso. 189 Ill. App. 440; National Acci. Soc. v. Ralstin, 101 Ill. App. 192.
- ² Rollins v. Business Men's Acci. Asso. 204 Mo. App. 679, 220 S. W. 1022; Utter v. Travelers' Ins. Co. 65 Mich. 545, 8 Am. St. Rep. 913, 32 N. W. 812; Reynolds v. Equitable Acci. Asso. 59 Hun, 13, 1 N. Y. Supp. 738; Travelers' Ins. Co. v. Sheppard, 85 Ga. 751, 12 S. E. 18.

c. Contracts to accept the oath or certificate of a third person as conclusive evidence.—Contracts providing that the certificate of a third person shall be conclusive have in this country usually related to the certificate of an engineer or architect and have ordinarily been held valid.¹

- ¹ Cases relating to certificates of engineers: Williams v. Chicago, S. F. & C. R. Co. 112 Mo. 463, 487, 34 Am. St. Rep. 403, 20 S. W. 631; Leighton v. Grant, 20 Minn. 345, Gil. 298. See also other cases cited in Prof. Wigmore's article *supra*, 16 Ill. L. Rev. 87 at 102.
- Cases relating to certificates of architects: Mercantile Trust Co. v. Hensley, 205 U. S. 298, 309, 51 L. ed. 811, 815, 27 Sup. Ct. Rep. 535, 10 Ann. Cas. 572; Hebert v. Dewey, 191 Mass. 403, 412, 77 N. E. 822.

d. Contracts to accept obligee's statement as proof of amount due.—The courts are divided as to the validity of contracts providing that the obligee's statement as to the amount due shall be conclusive.¹ This question usually arises in surety bond cases. Even here Professor Wigmore sees no reason why such contracts should not be valid.²

- ¹ Cases holding such contracts valid: John A. Tolman Co. v. Clements, 98 Mich. 6, 56 N. W. 1038; John A. Tolman Co. v. Griffin, 111 Mich. 301, 69 N. W. 649; John A. Tolman Co. v. Butt, 116 Wis. 597, 93 N. W. 548; Guarantee Co. of N. A. v. Pitts, 78 Miss. 837, 30 So. 758; John A. Tolman Co. v. Bowerman, 5 S. D. 197, 58 N. W. 568,

Cases holding such contracts invalid: *White v. Middlesex R. Co.* 135 Mass. 216; *Fidelity & C. Co. v. Eickhoff*, 63 Minn. 170, 30 L.R.A. 586, 56 Am. St. Rep. 464, 65 N. W. 351; see also *Fidelity & Co. v. Crays*, 76 Minn. 450, 79 N. W. 531; *Guarantee Co. of N. A. v. Charles*, 92 S. C. 282, 75 S. E. 387, Ann. Cas. 1916B, 687.

² 16 Ill. L. Rev. 103.

e. Contracts leaving the question of one party's satisfactory performance entirely to the discretion of the other party.—Where a contract provides that some fact or facts on which one party's rights are based must be proven to the satisfaction of the other party the courts will ordinarily sustain its validity, even though it is usually necessary to imply a limitation that the proof need only be reasonably satisfactory.¹

¹ *Noyes v. Commercial Travelers' Eastern Acci. Asso.* 190 Mass. 171, 182, 76 N. E. 665; *Traiser v. Commercial Travelers' Eastern Acci. Asso.* 202 Mass. 292, 88 N. E. 901; *Ellis v. Interstate Business Men's Acci. Asso.* 183 Iowa, 1279, L.R.A.1918F, 414, 168 N. W. 212; *Buffalo Loan, Trust & S. D. Co. v. Knights Templar & M. Mut. Aid Asso.* 126 N. Y. 450, 22 Am. St. Rep. 839, 27 N. E. 942.

f. Contracts waiving the privilege against corporal inspection of the party.—Insurance contracts frequently contain provisions permitting an autopsy by the physician of the insurance company. Such a contract was recently upheld in Maine¹ while a similar one was held void in Mississippi.²

¹ *O'Brion v. Columbian Nat. L. Ins. Co.* 119 Me. 94, 109 Atl. 379.

² *United States Fidelity & G. Co. v. Hood*, 124 Miss. 548, 15 A.L.R. 605, 87 So. 115.

g. Contracts waiving the privilege as to communications from a patient to a physician.—The privilege governing communications made by a patient to his physician is generally created by statute, and the statutes of the several states vary somewhat in their language. Where such statutes specifically authorize a waiver of the privilege by the patient some courts have held valid, contracts waiving the privilege.¹ So too where the statute provides that a court may in its discretion compel the physician to testify, a contract waiving the privilege has been upheld.² Where the prohibition of the statute is definite and the physician is forbidden to disclose the communications except in certain specified instances, the authorities are in con-

flict as to the validity of a contract attempting to waive the privilege. A long line of decisions in Missouri upholds such contracts³ while the courts of Michigan and New York hold them void as against the public policy of the statutes.⁴

¹ Trull v. Modern Woodmen, 12 Idaho, 318, 85 Pac. 1081, 10 Ann. Cas. 53; Western Travelers' Acci. Asso. v. Munson, 73 Neb. 858, 1 L.R.A. (N.S.) 1068, 103 N. W. 688.

² Fuller v. Knights of Pythias, 129 N. C. 318, 85 Am. St. Rep. 744, 40 S. E. 65.

³ Cromeenes v. Sovereign Camp, W. W. 205 Mo. App. 419, 224 S. W. 15; Epstein v. Pennsylvania R. Co. 250 Mo. 1, 48 L.R.A. (N.S.) 394, 156 S. W. 699, Ann. Cas. 1915A, 423; Hicks v. Metropolitan L. Ins. Co. 196 Mo. App. 162, 190 S. W. 661; Frazier v. Metropolitan L. Ins. Co. 161 Mo. App. 709, 141 S. W. 936; Modern Woodmen v. Angle, 127 Mo. App. 94, 104 S. W. 297; Keller v. Home L. Ins. Co. 95 Mo. App. 627, 69 S. W. 612; Adreveno v. Mutual Reserve Fund Life Asso. 34 Fed. 870, construing a Missouri statute.

⁴ Gilchrist v. Mystic Workers, 188 Mich. 466, 154 N. W. 575, Ann. Cas. 1918C, 757, and 196 Mich. 247, 163 N. W. 10; Holden v. Metropolitan L. Ins. Co. 165 N. Y. 13, 58 N. E. 771; Meyer v. Supreme Lodge, K. P. 178 N. Y. 63, 64 L.R.A. 839, 70 N. E. 111; Supreme Lodge K. P. v. Meyer, 198 U. S. 508, 49 L. ed. 1146, 25 Sup. Ct. Rep. 754 (following New York decisions in construing a New York contract).

CHARACTER.

I. REPUTATION.

1. Good character, when competent.
2. How proved.
 - a. General reputation.
 - b. Particular facts.
 - c. Evidence referring to time subsequent to the fact.
 - d. Competency of witness.

II. COMPETENCY AND SKILL.

3. Direct testimony.
4. General reputation.
5. Single instances.
6. Intoxication.
7. Inspection of witness.

See also CARE; HABITS.

I. REPUTATION.

1. Good character, when competent.

Evidence of general reputation of a person's good character

to strengthen the presumption of good character¹ is not admissible in civil actions,² even though a criminal act be directly involved,³ unless character is put in issue by the pleadings,⁴ or evidence of general bad character has been received against him.⁵

¹ It is now recognized by the decided weight of authority that there is no presumption of good character as to a defendant in a criminal case *Greer v. United States*, 245 U. S. 559, 62 L. ed. 469, 38 Sup. Ct. Rep. 209; *Addison v. People*, 193 Ill. 405, 419, 62 N. E. 235; *People v. Lingley*, 207 N. Y. 396, 46 L.R.A.(N.S.) 342, 101 N. E. 170, Ann. Cas. 1913D, 403; *People v. Kemmis*, 153 Mich. 117, 116 N. W. 554.

Some courts have, however, spoken rather loosely of the existence of such a presumption. *Biester v. State*, 65 Neb. 276, 91 N. W. 416; *Howard v. Com.* 114 Ky. 372, 70 S. W. 1055. See also cases cited in note in 46 L.R.A.(N.S.) 342.

For the rule as to the competency of evidence of good character in criminal prosecutions to strengthen the presumption of innocence and as tending to negative guilt, and its application, see *Criminal Trial Brief*; see also notes in 20 L.R.A. 609; 2 L.R.A.(N.S.) 102; 2 L.R.A.(N.S.) 553; 3 L.R.A.(N.S.) 352, and 46 L.R.A.(N.S.) 342.

For discussion of the admissibility of evidence of prior unchastity of prosecutrix in a rape case, see *Lee v. State*, 132 Tenn. 655, L.R.A. 1916B. 963, 179 S. W. 145, and note in 16 *Columbia L. Rev.* 161.

In a criminal prosecution for adultery defendant's character is inadmissible unless he puts it in issue. *State v. Snyder*, 86 Vt. 449, 85 Atl. 984. In such a prosecution the defendant may show the good character of the alleged participant in the act of adultery. *Glover v. State*, 15 Ga. App. 44, 82 S. E. 602. See also note in 28 *Harvard L. Rev.* 324.

For right of witness to testify to character from personal knowledge, see note in 22 L.R.A.(N.S.) 650.

² *Jackson v. Martin*, — Tex. Civ. App. —, 41 S. W. 837 (action for breach of contract); *Timmony v. Burns*, — Tex. Civ. App. —, 42 S. W. 133 (trespass to try title); *Sullivan v. Sullivan*, 92 Me. 84, 42 Atl. 230 (divorce for gross and confirmed habits of intoxication); *O'Neill v. Register*, 75 Md. 425, 23 Atl. 960 (action by fireman for damages for alleged wrongful dismissal); *Stoppert v. Nierle*, 45 Neb. 105, 63 N. W. 382 (bastardy case); *Powers v. Armstrong*, 62 Ark. 267, 35 S. W. 228 (replevin; charge of fraud in issue); *Vance v. Richardson*, 110 Cal. 414, 42 Pac. 909 (assault and battery).

As to the relevancy of evidence as to character or reputation on the issue of fraud or dishonesty in civil cases the courts generally hold that such evidence is not admissible either to raise or rebut the inference of fraud. *Great Western Life Ins. Co. v. Sparks*, 38 Okla. 395, 49 L.R.A.(N.S.) 724, 132 Pac. 1092; *Vansickle v. Shenk*, 150 Ind. 413, 50 N.

E. 381 and cases there cited. See also numerous additional cases cited in note in 49 L.R.A.(N.S.) 724.

To this general rule of exclusion some courts have recognized exceptions where actual fraud is attempted to be shown solely by circumstantial evidence, and where either fraud or the party's character are directly in issue. *Bowerman v. Bowerman*, 76 Hun, 46, 27 N. Y. Supp. 579 (an action to set aside deed executed in settlement of partnership account on the ground that the statement of account by the grantor was false and fraudulent, in which it was held that evidence of the grantee's reputation for honesty, integrity, and general reputation was admissible); *Fire Asso. of Philadelphia v. Jones*, — Tex. Civ. App. —, 40 S. W. 44 (that plaintiff in an action on an insurance policy in which defendant pleads fraudulent overvaluation of property, and that fire was caused by him, may prove reputation for truth, honesty, and fair dealing, though not otherwise impeached); *Rasmussen v. North Coast F. Ins. Co.* 83 Wash. 569, L.R.A.1915C, 1179, 145 Pac. 610 (insured on fire policy died pending suit and evidence as to his general reputation was admitted to refute the defense on the policy that he had fraudulently overstated his loss). *Contra*: *Munkers v. Farmers' & M. Ins. Co.* 30 Or. 211, 46 Pac. 850 (that plaintiff in an action on an insurance policy cannot in the first instance give evidence of good character for honest and fair dealing and as a peaceful and lawabiding citizen because an issue in the case is whether or not the fire was fraudulently caused by him); *United States Annuity & L. Ins. Co. v. Peak*, 122 Ark. 58, 182 S. W. 565.

⁸ *Pratt v. Andrews*, 4 N. Y. 493 (criminal conversation); *Approved in Stone v. Hawkeye Ins. Co.* 68 Iowa, 737, 56 Am. Rep. 870, 28 N. W. 47 (arson as defense to action on insurance policy; citing cases from other jurisdictions); *Fahey v. Crotty*, 63 Mich. 383, 29 N. W. 876 (action for assault and battery); *Diers v. Mallon*, 46 Neb. 121, 64 N. W. 722 (action for false imprisonment; charge of murder); *Geary v. Stevenson*, 169 Mass. 23, 47 N. E. 508, and cases cited (action for false imprisonment; charge of burglary); *Blakeslee v. Hughes*, 50 Ohio St. 490, 34 N. E. 793 (libel); *Pokriefka v. Mackurat*, 91 Mich. 399, 51 N. W. 1059 (assault and battery); *Vawter v. Hultz*, 112 Mo. 633, 20 S. W. 689 (civil action by wife for killing her husband). *s. p.*, *Bates v. Barber*, 58 Mass. 107; *Continental Ins. Co. v. Jachnichen*, 110 Ind. 59, 59 Am. Rep. 194, 10 N. E. 636; *Simpson v. Westenberger*, 28 Kan. 756, 42 Am. Rep. 195 (replevin of mortgaged property attached, where mortgage claimed to be fraudulent).

For the application of this rule in various particular actions, see 16 Cent. L. J. 202, 25 Cent. L. J. 148.

⁴ *Fulkerson v. Murdock*, 53 Mo. App. 151 (slander); *Ferguson v. Moore*, 98 Tenn. 342, 39 S. W. 341 (seduction); *Cox v. Strickland*, 101 Ga. 482, 28 S. E. 655 (libel); *Stafford v. Morning Journal Asso.*

142 N. Y. 598, 37 N. E. 625 (libel); *Graves v. Gilchrist*, 29 N. Y. S. R. 638, 9 N. Y. Supp. 88 (slander); *Nettles v. Somervell*, 6 Tex. Civ. App. 627, 25 S. W. 658 (libel); *Smith v. Hall*, 69 Conn. 651, 38 Atl. 386 (breach of marriage promise); *Root v. Davis*, 10 Mont. 228, 25 Pac. 105; *Deitchman v. Bowles*, 166 Ky. 285, 179 S. W. 249 (slander). See also cases cited in notes in 14 L.R.A.(N.S.) 748 and 29 Harvard L. Rev. 460.

Nor is it rendered inadmissible by the fact that the witness testifies on cross-examination that he did not move to the place where plaintiff lived until shortly after publication of the challenged libel, and that all he knew of plaintiff's reputation was learned after he moved there; but the weight and value of such testimony are for the jury. *Nettles v. Somervell*, 6 Tex. Civ. App. 627, 25 S. W. 658. It is improper on cross-examination of an ordinary witness to attack his or her character for chastity. *People v. Brown*, 254 Ill. 260, 98 N. E. 535.

Contra, as to breach of marriage promise. *Colburn v. Marble*, 196 Mass. 376, 124 Am. St. Rep. 561, 82 N. E. 28, where it was held improper for the plaintiff in breach of promise suit to prove her good reputation for chastity in rebuttal to the charge of specific acts of misconduct.

⁵ *German American Mut. Life Asso. v. Farley*, 102 Ga. 720, 29 S. E. 615; *Post Pub. Co. v. Hallam*, 8 C. C. A. 201, 16 U. S. App. 613, 59 Fed. 530; *Loomis v. Stuart*, — Tex. Civ. App. —, 24 S. W. 1078; *Jones v. Layman*, 123 Ind. 569, 24 N. E. 363.

But evidence of attempted subornation of witnesses by plaintiff does not let in evidence of good character on rebuttal. *Fulkerson v. Murdock*, 53 Mo. App. 151.

Nor does evidence that plaintiff suing for personal injuries might have simulated injuries complained of by him admit evidence of character for honesty. *Austin & N. W. R. Co. v. McElmurry*, — Tex. Civ. App. —, 33 S. W. 249.

There is a conflict of authority as to whether evidence of good character is admissible where the only matter disclosed derogatory to the party came out on cross-examination. The better reasoning would seem to support the admission of such evidence. *Derrick v. Wallace*, 217 N. Y. 520, 112 N. E. 440, reversing 160 App. Div. 681, 145 N. Y. Supp. 585. See also cases cited in *First Nat. Bank v. Blakeman*, 19 Okla. 106, 12 L.R.A.(N.S.) 364, 91 Pac. 868, and *Wigmore*, Ev. § 1106.

Contra, *Orris v. Chicago, R. I. & P. R. Co.* 279 Mo. 1, 214 S. W. 124, overruling *Gourley v. Callahan*, 190 Mo. App. 666, 176 S. W. 239 and other Missouri cases; *Mack v. Porter*, 18 C. C. A. 527, 25 U. S. App. 595, 72 Fed. 236; *Munroe v. Godkin*, 111 Mich. 183, 69 N. W. 244.

Nor can a physician and surgeon adduce proof of good character to rebut a charge of negligence. *Smith v. Stump*, 12 Ind. App. 359, 40 N. E. 279.

The reputation of a party to a civil action cannot be attacked unless the opposite party gives evidence tending to support it or it is

involved in the nature of the action. *Stewart v. Watson*, 133 Mo. App. 44, 112 S. W. 762.

A defendant who, sued for damages for a homicide, alleges that the act was done in self-defense, cannot show his own good character. *Morgan v. Barnhill*, 55 C. C. A. 1, 118 Fed. 24.

2. How proved.

a. General reputation.—Character, in the sense of reputation, may be proved by general reputation.¹

¹ *Golder v. Lund*, 50 Neb. 867, 70 N. W. 379 (but not by opinion of witnesses based on their personal observation); *Houston & T. C. R. Co. v. Ritter*, 16 Tex. Civ. App. 482, 41 S. W. 753; *Georgia v. Bond*, 114 Mich. 196, 72 N. W. 232; *Adams v. Salina*, 58 Kan. 246, 48 Pac. 918; *Thibault v. Sessions*, 101 Mich. 279, 59 N. W. 624; *Stewart v. Smith*, 92 Wis. 76, 65 N. W. 736, and cases cited; *Indianapolis Journal Newspaper Co. v. Pugh*, 6 Ind. App. 510, 33 N. E. 991. Compare *Norris v. Warner*, 59 Ill. App. 300 (that evidence that a dog was vicious toward other dogs is inadmissible in an action for injuries from his biting a person); *Short v. Bohle*, 64 Mo. App. 242 (that evidence of the reputation of a horse in a livery stable among the drivers who drove it is admissible to show notice to the proprietor of the stable that the horse was dangerous and unmanageable, although it is not admissible for the purpose of showing the character of the horse).

But evidence of the unchastity of the complainant in bastardy proceedings, outside of the period of gestation, whether it relates to general reputation or specific acts, is inadmissible. *Davison v. Cruse*, 47 Neb. 829, 66 N. W. 823.

But that the inquiry must be limited to the trait of character under investigation, see: *Indianapolis Journal Newspaper Co. v. Pugh*, 6 Ind. App. 510, 33 N. E. 991 (that a question in respect to plaintiff's character, as to whether the witness was acquainted on a certain occasion with her reputation, and as to whether such reputation was good or bad, is incompetent as not confining the investigation to plaintiff's general reputation for morality, virtue, and chastity): *Remsen v. Bryant*, 36 App. Div. 240, 56 N. Y. Supp. 728 (that evidence as to the popularity or unpopularity in a community, of plaintiff in an action for libel in charging that he made himself notorious and hated, is inadmissible upon the issue as to his general character); *Evans v. Evans*, 93 Ky. 510, 20 S. W. 605 (that evidence of the general reputation of the wife for unchastity is inadmissible in a suit brought by her for divorce and alimony, in which she is charged by defendant with adultery, since her general character is not in issue).

But evidence of the character of plaintiff in an action for libel need not be restricted to his general reputation in respect to the trait of character involved in the defamatory charge; but his general reputation, either as a man of moral worth, or in the particular relation, is admissible. *Sickra v. Small*, 87 Me. 493, 33 Atl. 9. And in *Sanford v. Rowley*, 93 Mich. 119, 52 N. W. 1119, a libel suit where defendant pleaded the truth as justification of a publication charging plaintiff with political perjury, and that he would lie to defend himself against such charges, it was held that he had the right to show, not only plaintiff's general reputation for truth and veracity, but also that plaintiff was generally regarded in the community as a person who in political matters was unworthy of belief.

Whether evidence of the general reputation of a house, the owner of which is being prosecuted for keeping a disorderly house, a house of "ill fame," etc., is admissible as tending to show the alleged character of the house, is contested. That it is not, see, for instance, *Wooster v. State*, 55 Ala. 217 (where the reason for its exclusion is clearly stated); *State v. Lee*, 80 Iowa, 75, 45 N. W. 545; *People v. Mauch*, 24 How. Pr. 276; *State v. Plant*, 67 Vt. 454, 32 Atl. 237; *Nelson v. Territory*, 5 Okla. 512, 49 Pac. 920. And see *Barker v. Com.* 90 Va. 820, 20 S. E. 776 (although an action for seduction, the same rule was applied where the defendant sought to show the character of the house in which the prosecutrix lived). In *People ex rel. Eakins v. Roosevelt*, 16 App. Div. 354, 44 N. Y. Supp. 1003, however, while it was said that evidence of the general reputation of houses as disorderly houses was not admissible to prove their character, it was held admissible on the question whether a police captain by a reasonably diligent prosecution of his duties in the precinct could have learned of the character and reputation of the houses, where the fact that they were disorderly is established. But that it is admissible, see *Egan v. Gordon*, 65 Minn. 505, 68 N. W. 103; *Sprague v. State*, — Tex. Crim. Rep. —, 44 S. W. 837. See also cases in note to *Beard v. State*, 4 L.R.A. 675. It is so by express statute in some states. See, for instance, *Shaffer v. State*, 87 Md. 124, 39 Atl. 313; *State v. Morgan*, 40 Conn. 44.

That general reputation of frequenters and inmates of a house alleged to be a disorderly house, etc., is admissible to prove its character, see *Betts v. State*, 93 Ind. 375; *Com. v. Clark*, 145 Mass. 251, 13 N. E. 888; *Roop v. State*, 58 N. J. L. 479, 34 Atl. 749; *Sprague v. State*, — Tex. Crim. Rep. —, 44 S. W. 837; *People v. Russell*, 110 Mich. 46, 67 N. W. 1099.

Witness may testify that a person's reputation for truth and veracity is good, although it has never been the subject of discussion. *Hand v. Miller*, 58 App. Div. 126, 68 N. Y. Supp. 531.

b. Particular facts.—Particular facts are not competent to prove the reputation of a party or witness to be either good or bad.¹

¹ Lord v. Mobile, 113 Ala. 360, 21 So. 366; Cox v. Strickland, 101 Ga. 482, 28 S. E. 655; State v. McDonough, 104 Iowa, 6, 73 N. W. 357; Miller v. Curtis, 158 Mass. 127, 32 N. E. 1039; Dennis v. Johnson, 47 Minn. 56, 49 N. W. 383; State v. Campbell, 20 Nev. 122, 17 Pac. 620; Meyer v. Suburban Home Co. 25 Misc. 686, 55 N. Y. Supp. 566; Nixon v. McKinney, 105 N. C. 23, 11 S. E. 154; Wolf v. Perryman, 82 Tex. 112, 17 S. W. 772; Landa v. Obert, 5 Tex. Civ. App. 620, 25 S. W. 342; Davis v. State, 36 Tex. Crim. Rep. 548, 38 S. W. 174. Compare Egan v. Gordon, 65 Minn. 505, 68 N. W. 103 (evidence of specific acts on leased premises, tending to show that the place was a house of ill-fame, was held competent to prove the character of the house, although the lessor, who is alleged to have consented to such use, was not present at the time).

In libel for charging that plaintiff had been "in more rows than any other one man" in the county, evidence of instances of quarrels and disturbances in which he had been engaged is admissible for defendant. Ratcliffe v. Louisville Courier Journal Co. 99 Ky. 416, 36 S. W. 177.

And in an action against a city for liability for the death of a person killed by a mob, under a statute providing that in all such actions the "reputation and conduct" of the deceased may be given in evidence in mitigation of damages, any misconduct or crime committed by the deceased within a reasonable time before the killing, which might have influenced the mob which committed the act, or which would affect the value of his life to the next of kin, is admissible. Adams v. Salina, 58 Kan. 246, 48 Pac. 918. (Gen. Stats. of Kan. 1915, § 3823, p. 726.)

For other cases as to evidence of specific instances to prove character, see note in 14 L.R.A.(N.S.) 689.

For other cases as to evidence of reputation to show incompetency of servant or masters' knowledge thereof see note in 33 L.R.A.(N.S.) 751.

For other cases as to evidence of specific acts of unchastity see note in L.R.A.1916B, 965.

c. Evidence referring to time subsequent to the fact.—Evidence upon the issue of a party's character is inadmissible where it refers to a time subsequent to the act in issue which involves his character.¹

¹ Landa v. Obert, 5 Tex. Civ. App. 620, 25 S. W. 342.

But evidence that leased premises were used as a house of ill fame after execution of a lease is admissible to show condition of affairs at and before the execution of the lease, where the lessee occupied and used the premises in the same general way before as well as after the

lease was executed, and it is alleged that the lessor knew of, and consented to, such use at the execution of the lease. *Egan v. Gordon*, 65 Minn. 505, 68 N. W. 103.

And in an action for slander in calling a married woman a whore evidence of acts of adultery after the speaking of the words and after the beginning of the suit is admissible, where proof has been introduced designed to show that she was guilty of adultery before such time. *Claypool v. Claypool*, 65 Ill. App. 446.

d. Competency of witness.—A witness who had long known the deceased is competent to testify, in a prosecution for homicide, as to whether the latter's character was dangerous or otherwise.¹ But a witness cannot testify to the reputation of one deceased where he did not know his reputation in his lifetime, but acquired knowledge concerning it after his death.²

Where proof of reputation is admissible, the American courts are almost unanimous in laying down the familiar rule that it is the general reputation of the party in the community in which he lives that is to be proved, and hence a witness cannot testify to character from his own personal knowledge only.³

¹ *Turner v. State*, 70 Ga. 765.

² *State v. Kenyon*, 18 R. I. 217, 26 Atl. 199; *Gordon v. State*, 140 Ala. 29, 36 So. 1009; *Skaggs v. State*, 31 Tex. Crim. Rep. 563, 21 S. W. 257.

³ *People v. Van Gaasbeck*, 189 N. Y. 408, 22 L.R.A.(N.S.) 650, 82 N. E. 718, 12 Ann. Cas. 745; *People v. Turney*, 124 Mich. 542, 83 N. W. 273; *Galveston, H. & S. A. R. Co. v. Burnett*, — Tex. Civ. App. —, 42 S. W. 314; *State v. Stewart*, — (Del.) —, 67 Atl. 786; *People v. Ward*, 134 Cal. 301, 66 Pac. 372; *French v. Millard*, 2 Ohio St. 44; *Bucklin v. State*, 20 Ohio, 18; *Carp v. Queen Ins. Co.* 203 Mo. 295, 101 S. W. 78; *Sargent v. Wilson*, 59 N. H. 396; *United States v. Vansickle*, 2 McLean, 221, Fed. Cas. No. 16,609. For other cases, see note in 22 L.R.A.(N.S.) 650.

For an elaborate note on right of witness to testify to character from personal knowledge, see 22 L.R.A.(N.S.) 650.

II. COMPETENCY AND SKILL.

3. Direct testimony.

A witness who has had adequate opportunities of observation may be asked whether a person appeared to be competent to his place.¹

But the question should be so framed as to direct the witnesses attention to his capacity to perform the particular service required of him.²

¹ *Gahagan v. Boston & L. R. Co.* 1 Allen, 187, 79 Am. Dec. 724; *Wheeler v. Delaware & H. Canal Co.* 20 N. Y. Week. Dig. 301, Affirmed without opinion in 99 N. Y. 616 (engineer was asked how fireman performed his duties, and whether he understood the working of the engine; and answered: "He always handled her well while he was with me; that is, when I asked him to move her one way or another he done so." Held, proper; because the skilfulness of a mechanic is a collective fact); *Lewis v. Emery*, 108 Mich. 641, 66 N. W. 569 (that a foreman and head sawyer in sawmill may give their opinion as to whether a setter in such mill, whom they had seen act as head sawyer at times, was a competent head sawyer, in an action for personal injuries to an employee alleged to have been caused by the incompetency of such setter while acting as head sawyer); *Mexican Nat. R. Co. v. Musette*, 7 Tex. Civ. App. 169, 24 S. W. 520, affirmed in 86 Tex. 708, 24 L.R.A. 642, 26 S. W. 1075 (that a trainmaster of a railroad company, having the general supervision of trainmen and engineers, and knowing the reputation of a particular engineer from actual reports and notices that come into his possession, is competent to give evidence concerning his general reputation for care and caution).

A sufficient predicate for an opinion as to the competency of a person to be superintendent of a mine is laid by the testimony of a witness that he has been engaged in mining for about two years and a half, that he is familiar with the kind of work the superintendent was engaged in, had known him four and a half years, and had often seen him work, and that his duties were, together with his laborers, to take down from the roof of the entry, and load, slate or rock in the mine. *Buckalew v. Tennessee Coal, I. & R. Co.* 112 Ala. 146, 20 So. 606.

² Thus, the inquiry should be directed to his capacity to perform the particular service required of him, and not as to his being bright, intelligent, and a ready, fluent speaker. *Latremonille v. Bennington & R. R. Co.* 63 Vt. 336, 22 Atl. 656.

4. General reputation.

General reputation for care and skill is not competent to show disposition or habitual character.¹

¹ *Baldwin v. Western R. Corp.* 4 Gray, 333 (careless driver); *Park v. New York C. & H. R. R. Co.* 155 N. Y. 215, 49 N. E. 674; *Marrinan v. New York C. & H. R. R. Co.* 13 App. Div. 439, 43 N. Y. Supp. 606; *Baird v. New York C. & H. R. R. Co.* 16 App. Div. 490, 44 N. Y. Supp. 926; *Saevenson v. Gelsthorpe*, 10 Mont. 563, 27 Pac. 404.

It may be competent to show notice to an employer. *Cincinnati, H. & I. R. Co. v. Jones*, 111 Ind. 259, 12 N. E. 113 (disposition of horse);

Terrell v. Russell, 16 Tex. Civ. App. 573, 42 S. W. 129; Western Stone Co. v. Whalen, 151 Ill. 472, 38 N. E. 241, and cases cited (followed in Chicago, L. S. & E. R. Co. v. Hartmann, 71 Ill. App. 427), s. p. Brooks v. Action, 117 Mass. 204.

5. Single instances.

Carelessness on a single previous occasion is not alone competent to show unfitness for service;¹ but carelessness on several occasions is, if accompanied by evidence of notice to the employer.²

¹ Lacy v. Kossuth County, 106 Iowa, 16, 75 N. W. 689; Piehl v. Albany R. Co. 19 App. Div. 471, 46 N. Y. Supp. 257; Baltimore v. War, 77 Md. 593, 27 Atl. 85.

As to evidence of specific instances to prove character in civil actions, see also note in 14 L.R.A.(N.S.) 745, especially division as to character of servant in action against master, beginning on page 756.

² Baltimore Elevator Co. v. Neal, 65 Md. 438, 5 Atl. 338; Baulec v. New York & H. R. Co. 59 N. Y. 356, 17 Am. Rep. 325, affirming in effect 12 Abb. Pr. N. S. 310, 5 Lans. 436, 62 Barb. 623.

6. Intoxication.

Intoxication at a time within the period of service is relevant to the question of the competency of a servant.¹

So, also, evidence of the habits of intoxication is admissible in connection with other evidence showing his habits from such period to the time of the occurrence under investigation, on the question as to his suitability for the place he was filling.²

¹ Probst v. Delamater, 100 N. Y. 266, 3 N. E. 184.

² Cox v. Central Vermont R. Co. 170 Mass. 129, 49 N. E. 97.

But the fact that an engineer a year previous to an accident alleged to have been caused by his negligence took an occasional sociable drink, or was occasionally under the influence of drink, is not sufficient to authorize the inference that he had been rendered incapable of properly managing his engine. Cosgrove v. Pitman, 103 Cal. 268, 37 Pac. 232; Baltimore & O. R. Co. v. Henthorne, 19 C. C. A. 623, 43 U. S. App. 113, 73 Fed. 634.

7. Inspection of witness.

The jury may consider the appearance and conduct of a witness, to aid them in determining whether he has suitable

qualifications and intelligence to be intrusted with a responsible duty.¹

¹ Keith v. New Haven & N. Co. 140 Mass. 175, 3 N. E. 28. Devens, J., says, the same principle applies when the inquiry relates to intelligence and understanding, as well as physical capacity.

CHILD BEARING.

Presumption that a person may have children through life.

The American courts have almost uniformly held that even in the cases of women of advanced age the presumption held good that they might still bear children.¹ The more sensible rule would seem to be that, where no rule of property law is involved, and a woman has passed far beyond the child-bearing age, there should be a presumption that she is incapable of child bearing.²

¹ Westhafer v. Koons, 144 Pa. 26, 22 Atl. 885; Read v. Fife, 8 Humph. 328. The doctrine as to possibility of issue extinct as affecting property rights is discussed in note in 48 L.R.A.(N.S.) 865.

² Whitney v. Groo, 40 App. D. C. 496 (where a defendant refused to perform a contract to purchase land on the ground that a woman more than 70 years old might have children.) See also note in 27 Harvard L. Rev. 286.

CITIZENSHIP.

1. Distinguished from residence.
2. Presumption.
3. Naturalization.
4. Passport.
5. Hearsay.
6. Declarations to show lack of citizenship.

7. Citizenship of foreign-born wife.

See also ABANDONMENT; DOMICIL; NATURALIZATION; RESIDENCE.

1. Distinguished from residence.

An allegation of residence cannot avail as equivalent to an allegation of citizenship for the purpose of giving jurisdiction.¹

¹ *Menard v. Goggan*, 121 U. S. 253, 30 L. ed. 914, 7 Sup. Ct. Rep. 873 (at law); *Everhart v. Huntsville College*, 120 U. S. 223, 30 L. ed. 623, 7 Sup. Ct. Rep. 555 (in equity).

In citizenship, residence and intent must concur; a man may reside awhile within a state without becoming a citizen. *Sharon v. Hill*, 26 Fed. 337; *State Sav. Asso. v. Howard*, 31 Fed. 433.

2. Presumption.

To support an apparent right,¹ or to avoid an inference of illegal conduct,² citizenship will be presumed in the absence of evidence to the contrary.

¹ *Blight v. Rochester*, 7 Wheat. 535, 5 L. ed. 516; *Shelton v. Tiffin*, 6 How. 163, 12 L. ed. 387 (so holding of residents); *Behrensmeyer v. Kreitz*, 135 Ill. 591, 26 N. E. 704.

As to presumptions and burden of proof of diverse citizenship for the purpose of giving the Federal courts jurisdiction, see *Minneapolis v. Reun*, 6 C. C. A. 31, 12 U. S. App. 446, 56 Fed. 576; *Foster v. Cleveland*, C. C. & St. L. R. Co. 56 Fed. 434; *National Masonic Asso. v. Sparks*, 28 C. C. A. 399, 49 U. S. App. 681, 83 Fed. 225.

According to *Harris v. Kellogg*, 117 Cal. 484, 49 Pac. 708, citizenship or a declaration of intention to become a citizen must be averred and proved in order to maintain an action for possession of a mining claim located under the laws of the United States.

² *People ex rel. Smith v. Pease*, 27 N. Y. 45, 84 Am. Dec. 242, followed in *Garfield M. & M. Co. v. Hammer*, 6 Mont. 53, 8 Pac. 153; *People ex rel. Boyer v. Teague*, 106 N. C. 576, 11 S. E. 665.

Citizenship is presumed to continue until a change is established. *State ex rel. Phelps v. Jackson*, 79 Vt. 504, 8 L.R.A.(N.S.) 1245, 65 Atl. 657.

A person in the merchant marine service of the United States, residing in Massachusetts is presumed to be a citizen under a Federal statute which requires such officers to be citizens. *Buckley v. McDonald*, 33 Mont. 483, 84 Pac. 1114.

For other cases as to presumption of citizenship from residence, see note in 8 L.R.A.(N.S.) 1245.

3. Naturalization.

That a voter has taken out naturalization papers subsequent to the election at which he voted is in the nature of an admission that he was not a qualified voter at the time of the election, but it is not competent evidence upon a contest of the election.¹ The general rule is that an order, valid on its face, admitting a person to citizenship issued by a court of competent jurisdiction is conclusive when collaterally attacked.²

¹ Behrensmeyer v. Kreitz, 135 Ill. 591, 26 N. E. 704. In Clarke v. Bettenhausen, 296 Ill. 373, 129 N. E. 803, proof that a voter was foreign born was held not sufficient to overcome the prima facie case of his right to vote so as to require him to produce proof of naturalization.

² Oehlert v. Oehlert, 233 Mass. 497, 6 A.L.R. 406, 124 N. E. 249, and note in 6 A.L.R. 407.

4. Passport.

A passport issued by our government is not of itself evidence of citizenship for the purpose of a judicial trial. It is but an *ex parte* certificate; and if founded upon evidence produced by the Secretary of State establishing citizenship, that evidence, if admissible, should be produced to render the passport competent.¹

¹ Urtetiqui v. D'Arcy, 9 Pet. 692, 9 L. ed. 276.

A passport issued to a Chinese person by the Secretary of State is not evidence of the citizenship of such person in the United States. Edsell v. Mark, 103 C. C. A. 121, 179 Fed. 292.

5. Hearsay.

Citizenship is not a fact of pedigree to be proved by declarations in the nature of hearsay.¹

¹ Anonymous cases cited in 1 Pick. 247 (alienage of a deserter from the army).

6. Declarations to show lack of citizenship.

Declarations of voters made before or after election, and not as a part of the *res gestæ*, are not admissible in an election contest to show their disqualification.¹

¹ *Rucks v. Renfrow*, 54 Ark. 409, 12 L.R.A. 362, 16 S. W. 6.

But the courts are not in harmony upon this question, as may be seen from the case just cited. And it has been held that such declarations are competent if made at or prior to the election. *Sharp v. McIntire*, 23 Colo. 99, 46 Pac. 115. Even though they do not accompany any act. *Behrensmeyer v. Kreitz*, 135 Ill. 591, 26 N. E. 704.

7. Citizenship of foreign-born wife.

Citizenship of a foreign-born woman claiming under the naturalization of her husband can be proved only by the record of his naturalization.¹

¹ *Belcher v. Farren*, 89 Cal. 73, 26 Pac. 791; *Harney v. Farren*, — Cal. —, 26 Pac. 792.

CLAIM.

For kindred topics, see ADVERSE POSSESSION; NEGATIVE; POSSESSION.

Direct testimony.

A witness may, subject to cross-examination as to details, testify that a person in possession claimed a fee, or a dower interest, or a reversion, etc., as the case may be.¹

So he may testify that he never heard any other person claim the property.²

¹ *Hancock v. Kelly*, 81 Ala. 368, 2 So. 281. Compare *Niles v. Patch*, 13 Gray, 254 (witness who testified he had been accustomed to go upon the premises, not allowed to be asked what for); *Diefendorf v. Thomas*,

37 App. Div. 49, 55 N. Y. Supp. 699, an action for ejectment, where it is held error to allow a witness to state his conclusion that a party, during her occupancy, claimed title to the disputed strip of land; but that he might testify to the acts and declarations on which he bases that conclusion.

Abstract of title, delivered by vendor, competent to show his claim of title, as against him. *Hartley v. James*, 50 N. Y. 38.

² *Maxwell v. Harrison*, 8 Ga. 61, 52 Am. Dec. 385.

Direct testimony. It was competent in an action in ejectment for a witness to testify that she knew that a certain person claimed the property as her own, and so claimed it continuously to her death. *Hays v. Lemoine*, 156 Ala. 465, 47 So. 97.

A claim is not established by a voluntary unanswered letter containing a demand or statement of indebtedness. *Healy v. Malcolm*, 77 App. Div. 69, 78 N. Y. Supp. 1043.

A party was allowed to testify as to who, if anybody claimed specified land after a particular date, the question of such claim being pertinent to the issue of possession. *Field v. Field*, 39 Tex. Civ. App. 1, 87 S. W. 726.

COLLATERAL ISSUES.

If the objective fact sought to be proved has any bearing on the main issue it should not be held inadmissible on the ground that it contradicts a witness on a collateral point.¹ The admissibility of self contradictory statements has been held to depend on whether they raise collateral issues.²

¹ *Lake Erie & W. R. Co. v. Howarth*, — Ind. App. —, 124 N. E. 687, 692; *Knapp v. State*, 168 Ind. 153, 79 N. E. 1076, 11 Ann. Cas. 604; *Com. v. Hourigan*, 89 Ky. 305, 12 S. W. 550; article by Prof. Wigmore, 2 Ill. L. Rev. 35; note in 12 Mich. L. Rev. 72.

Contra, *People v. Harris*, 209 N. Y. 70, 102 N. E. 546.

² *State v. Swartz*, 87 Kan. 852, 126 Pac. 1091. See also note in 11 Mich. L. Rev. 253.

COLLATERAL ORAL AGREEMENT.

The rule against oral evidence.

The rule against oral evidence to vary a writing¹ does not preclude proving an oral stipulation collateral² to even a sealed contract, if the object is not to show a breach of the contract as thus modified, but merely to enforce the oral stipulation itself; and this may be done even by way of counterclaim against the liability arising on the written contract.³

¹ The settled rule is that evidence of an oral agreement made at or prior to the time of the execution of a written instrument is properly excluded if such oral agreement does not fall within any of the exceptions to the rule forbidding oral evidence to vary the terms of a writing. *Genet v. Delaware & H. Canal Co.* 122 N. Y. 505, 25 N. E. 922; *Culver v. Wilkinson*, 145 U. S. 205, 36 L. ed. 676, 12 Sup. Ct. Rep. 832; *Crescent Brewing Co. v. Handley*, 90 Ala. 486, 7 So. 912; *Jenkins v. Shinn*, 55 Ark. 347, 18 S. W. 240; *Osborne v. Taylor*, 58 Conn. 439, 20 Atl. 605; *Murchie v. Peck*, 160 Ill. 175, 43 N. E. 356; *Younie v. Walrod*, 104 Iowa, 475, 73 N. W. 1021; *Diebold Safe & Lock Co. v. Huston*, 55 Kan. 104, 28 L.R.A. 53, 39 Pac. 1035; *Neal v. Flint*, 88 Me. 72, 33 Atl. 669; *Nally v. Long*, 71 Md. 585, 81 Atl. 811; *Wooley v. Cobb*, 165 Mass. 503, 43 N. E. 497; *Wheaton Roller-Mill Co. v. John T. Noye Mfg. Co.* 66 Minn. 156, 68 N. W. 854; *Slaughter v. Smither*, 97 Va. 202, 33 S. E. 544; *Gilbert v. Stockman*, 76 Wis. 62, 44 N. W. 845. See also cases in notes to *Ferguson v. Rafferty*, 6 L.R.A. 33; *Durkin v. Cobleigh*, 17 L.R.A. 270. And for the application of the rule and its exception in special instances, such as consideration, explanation, illegality, mistake, suretyship, etc., see the particular titles.

² For cases instancing this exception to the rule, see *McPherson v. Weston*, 85 Cal. 90, 24 Pac. 733 (admitting oral evidence that defendant indorsed the note sued on, under an agreement, for a valuable consideration, that his coindorser was to hold him harmless on his indorsement); *Brook v. Latimer*, 44 Kan. 431, 11 L.R.A. 805, 24 Pac. 946 (admitting oral evidence to show that a promissory note executed by a daughter to her father was in fact executed as a mere receipt or memorandum of an advancement by the father to the daughter, and that there was a contemporaneous mutual understanding that payment would never be demanded or enforced); *Queen Ins. Co. v. Kline*, 17 Ky. L. Rep. 619, 32 S. W. 214 (admitting oral evidence of a parol

agreement by an agent or solicitor of an insurance company, that the insured might have all the time he wanted to complete the insured property, to avoid the effect of a provision of the policy limiting the time to thirty days); *Cole v. Hadley*, 162 Mass. 579, 39 N. E. 279 (admitting oral evidence that the grantor of land described as bounded on a specified street promised to grade and work such street so that it should be fit for travel, as an independent, collateral agreement); *Breitenwischer v. Clough*, 111 Mich. 6, 69 N. W. 88 (admitting oral evidence to show an agreement by the grantee, as part of the consideration, that he would allow the grantor to grow 20 or 25 acres of wheat upon the place conveyed); *American Bldg. & L. Asso. v. Dahl*, 54 Minn. 355, 56 N. W. 47 (admitting oral evidence of an independent agreement between the sureties and the obligees of an indemnity bond at the time of its execution and as an inducement therefor, that the obligees would retain out of moneys agreed to be loaned the principal an amount sufficient to pay a certain claim); *Corbett v. Fetzer*, 47 Neb. 269, 66 N. W. 417 (that the terms of an indorsement in blank of a bill or note may be established by parol as between the original parties thereto, but not as between the indorser and a subsequent bona fide holder); *Hamill v. Inventors' Mfg. Co.* 55 N. J. Eq. 648, 37 Atl. 773 (that the effect of a covenant of warranty in a deed as an estoppel against the grantor to assert an existing encumbrance subsequently acquired by him may be avoided by proof of an oral agreement that the grantee should assume the mortgage); *Benniman v. Alexander*, 111 N. C. 427, 16 S. E. 408 (that one who accepts a writing directing him to pay a certain amount to the payee may show in an action upon the acceptance that there was a collateral agreement with the payee that he should not be required to pay except upon certain conditions); *Evans v. Freeman*. 142 N. C. 61, 54 S. E. 847 (parol evidence to show agreement that note was to be paid out of proceeds of sale of specified article). See also cases in notes to *Ferguson v. Rafferty*, 6 L.R.A. 33 and *Durkin v. Cobleigh*, 17 L.R.A. 270.

The existence of a separate oral agreement as to any matter on which a written contract is silent, and which is not inconsistent with its terms, may be proved by parol, if under the circumstances of the particular case it may properly be inferred that the parties did not intend the written paper to be a complete and final statement of the whole of the transaction between them; but such an agreement must not only be collateral, but must relate to a subject distinct from that to which the written contract applies. *Seitz v. Brewers' Refrigerating Mach. Co.* 141 U. S. 510, 35 L. ed. 837, and note, 12 Sup. Ct. Rep. 46.

Parol evidence is competent to establish an independent collateral agreement as a condition precedent to a contract becoming operative. *Manhattan Guide Co. v. Gluck*, 52 Misc. 652, 101 N. Y. Supp. 528.

So collateral agreement that promissory note was not to take effect until signed by third party may be proved by parol. *Hodge v. Smith*, 130 Wis. 326, 110 N. W. 192.

But if a deed is absolute in form, parol evidence is inadmissible to prove a collateral agreement that certain buildings should be excepted from the operation of the deed. *Mahaffey v. J. L. Rumbarger Lumber Co.* 61 W. Va. 571, 8 L.R.A.(N.S.) 1263, 56 S. E. 893.

Parol evidence is not admitted to exonerate a defendant who signed a contract in his own name with an oral understanding that contract was between plaintiff and defendant's principal. *Thomas Gordon Malting Co. v. Bartels Brewing Co.* 206 N. Y. 528, 100 N. E. 457, 461. Where however, in such a case evidence is admitted to show that the principal is also bound it should be on the theory that there was a collateral agreement. *Lerned v. Johns*, 9 Allen, 419. *Contra, Chandler v. Coe*, 54 N. H. 561.

Nor in the absence of fraud or mistake, can an express warranty made by parol be admitted, even under the Uniform Sales Act, where the written contract purports to contain the entire contract. *Marmet Coal Co. v. People's Coal Co.* 141 C. C. A. 402, 226 Fed. 646; *Seitz v. Brewers' Refrigerating Mach. Co.* 141 U. S. 510, 35 L. ed. 837, 12 Sup. Ct. Rep. 46; *Telluride Power Transmission Co. v. Crane Co.* 208 Ill. 218, 70 N. E. 319; *Witeeman Co. v. Beck Malting & Brewing Co.* 183 Mich. 227, 150 N. W. 109; *Thomas v. Scutt*, 127 N. Y. 133, 27 N. E. 961; note in 16 Columbia L. Rev. 253.

Where however, the written contract does not purport to contain the entire agreement, parol evidence of the warranty is admissible. *Tainter v. Wentworth*, 107 Me. 439, 78 Atl. 572; *Cooper v. Payne*, 186 N. Y. 334, 78 N. E. 1076.

And so where the evidence warrants a finding of fraud the parol evidence is admissible. *First Nat. Bank v. Harvey*, 29 S. D. 284, 137 N. W. 365.

In California the Code provides that a contract in writing may be altered by an executed oral agreement; and therefore oral evidence as to the circumstances attending an oral agreement made contemporaneously with a written agreement is admissible, where the oral agreement has been fully executed. *Dunn v. Price*, 112 Cal. 46, 44 Pac. 354. (Kerr's Cyc. Codes of Cal. 1920, Part 2 of the Civil Code, § 1698, p. 2028.)

For notes on various phases of the question of admissibility of oral evidence to show collateral agreement, see 18 L.R.A.(N.S.) 337 (proof of escrow agreement); 23 L.R.A.(N.S.) 1218 (reservation of growing crops from deed); 19 L.R.A.(N.S.) 1183 (parol warranty in connection with sale of personalty); 16 L.R.A.(N.S.) 1165 (parol evidence rule as to varying or contradicting written contracts as affected by the doctrine of waiver or estoppel as applied to policies of insurance); 18 L.R.A.(N.S.) 288 (oral evidence to show that bill or note was

delivered upon condition); 28 L.R.A.(N.S.) 1045 (as to liability of accommodation parties *inter se*).

See note in 30 Harvard L. Rev. 746, on Proof of Parol Conditions as to Bills and Notes stating that "if delivery in escrow to the payee is to be allowed at all, then it must be open to the parties to fix any condition they desire as the condition on which delivery is to take place," and the courts should admit parol evidence of such conditions. See also note in 31 Harvard L. Rev. 655, stating four different views as to when parol evidence of a collateral agreement concerning a negotiable instrument is admissible.

The entire question of the admissibility of evidence of a prior or contemporaneous oral agreement to prove that a bill or note is conditional is discussed in an extensive note to *Vincent v. Russell*, — A.L.R. —.

³ *West Chester & P. R. Co. v. Broomall*, 1 Sadler (Pa.) 587, 18 W. N. C. 44, 3 Atl. 444 (reversing for error in excluding evidence of an oral stipulation upon which a conveyance reciting only a nominal consideration was made); *Van Brunt v. Day*, 8 Abb. N. C. 336, 81 N. Y. 251 (oral agreement of assignee of mortgage with guaranty, to keep premises insured, in consideration of being allowed to retain part of the price of assignment, held available as a counterclaim on foreclosure); *Richardson v. Traver*, 112 U. S. 423, 431, 28 L. ed. 804, 5 Sup. Ct. Rep. 201 (recital of \$100 as the consideration does not preclude evidence of promise to pay a large amount of outstanding debt; for this is not inconsistent with the deed. So held on the question of the duty to perform the collateral promise); *United States v. Peck*, 102 U. S. 64, 26 L. ed. 46 (the government claimed to recoup against price of wood, damages for not delivering hay also called for by the contract. Held, competent for plaintiff to show that at the time and place of making the contract it was understood that the contractor was to rely on the grass at a particular place, that being the only supply within hundreds of miles; and that afterwards the government, fearing he would make default, allowed other persons to cut this grass to supply the purpose for which the contract was made); *Braly v. Henry*, 71 Cal. 481, 11 Pac. 385, 12 Pac. 623, and cases cited (recoupment of damages for breach of oral agreement, so as to reduce recovery on note); *Bennett v. Tillmon*, 18 Mont. 28, 44 Pac. 80 (that it is competent in an action upon a promissory note to prove an oral agreement that the maker might be offset against the same on account due from one other than the payee, who furnished the consideration for the note).

And in an action by a purchaser against his vendee for specific performance of a written contract of sale of land conditioned for the payment of a specified amount, evidence of an oral agreement that the past services of the purchaser were to be accepted in full payment of the sums agreed to be paid by him in the written contract is admissible. *Boles v. Welch*, 94 Wis. 189, 68 N. W. 655.

COMPROMISE.

See also **ADMISSION**.

The burden of proof is on the party claiming a compromise.¹
A compromise is presumed to include all existing controversies.²
And a written promise to pay a sum agreed on as due upon a disputed claim cannot be defeated by proving that nothing was due.³

¹ Barber v. Maden, 126 Iowa, 402, 102 N. W. 120.

² Johnson v. Berdo, 131 Iowa, 524, 106 N. W. 609.

³ Dunham v. Griswold, 100 N. Y. 224, 3 N. E. 76.

CONCEALMENT.

1. **Positive acts.**

2. **Circumstantial evidence.**

And see **ABSENCE; FICTITIOUS PERSON**.

1. **Positive acts.**

Positive acts calculated to prevent discovery must be shown.¹

¹ Rhoton v. Mendenhall, 17 Or. 199, 20 Pac. 49, and cases cited.

An alleged fraudulent concealment of a cause of action, to avoid the statute of limitations, can only be established by affirmative acts or acts of gross negligence. Cunningham v. Dougherty, 121 Ill. App. 395.

Thus, defendant in a common-law action based, not upon fraud or violation of trust, but upon a breach of duty or an implied undertaking, cannot be deprived of the benefit of the statute of limitations, except upon proof of actual fraudulent concealment, amounting to something more than mere silence. Despeaux v. Pennsylvania R. Co. 87 Fed. 794.

2. **Circumstantial evidence.**

Absence, and the declarations of persons at the abode refusing information or answering inquiries evasively, may be sufficient evidence of concealment.¹

¹ Genin v. Tompkins, 12 Barb. 265, 284; Baker v. Stephens, 10 Abb. Pr. N. S. 1, 12, 27.

CONDITION OF PERSONS, PLACES, AND THINGS.

I. CONDITION OF PERSONS.

1. Condition in life.
2. Financial condition.
 - a. In general.
 - b. General reputation.
3. Physical conditions.
 - a. Photographs.
 - b. Direct testimony.
 - c. Inspection in court.
 - d. Inspection out of court.

II. CONDITION OF PLACES AND THINGS.

4. Direct testimony.
 - a. In general.
 - b. What witness observed.
5. Combining testimony of several witnesses.
6. Condition at another time or place.
 - a. In general.
 - b. Laying foundation for the evidence.
7. Inspection in court.
8. View by jury.
9. Experiments.
10. Official inspection.
11. Use of correct photograph or map.
12. Use of approximate maps, plans, etc.
 - a. In general.
 - b. Reasonable accuracy.

See also FORGOTTEN FACT; NEGATIVE. As to Conditional Delivery, etc., see CONTRACT; DELIVERY.

I. CONDITION OF PERSONS.

See also ABILITY; AGE; AUTOPSY; CAUSE; DISEASE; EFFECT; FEELINGS; HEALTH; INSANITY; INSOLVENCY; INTOXICATION.

1. Condition in life.

In an action for damages for a personal injury, evidence that plaintiff is married and has a family,¹ and as to the number and ages of his children,² is inadmissible, as it does not legitimately affect the amount of damages. But the condition in life, and

social standing, of plaintiff in a libel suit, is competent to show the nature and extent of the injury.³

¹ *Louisville & N. R. Co. v. Binion*, 107 Ala. 645, 18 So. 75; *Galion v. Lauer*, 55 Ohio St. 392, 45 N. E. 1044. As opposed to these cases is *Perry v. Lansing*, 17 Hun, 34, in which it was held (one of the three justices concurring in the result, the other dissenting) that it is not error to show that plaintiff in such an action was a man of family, as the jury are entitled to know the situation or condition in life of a party or witness. See, however, *Mannion v. Hagan*, 9 App. Div. 98, 41 N. Y. Supp. 86, in which it was held prejudicial error on the authority of *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. ed. 141, to permit plaintiff to testify that in making an unsuccessful appeal to defendant for compensation for his injuries he had stated that he was a poor man and had a wife.

² *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. ed. 141; *Dayharsh v. Hannibal & St. J. R. Co.* 103 Mo. 570, 15 S. W. 554; *Kreuziger v. Chicago & N. W. R. Co.* 73 Wis. 158, 40 N. W. 657. But evidence as to the number and age of plaintiff's children is admissible in an action brought by a husband for damages for injuries to his wife and the loss of her services to himself and their children. *Conway v. New Orleans & C. R. Co.* 46 La. Ann. 1429, 16 So. 362. And evidence that a wife suing to abate a nuisance was married and had six children, and that she furnished the house in which they resided, is admissible to show the use to which she was putting the property as bearing on the question of her injury. *Friburk v. Standard Oil Co.* 66 Minn. 277, 68 N. W. 1090. And to permit plaintiff in an action for personal injuries to state how many persons he had to care for, and of whom they consisted, is not prejudicial, where the court charged that punitive damages should not be awarded, unless in a clear case of wilful, palpable disregard of duty. *Johns v. Charlotte, C. & A. R. Co.* 39 S. C. 162, 20 L.R.A. 520, 17 S. E. 698.

The names and ages of the children of a person for whose death an action is brought may be proved under a statute providing that such damages may be given as under all the circumstances may be just (*Pool v. Southern P. Co.* 7 Utah, 303, 26 Pac. 654; *Chilton v. Union P. R. Co.* 8 Utah, 47, 29 Pac. 963),—especially where they are parties to the action; *English v. Southern P. Co.* 13 Utah, 407, 35 L.R.A. 155, 45 Pac. 47. (See *Compiled Laws of Utah*, 1917, § 6505, vol. 2, p. 1255.) The same is true where the statute gives a right of action for the benefit of the widow and next of kin free from the claims of creditors, and awards damages to the parties for whose use and benefit the right of action from death consequent upon an injury survives. *Spiro v. Felton*, 73 Fed. 91. (See *Thompson's Shan-*
ABB. FACTS—25.

non's Code of Tenn. 1918, § 4028, p. 1731.) But such evidence is inadmissible where the statute limits the damages to a fair and just compensation for the pecuniary injury resulting from the death. *Bradley v. Ohio River & C. R. Co.* 122 N. C. 972, 30 S. E. 8. (Consol. Stats. of N. C. 1919, § 161, vol. 1, p. 50.) The number of an intestate's children can have no legitimate bearing on the value of the deceased's life to his estate. *Beems v. Chicago, R. I. & P. R. Co.* 58 Iowa, 150, 12 N. W. 222. But the number and ages of the dependents upon a person for whose death an action is brought may be proved where the evidence as to what proportion of his earnings were consumed in his own support is circumstantial. *Alabama Mineral R. Co. v. Jones*, 114 Ala. 519, 21 So. 507. The number and ages of a widow's minor children may be shown in an action by her to recover for the death of her husband, since the liability to maintain the children is, by his death, cast upon her. *Tetherow v. St. Joseph & D. M. R. Co.* 98 Mo. 74, 11 S. W. 310. But, although such evidence may be admissible, the damages recoverable are those which the widow, and not the children, has suffered. *Abbott v. McCadden*, 81 Wis. 563, 51 N. W. 1079.

³ *Press Pub. Co. v. McDonald*, 26 L.R.A. 531, 11 C. C. A. 155, 26 U. S. App. 167, 63 Fed. 238; *Turner v. Hearst*, 115 Cal. 394, 47 Pac. 129; *Alliance Review Pub. Co. v. Valentine*, 9 Ohio C. C. 387, 6 Ohio C. D. 323. Evidence that a woman suing for libel imputing unchastity has three small children is admissible, as her relation to them is such as may make the hurt to her more acute and permanent, and render her more sensitive to, and more helpless against, the wrong done. *Enquirer Co. v. Johnston*, 18 C. C. A. 628, 34 U. S. App. 607, 72 Fed. 443.

In a proceeding to condemn land for a railroad it is not competent for the owner to prove the number of children composing his family. *Shirley v. Southern R. Co.* 121 Ky. 187, 89 S. W. 124.

2. Financial condition.

a. In general.—A witness having had adequate opportunity of observation and hearing reputation may testify what were a man's circumstances as to property,¹ whether a man's business was profitable,² whether he was able to pay a specified sum, and whether he lived extravagantly.³

The financial condition of plaintiff in an action to recover damages for personal injuries or injuries to property is not competent to affect the amount of the damages,⁴ but his prior earning capacity,⁵ or the profits of his business,⁶ may be proved.

Evidence of the poverty or wealth of the persons for whose

benefit an action is brought to recover damages for the death of another is inadmissible for the purpose of affecting damages,⁷ although such evidence may be competent to show their pecuniary interest in the life of the deceased.⁸ Proof of the earning capacity of the deceased should be confined to such conditions as actually existed at the time of his death, and such as it is reasonably certain will occur in the future.⁹

The rule excluding evidence of defendant's financial condition does not extend to actions in which exemplary or punitive damages are recoverable,¹⁰ or in which the degree of the injury is dependent upon the status of defendant;¹¹ and such evidence is always admissible in actions for the breach of a promise to marry.¹²

¹ *Sheldon v. Root*, 16 Pick. 567, 28 Am. Dec. 266.

Evidence of pecuniary condition of lessees at the time of giving guaranties for faithful performance is competent to show their financial responsibility, and that the guaranties furnished were proper. *Porter v. Carpenter*, 65 N. H. 650, 23 Atl. 523. But proof of the style in which an administrator and his sureties lived after the approval of his bond is inadmissible to show their financial condition when the bond was given, or that collection could have been enforced from them. *Field v. Wallace*, 89 Iowa, 597, 57 N. W. 303.

Evidence is proper as to specific property owned by defendant. *Vierling v. Binder*, 113 Iowa, 337, 85 N. W. 621. See also *Smith v. Compton*, 67 N. J. L. 548, 58 L.R.A. 480, 52 Atl. 386 (same rule, as affecting plaintiff's possible dower in defendant's property).

² *Bartlett v. Decreet*, 4 Gray, 111 (excluding question "From your knowledge of B. was his business profitable?" merely because it was thus restricted. Another question based on an examination of B.'s business was allowed at the trial by Mellen, Ch. J.).

Testimony as to what business, if any, one charged with theft was pursuing, is competent on his trial for that offense to show his financial condition at the time of the alleged theft. *Sims v. State*, — Tex. Crim. Rep. —, 45 S. W. 705.

³ *Griffin v. Brown*, 2 Pick. 304, 309, holding that to add that he had spent a larger sum, as witness verily believes, is not objectionable, for it gives, not mere opinion, but reasons for the testimony.

⁴ *Alabama G. S. R. Co. v. Carroll*, 28 C. C. A. 207, 52 U. S. App. 442, 84 Fed. 772; *Parsons v. Lindsay*, 26 Kan. 426; *Schwanzer v. Brooklyn Heights R. Co.* 18 App. Div. 205, 45 N. Y. Supp. 889; *Shea v. Potrero & B. V. R. Co.* 44 Cal. 414. But see *Stafford v. Oskaloosa*, 64 Iowa, 251, 20 N. W. 174, in which evidence that a physician suing

for personal injuries had no other means of support than his earnings was held competent.

Except where the evidence will justify the jury in awarding exemplary or punitive damages. *Beck v. Dowell*, 111 Mo. 506, 20 S. W. 209.

⁵ *Louisville & N. R. Co. v. Woods*, 115 Ala. 527, 22 So. 33; *Cleveland, C. C. & St. L. R. Co. v. Gray*, 148 Ind. 266, 46 N. E. 675; *McCarthy v. Philadelphia & R. R. Co.* 211 Pa. 193, 60 Atl. 778. Returns made by a physician to the assessors, showing all of his property, including debts due or to become due to him, is inadmissible for the purpose of showing the amount of his income from his practice in former years. *Nelson v. Boston & M. R. Co.* 155 Mass. 356, 29 N. E. 586. Evidence of salaries and fees earned in an office which expired before the accident is inadmissible to show earning capacity. *Chicago, St. P. M. & O. R. Co. v. Myers*, 25 C. C. A. 486, 49 U. S. App. 279, 80 Fed. 361.

Evidence that plaintiff was receiving a specified salary per month is persuasive, although not conclusive, evidence that such amount was a fair value of his earning power. *Goodhart v. Pennsylvania R. Co.* 177 Pa. 1, 35 Atl. 191. But evidence of the age, health, and habit of a person is not sufficient to sustain a verdict based on his probable earnings with nothing to show his earning power or his business habits or past earnings. *McHugh v. Schlosser*, 159 Pa. 480, 23 L.R.A. 574, 28 Atl. 291.

Evidence that a person suing for personal injuries which compelled her to give up her position had been promised an increase of salary within a short time if she remained and proved satisfactory is competent. *Bryant v. Omaha & C. B. R. & Bridge Co.* 98 Iowa, 483, 67 N. W. 392.

Evidence of industrious habits has been admitted as an element in determining earning capacity. *Forsyth v. Wallace*, 92 Wash. 523, 159 Pac. 696.

So contributions formerly made to support of family from profit by deceased blacksmith held competent on question of deceased's earning capacity. *Baxter v. Philadelphia & R. R. Co.* 264 Pa. 467, 9 A.L.R. 504, 107 Atl. 881. See also notes in 15 Mich. L. Rev. 80 and 18 Mich. L. Rev. 238.

⁶ In personal injury cases: *Wallace v. Pennsylvania R. Co.* 195 Pa. 127, 52 L.R.A. 33, 45 Atl. 685, holding profits of injured boarding house keeper competent; *Rabinowitz v. Hawthorne*, 89 N. J. L. 308, 98 Atl. 315, admitting testimony from memory of injured huckster, who kept no books, as to his average profits; *Kronold v. New York*, 186 N. Y. 40, 78 N. E. 572, 20 Am. Neg. Rep. 690, where injured plaintiff who had been engaged in selling embroidery was allowed to show profits of that business even though he had had small capital invested.

But where the business is of such a nature that the profits are uncertain, proof of past profits is inadmissible. *Masterton v. Mt. Vernon*, 58 N. Y. 391.

The true test is whether the profits are capable of being estimated "with a reasonable degree of certainty." *Wolcott v. Mount*, 36 N. J. L. 265, 13 Am. Rep. 438. See also Note on Prospective Profits as Damages in 19 Columbia L. Rev. 399.

Where one was engaged in the business of fishing the profits were held not too uncertain and speculative to be allowed in evidence. *Lund v. Tyler*, 115 Iowa, 236, 88 N. W. 333. See generally note in 17 Columbia L. Rev. 163.

In suits for damages to property: The profits of a business before an accident may be proved for the purpose of showing the loss resulting from the destruction or suspension of the business by reason of the accident. *Evans v. Murphy*, 87 Md. 498, 40 Atl. 109.

⁷ *Mahoney v. San Francisco & S. M. R. Co.* 110 Cal. 471, 42 Pac. 968 (so held under a statute which limits the damages to the "pecuniary" injuries); *Chicago, P. & St. L. R. Co. v. Woolridge*, 174 Ill. 330, 51 N. E. 701; *Dallas v. Moore*, 32 Tex. Civ. App. 230, 74 S. W. 95. (See McEachem's Tex. Civ. Stats. Anno. 1913, art. 4704, vol. 2, p. 1701.)

The more prosperous condition of the decedent's family after his death is inadmissible where the statute gives the widow the gross value of her husband's life. *Boswell v. Barnhart*, 96 Ga. 521, 23 S. E. 414. And see note 8, *infra*. (See Park's Anno. Code of Va. 1915, § 4424, vol. 3, p. 2669.)

⁸ Where there is no dependent condition between decedent and his kindred, their poverty or wealth can furnish no guidance to the jury in fixing the damages, but where the head of a family is taken away the fullest insight into the family circumstances is of value in determining the injury. *Staal v. Grand Rapids & I. R. Co.* 57 Mich. 239, 23 N. W. 795. Evidence that the widow and children were dependent upon the decedent before and at his death for their support is admissible. *Swift v. Foster*, 163 Ill. 50, 44 N. E. 837.

Evidence as to the financial condition and means of support of the parents of deceased is admissible under a statute which limits the damages to the pecuniary injury sustained. *Cincinnati Street R. Co. v. Altemeier*, 60 Ohio St. 10, 53 N. E. 300; *Potter v. Chicago & N. W. R. Co.* 21 Wis. 373, 94 Am. Dec. 548. To the same effect are *Pressman v. Mooney*, 5 App. Div. 121, 39 N. Y. Supp. 44; *Lipp v. Otis Bros. & Co.* 28 App. Div. 228, 51 N. Y. Supp. 13; *Chicago v. Powers*, 42 Ill. 169, 89 Am. Dec. 418; *Augusta R. Co. v. Glover*, 92 Ga. 132, 18 S. E. 406; *Galveston, H. & S. A. R. Co. v. Bonnett*, — Tex. Civ. App. —, 38 S. W. 813. And such evidence is admissible without being specially pleaded. *International & G. N. R. Co. v. Knight*, 91 Tex. 660, 45 S. W. 556.

Where decedent was accustomed to contribute to his father's support, evidence of the father's financial condition was held proper on the

question of the probable continuance of the support. *United States Electric Lighting Co. v. Sullivan*, 22 App. D. C. 115.

A husband's circumstances and financial condition may be proved to enable the jury to assess the damages for the negligent death of his wife under a statute authorizing such damages as are fair and just with reference to the pecuniary injuries resulting from such death. *Thoresen v. La Crosse City R. Co.* 94 Wis. 129, 68 N. W. 548. Evidence of a husband's wealth at the time of the negligent killing of his wife is admissible in an action for damages by his fourteen-year-old girl to show what aid she could expect to receive from the continuance of her mother's life. *Gulf, C. & S. F. R. Co. v. Younger*, 90 Tex. 387, 38 S. W. 1121.

9 *Hesse v. Columbus, S. & H. R. Co.* 58 Ohio St. 167, 50 N. E. 354; *Brown v. Chicago, R. I. & P. R. Co.* 64 Iowa, 652, 21 N. W. 193; *Bonnet v. Galveston, H. & S. A. R. Co.* 89 Tex. 72, 33 S. W. 334. Evidence that decedent, a railroad employee, could do a good day's work as a plasterer, and as to the wages paid to plasterers at the time of his death, is admissible. *Grimmelman v. Union P. R. Co.* 101 Iowa, 74, 70 N. W. 90.

The value of a fire insurance agent's business may be shown on the question of damages resulting from his wrongful death. *Wheeling & L. E. R. Co. v. Parker*, 29 Ohio C. C. 1.

10 *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 782, 22 So. 53; *Johnson v. Smith*, 64 Me. 553; *Webb v. Gilman*, 80 Me. 177, 13 Atl. 688; *Courvoisier v. Raymond*, 23 Colo. 113, 47 Pac. 284; *Johnson v. Allen*, 100 N. C. 131, 5 S. E. 666; *Rowe v. Moses*, 9 Rich. L. 423, 67 Am. Dec. 560; *Matheis v. Mazet*, 164 Pa. 580, 30 Atl. 434; *Rea v. Harrington*, 58 Vt. 181, 56 Am. Rep. 561, 2 Atl. 475; *Eagleton v. Kabrich*, 66 Mo. App. 231; *Willett v. Johnson*, 13 Okla. 563, 76 Pac. 174; *Greenenberg v. Western Turf Asso.* 140 Cal. 357, 73 Pac. 1050; *Bogue v. Gunderson*, 30 S. D. 1, 137 N. W. 595, Ann. Cas. 1915B, 126; see also note in 26 Harvard L. Rev. 270.

Contra: *Guengerech v. Smith*, 34 Iowa, 348. The rule in Iowa excludes evidence of defendant's wealth and social position except in cases of breach of promise to marry and of slander. *Bailey v. Bailey*, 94 Iowa, 598, 63 N. W. 341; *Givens v. Berkley*, 108 Ky. 236, 56 S. W. 158; *Southern Car & Foundry Co. v. Adams*, 131 Ala. 147, 32 So. 503.

But evidence of the wealth of one of the defendants in a libel suit, offered as bearing on the allowance of exemplary damages, is inadmissible, as the verdict must be against all the defendants, and may be collected from any of them. *Washington Gaslight Co. v. Lansden*, 172 U. S. 534, 43 L. ed. 543, 19 Sup. Ct. Rep. 296.

11 Evidence of the financial standing of defendant in an action for slander is admissible to show the influence his words would have in the community. *Bennett v. Hyde*, 6 Conn. 24; *Humphries v. Parker*, 52 Me. 502; *Botsford v. Chase*, 108 Mich. 432, 66 N. W. 325; *Womack*

v. Circle, 29 Gratt. 192. *Contra*: Ware v. Cartledge, 24 Ala. 622, 60 Am. Dec. 489; Enos v. Enos, 58 Hun, 48, 11 N. Y. Supp. 415; Austin v. Bacon, 49 Hun, 388, 3 N. Y. Supp. 587; Morris v. Barker, 4 Harr. (Del.) 520. The true subject of inquiry is the character, standing, and influence of the defendant, to constitute which wealth is not a necessary ingredient. Palmer v. Haskins, 28 Barb. 90.

¹² Evidence of the wealth of defendant in an action for breach of promise to marry is admissible, not to show his ability to pay damages, but as tending to show the condition in life which plaintiff would have secured by a consummation of the marriage contract. Hunter v. Hatfield, 68 Ind. 416; Bennett v. Beam, 42 Mich. 346, 4 N. W. 8; Stratton v. Dole, 45 Neb. 472, 63 N. W. 875; Kniffen v. McConnell, 30 N. Y. 285; Olson v. Solverson, 71 Wis. 667, 38 N. W. 329; Birum v. Johnson, 87 Minn. 362, 92 N. W. 1.

Evidence of defendant's wealth is admissible in an action by a woman for deceiving her into a void marriage with him,—especially where she claims damages for the value of her services in accumulating the property. Morrill v. Palmer, 68 Vt. 1, 33 L.R.A. 411, 33 Atl. 829.

b. General reputation.—General repute is not competent as tending to show financial condition;¹ but it is competent as tending to show knowledge thereof, or the good faith of a person who acted in reliance on such repute.²

¹ Sheldon v. Root, 16 Pick. 567, 28 Am. Dec. 266.

But the wealth of defendant in a slander suit, when competent (see § 2, a, this title) can only be proved by general reputation, and not by particular facts. Stanwood v. Whitmore, 63 Me. 209. And evidence as to the financial condition of defendant in an action for breach of promise to marry should be confined to general reputation. Kniffen v. McConnell, 30 N. Y. 285; Stratton v. Dole, 45 Neb. 472, 63 N. W. 875.

² Blanchard v. Mann, 1 Allen, 433. But evidence as to a person's reputed wealth is inadmissible to show the good faith of one who made incorrect representations as to the former's wealth upon his "personal knowledge." Browning v. National Capital Bank, 13 App. D. C. 1. And evidence of a mere rumor that a banker was engaged in stock speculations is inadmissible for the purpose of showing by reputation his financial standing. People ex rel. Nash v. Faulkner, 28 N. Y. S. R. 52, 8 N. Y. Supp. 376.

3. Physical condition.

a. Photographs.—A photograph, if proved to be correct, is

competent to show the physical condition of a person as apparent to the eye at the time it was taken.¹ And this rule extends to X-ray photographs offered to show the condition of a bone hidden from view.²

¹ *Cowley v. People*, 83 N. Y. 464, 38 Am. Rep. 464 (photographs of children ill treated); *Reddin v. Gates*, 52 Iowa, 210, 2 N. W. 1079 (ferrotype of plaintiff's back and shoulder showing effect of assault); *Alberti v. New York, L. E. & W. R. Co.* 118 N. Y. 77, 6 L.R.A. 765, 23 N. E. 35 (photograph showing manner in which injured person's limbs have been contracted).

Photograph of a child is competent to show probabilities of further growth and future development, although taken two years before the child's death. *Taylor, B. & H. R. Co. v. Warner*, 88 Tex. 642, 32 S. W. 868. See also PHOTOGRAPHS.

As to use in evidence of photographs of persons or parts of the body, see also notes in 35 L.R.A. 805, and 51 L.R.A. (N.S.) 843.

² *Bruce v. Beall*, 99 Tenn. 303, 41 S. W. 445; *Smith v. Grant*, 29 Chicago Legal News, 145; *Geneva v. Burnett*, 65 Neb. 464, 58 L.R.A. 287, 101 Am. St. Rep. 628, 91 N. W. 275 (to show condition of internal tissue). See L.R.A. notes above referred to.

And the fact that a sciagraph of an injured hip was taken five years after the injury does not render it inadmissible in evidence upon the question of the character of the injury. *Bonnet v. Foote*, 47 Colo. 282, 28 L.R.A. (N.S.) 136, 107 Pac. 252.

But in *Wingfield v. McClintock*, 85 Kan. 207, 113 Pac. 394, an X-ray picture of a set of false teeth placed under a dead body, taken from the opposite side of the body was rejected by the court as not having been taken under such conditions as to demonstrate that a like picture of the neck or stomach of a living patient would disclose the presence or absence of a set of teeth supposed to have been swallowed.

b. Direct testimony.—The rule which allows a witness to testify to his own condition¹ does not admit his statement of what he learned about himself from his medical attendant, nor from others, even as to his condition when unconscious.²

By so testifying as to his condition, the witness does not waive the confidential character of his communication with his physician so that the latter's testimony becomes admissible.³

¹ See EFFECT; FEELINGS.

² *Hagadorn v. Connecticut Mut. L. Ins. Co.* 22 Hun, 249.

³ *Arizona & N. M. R. Co. v. Clark*, 235 U. S. 669, 59 L. ed. 415, L.R.A. 1915C, 834, 35 Sup. Ct. Rep. 210. See also notes in 15 Columbia L. Rev. 199 and 28 Harvard L. Rev. 532. *Contra*: *McKenney v. American Locomotive Co.* 164 App. Div. 625, 149 N. Y. Supp. 826.

c. Inspection in court.—If physical condition of a party is material, he has a right, when giving his testimony as to it, to exhibit it to the jury,¹ or to an expert called to describe the injury;² but he has not a right to make unsuccessful efforts before them, as evidence in his own behalf, of his incapacity.³ As to compulsory exhibition the cases are conflicting.⁴

¹ *Hess v. Lowrey*, 122 Ind. 225, 7 L.R.A. 90, 23 N. E. 156; *Topeka v. Bradshaw*, 5 Kan. App. 879; Appx., 48 Pac. 751; *Langworthy v. Greene Twp.* 95 Mich. 93, 54 N. W. 697; *Edwards v. Three Rivers*, 96 Mich. 625, 55 N. W. 1003; *Cunningham v. Union P. R. Co.* 4 Utah, 206, 7 Pac. 795; *Carrico v. West Virginia, C. & P. R. Co.* 39 W. Va. 86, 24 L.R.A. 50, 19 S. E. 571; *Townsend v. Briggs*, 3 Cal. Unrep. 803, 32 Pac. 307.

But not in an action for malpractice where several years have elapsed since the injury has healed, since such an inspection could not aid the jury in determining the merits or demerits of the treatment. *Carstens v. Hanselman*, 61 Mich. 426, 28 N. W. 159. So it is error to allow plaintiff, in an action for personal injuries due to the bite of a dog, to exhibit his condition three years thereafter, and nine months after the time of his suffering therefrom as fixed in the declaration, where no testimony was offered to show that his condition had not changed for the worse. *Fench v. Wilkinson*, 93 Mich. 322, 53 N. W. 530.

² *Mulhado v. Brooklyn City R. Co.* 30 N. Y. 370 (the leading case); *Lanark v. Dougherty*, 153 Ill. 163, 38 N. E. 892. And the expert may place him in different attitudes to enable the jury to determine the extent of his disability. *Citizens' Street R. Co. v. Willooby*, 134 Ind. 563, 33 N. E. 627.

³ *Clark v. Brooklyn Heights R. Co.* 177 N. Y. 359, 69 N. E. 647, affirming 78 App. Div. 478, 79 N. Y. Supp. 811.

See also ABILITY; HANDWRITING.

⁴ As upholding the power of the court to compel the witness to exhibit his condition or submit to a personal examination in the presence of the jury, see *St. Louis S. W. R. Co. v. Dobbins*, 60 Ark. 486, 30 S. W. 887, 31 S. W. 147 (discretionary to order it to be made in

court or out); *Hall v. Manson*, 99 Iowa, 698, 34 L.R.A. 207, 68 N. W. 922; *Atchison, T. & S. F. R. Co. v. Thul*, 29 Kan. 466, 44 Am Rep. 659; *Graves v. Battle Creek*, 95 Mich. 266, 19 L.R.A. 641, 54 N. W. 757; *Miami & M. Turnp. Co. v. Baily*, 37 Ohio St. 104; *Bagley v. Mason*, 69 Vt. 175, 37 Atl. 287. But the application should not be granted if the examination will necessarily involve the use of anæsthetics. *Strudgeon v. Sand Beach*, 107 Mich. 496, 65 N. W. 616.

Several courts deny the existence of any power to compel such exhibition. *Illinois C. R. Co. v. Griffin*, 25 C. C. A. 413, 53 U. S. App. 22, 80 Fed. 278; *Mills v. Wilmington City R. Co.* 1 Marv. (Del.) 269, 40 Atl. 1114; *Parker v. Enslow*, 102 Ill. 272, 40 Am. Rep. 588; *People v. McCoy*, 45 How. Pr. 216; *Neill v. Brooklyn Elev. R. Co.* 13 Misc. 403, 34 N. Y. Supp. 1144.

Mr. Abbott in the first edition suggested these rules: The better opinion is that a party not testifying in his own behalf, nor voluntarily exhibiting his condition, cannot be absolutely required at the instance of the adverse party, to exhibit such condition. But the court may require it as the condition of a favor; and in any case refusal in a civil action may be considered by the jury as evidence against him. As to cross-examination, the better opinion is that if he has testified in regard to it on his own behalf, or voluntarily exhibited his physical condition, the court has power to require him to exhibit it upon cross-examination. (So far as this proposition authorizes compulsory after voluntary exhibition it is supported by *Haynes v. Trenton*, 123 Mo. 326, 27 S. W. 622; *Winner v. Lathrop*, 67 Hun, 511, 22 N. Y. Supp. 516.) If on direct he has testified as to his ability to do an ordinary physical act, such as walking, riding, or writing, the court may require him to attempt such an act in the presence of the jury. See § 5, ABILITY; § 2, HANDWRITING.

For other cases, see notes in 14 L.R.A. 466, 23 L.R.A.(N.S.) 463, and L.R.A.1915E, 936.

As to waiver of right to object to physical examination or exhibition of person, see note in 2 L.R.A.(N.S.) 386.

As to when refusal of order for physical examination amounts to an abuse of discretion, see note in 15 L.R.A.(N.S.) 663.

d. Inspection out of court.—In a suit to annul a marriage on the ground of impotence the court has power to compel the parties to submit to a physical examination whenever necessary to ascertain facts which are essential to a proper determination of the cause.¹ As to the power of the court in an action for personal injuries to compel the injured person to submit to a physi-

cal examination by experts to enable them to testify to the nature and extent of the injuries from knowledge derived from the examination, the same conflict exists as was noted in the preceding section.²

¹ *Devanbagh v. Devanbagh*, 5 Paige, 554, 28 Am. Rep. 443; Anonymous, 89 Ala. 291, 7 L.R.A. 425, 7 So. 100; *C. v. C.* 32 L. J. Prob. N. S. 12. And see note to *McQuigan v. Delaware, L. & W. R. Co.* 14 L.R.A. 466.

² The majority of the cases uphold the court's power to order such examination. *Alabama G. S. R. Co. v. Hill*, 90 Ala. 71, 9 L.R.A. 442, 8 So. 90; *White v. Milwaukee City R. Co.* 61 Wis. 536, 50 Am. Rep. 154, 21 N. W. 524; *Lane v. Spokane Falls & N. W. R. Co.* 21 Wash. 119, 46 L.R.A. 153, 57 Pac. 367; *Owens v. Kansas City, St. J. & C. B. R. Co.* 95 Mo. 169, 8 S. W. 350; *Richmond & D. R. Co. v. Childress*, 82 Ga. 719, 3 L.R.A. 808, 9 S. E. 602.

It is within the sound discretion of the trial court to order the physical examination made or not, and to direct whether it shall be made in court or out. *St. Louis S. W. R. Co. v. Dobbins*, 60 Ark. 481, 30 S. W. 887, 31 S. W. 147. But it is reversible error to refuse the application where the ends of justice require the disclosure, and the examination may be made without danger to life or health. *Schroeder v. Chicago, R. I. & P. R. Co.* 47 Iowa, 375; *Alabama G. S. R. Co. v. Hill*, 90 Ala. 71, 9 L.R.A. 442, 8 So. 90; *Sibley v. Smith*, 46 Ark. 275, 55 Am. Rep. 584; *Lane v. Spokane Falls & N. W. R. Co.* 21 Wash. 119, 46 L.R.A. 153, 75 Am. St. Rep. 821, 57 Pac. 367.

After plaintiff has exhibited his or her condition to the jury it is ordinarily held reversible error to refuse to permit the examination by defendant's experts to enable them to give their opinion as experts as to the plaintiff's condition. *Chicago, R. I. & T. R. Co. v. Langston*, 92 Tex. 709, 50 S. W. 574, 51 S. W. 331.

So where plaintiff voluntarily exhibited a portion of her body showing where one of two operations had been performed it was held error to refuse defendant the right through his physicians to examine the other part operated on. *Booth v. Andrus*, 91 Neb. 810, 137 N. W. 884. *Contra*, *Wheeler v. Chicago & W. I. R. Co.* 267 Ill. 306, 108 N. E. 330.

But the order for physical examination is properly refused where it does not appear that a more certain ascertainment of the facts can be elucidated by further expert examination. *Belt Electric Line Co. v. Allen*, 19 Ky. L. Rep. 1656, 44 S. W. 89. And that the request was for examination by physicians selected by defendant alone is a sufficient ground for refusing it. *Smith v. Spokane*, 16 Wash. 403, 47 Pac. 888.

If such examination is proper under any circumstances, it must be made before trial. *Chadron v. Glover*, 43 Neb. 732, 62 N. W. 62. The

application should be made a sufficient time before trial so that the examination may be deliberately and carefully made and without interfering with the progress of the trial; and where not made until after plaintiff had closed his testimony it was properly refused, no showing being made that the examination was essential to a full understanding of the injuries. *Southern Kansas R. Co. v. Michaels*, 57 Kan. 474, 46 Pac. 938. It is not an abuse of discretion to refuse the request of counsel first made after plaintiff has rested, with no showing that any benefit would be derived therefrom. *Terre Haute & I. R. Co. v. Brunker*, 128 Ind. 542, 26 N. E. 178. So, an application is properly refused where not made until plaintiff has closed his evidence, and it is then impracticable without too long a suspension of the trial to obtain a competent and satisfactory physician by whom an impartial examination may be made. *Savannah, F. & W. R. Co. v. Wainwright*, 99 Ga. 255, 25 S. E. 622. Application is properly refused where not made until after the close of plaintiff's evidence with no reason shown for the delay (*Miami & M. Turnp. Co. v. Baily*, 37 Ohio St. 104),—especially where the plaintiff offers to submit to a private examination as soon as the attendance of medical experts on his behalf have been secured. *Hess v. Lowrey*, 122 Ind. 225, 7 L.R.A. 90, 23 N. E. 156. And the order should not be made where the person is willing to be examined by competent and disinterested men without such order. *Gulf, C. & S. F. R. Co. v. Norfleet*, 78 Tex. 321, 14 S. W. 703.

The power is absolutely denied by several courts in the absence of any statutory enactment. *Union P. R. Co. v. Botsford*, 141 U. S. 250, 35 L. ed. 734, 11 Sup. Ct. Rep. 1000; *Peoria, D. & E. R. Co. v. Rice*, 144 Ill. 227, 33 N. E. 951; *McQuigan v. Delaware, L. & W. R. Co.* 129 N. Y. 50, 14 L.R.A. 466, 29 N. E. 235. By an amendment to N. Y. Code Civ. Proc. § 873, power is expressly given trial courts to order a compulsory physical examination of one suing for personal injuries if a requisite showing be made, but an order for such examination can only be made in connection with or as a part of an order for the examination of a party before trial, and a physical examination cannot be authorized as an independent proceeding. *Lyon v. Manhattan R. Co.* 142 N. Y. 298, 25 L.R.A. 402, 37 N. E. 113. (2d ed. Birdseye, Cummings & Gilbert's Consol. Laws of N. Y. Ann. 1919, vol. 9, p. 9536.) Nor does the statute authorize an application to be made upon the trial. *Cole v. Fall Brook Coal Co.* 87 Hun, 584, 34 N. Y. Supp. 572. A state statute authorizing such examination will be followed in trials at common law in the United States courts sitting in the state where the statute exists, there being no law of Congress in conflict therewith. *Camden & S. R. Co. v. Stetson*, 177 U. S. 172, 44 L. ed. 721, 20 Sup. Ct. Rep. 617.

For additional cases, see notes in 14 L.R.A. 466, 23 L.R.A. (N.S.) 463; and L.R.A.1915E, 936.

II. CONDITION OF PLACES AND THINGS.

4. Direct testimony.

a. In general.—On a subject within the common knowledge and observation of ordinary life, any witness having had adequate opportunity of observation may be asked what was the condition of a place or thing.¹ Otherwise, however, where the condition of the place or thing is not observable except upon examination.²

If the subject require special knowledge or experience, a witness so qualified may state his opinion.³

¹ Thus, a witness who has stated the condition of a thing may characterize it with the impression made on his mind at the time, as, "I thought it was a dangerous place, . . . the condition was bad,"—for this is a statement of knowledge, not of opinion. *Lund v. Tyngsborough*, 9 Cush. 36, 39. To the same effect, see *Ryan v. Bristol*, 63 Conn. 26, 27 Atl. 309 (sustaining such a holding on the ground that the elements that enter into the question of reasonable safety may be so numerous and difficult to describe that they cannot be clearly shown to a jury); *Kelleher v. Keokuk*, 60 Iowa, 473, 15 N. W. 280, abstr. 28 Alb. L. J. 334 (statement in affidavit "that sidewalk was in good repair" therefore competent); *Elkhart v. Witman*, 122 Ind. 538, 23 N. E. 796 (that it is not improper to permit a witness to testify that "there were defects in" a sidewalk). In *Reese v. Morgan Silver Min. Co.* 17 Utah, 489, 54 Pac. 759, a witness who had visited a mine four days after an accident, and was shown by the shift boss the ladder from which the deceased fell, was permitted to testify as to its rotten condition as against an objection that he knew it was the ladder in use at the time of the accident by hearsay only.

Compare *Yeaw v. Williams*, 15 R. I. 20, 23 Atl. 33 (holding that whether a highway was safe, convenient, and in good repair at the time of the accident is not a subject for expert testimony. So held, where the question at issue was whether a post standing out at a curve of the road was dangerous); *Clark Civil Twp. v. Brookshire*, 114

Ind 437, 16 N. E. 132 (witnesses acquainted with the highway and its condition before an improvement, and experienced in improving and maintaining highways, may give their own opinion as to the character of culverts, fills, and the amount of graveling necessary to render the road in good repair).

And see extensive note in L.R.A.1918A, 662 on right of witness to express an opinion on nontechnical subject because of impossibility or difficulty of reproducing the data. See also title OPINIONS, post.

² Thus, a witness cannot testify as to whether a dwelling house destroyed by fire was in good repair. Its condition as a whole is not observable except upon examination, and therefore does not come within the rule laid down in the cases in the preceding note. There might well be wide differences of opinion as to what would constitute good repair. It should be described in detail, and the jury permitted to determine its condition. *McMahon v. Dubuque*, 107 Iowa, 62, 77 N. W. 517.

But in *Van Gent v. Chicago, M. & St. P. R. Co.* 80 Iowa, 526, 45 N. W. 913, an experienced brakeman was allowed to testify that the platform of a caboose was in bad condition and insufficient, where he had made an examination, and his conclusions were based on difference, explained to him, between the car in question and others.

³ An expert may be asked "what was the condition of the fastenings of the vessel, as to safety," for this is a subject of science and experience, not of common knowledge. *Moore v. Westerveldt*, 27 N. Y. 234, 25 How. Pr. 277 (approved in *Eastern Transp. Line v. Hope*, 95 U. S. 297, 24 L. ed. 477).

So, also, as to fitness of place to store cheese. *Rust v. Eckler*, 41 N. Y. 488, opinion by Woodruff, J., at p. 495. But *Daniels, J.*, deemed that the question did not call for the witness's opinion. Even under the present somewhat stricter rules an expert's opinion could be taken by an hypothetical question.

Allowing an officer familiar with firearms to answer that the barrel of a pistol was cold, and that there was no indication that it had been fired, was approved in *People v. Driscoll*, 107 N. Y. 414, 420, 14 N. E. 305. And in *Meyers v. State*, 14 Tex. App. 35, 48, a prosecution for assault, a witness experienced in the use of firearms was allowed to state that he had inserted his finger into the muzzle of defendant's gun, and that when withdrawn the finger was wet and black, from which, in his opinion, the gun must have been recently discharged. See also *Wynne v. State*, 56 Ga. 113, 118, where such a witness was allowed to express his opinion whether cartridges had been punctured by snapping them before they were fired.

Opinions of men experienced in the business, upon the question whether fruit shipped a specified distance and under specified circumstances, and arriving in a certain condition, was in proper condition when shipped, were allowed in *Griffin v. Joannes*, 80 Wis. 601, 50 N. W. 785. And in *Hewes v. German Fruit Co.* 106 Cal. 441, 39 Pac. 853, a witness who had testified as to the condition in which he found raisins examined by him was allowed to testify that the examination made by him was made in the usual way in which such examinations are made by experts.

But the opinion of a witness as to the comparison of a track the surface of which is alleged to be uneven so as to endanger walking thereon by employees, with those of other railroad companies in the state generally, was held inadmissible in *Louisville & N. R. Co. v. Chaffin*, 84 Ga. 519, 11 S. E. 891.

In *Leyden v. New York C. & H. R. R. Co.* 55 Hun, 114, 8 N. Y. Supp. 187, it was held that the jury might say of their own knowledge that a once properly constructed fence of sufficient height and strength to turn cattle might be deemed insufficient and inadequate when permitted to remain in a broken condition in places, leaving a barrier less than 3 feet in height; and that it was not necessary to produce expert witnesses to prove that fact.

b. What witness observed.—A witness experienced in the use or care of things of a nature to require special care may be asked if he observed anything rendering the place where they were kept unfit for the purpose; for this does not call for an opinion, but an observation of fact.¹

¹ *Rust v. Eckler*, 41 N. Y. 488, opinion of Daniels, J., at p. 493 (Woodruff, J., deemed the question proper even as calling for an opinion). A witness may testify that certain shoes appeared as if they had been recently washed. *Com. v. Sturtivant*, 117 Mass. 122, 138, 19 Am. Rep. 401 (trial of an indictment for murder; a leading case).

5. Combining testimony of several witnesses.

Evidence as to the condition of a particular place or thing may be made out by proving by one witness that at a specified time he pointed out the identical place or thing to another, and then proving by the latter the condition at the time it was so pointed out.¹

¹ *Hirsch v. Buffalo*, 21 N. Y. Week. Dig. 312, affirmed it seems, but without opinion, in 107 N. Y. 671, 14 N. E. 608.

For other illustrations of this principle, see FORGOTTEN FACT; IDENTITY; OPINIONS.

6. Condition at another time or place.

a. In general.—Evidence of the condition of a thing or place at a time prior ¹ or subsequent ² to the time at which the condition of the thing or place is a material fact, as bearing on the probable condition at that time, is incompetent unless preceded by prima facie proof that no change has taken place in the meantime; ³ or unless the condition is of such character that it may be presumed that there has been no change during the interval.⁴

For cases ruling on the competency of evidence of condition at another place, see note.⁵

¹ For instances of cases where such evidence was admitted within this rule, see *Baltimore & Y. Turnp. Road v. Parks*, 74 Md. 282, 22 Atl. 399; *Swadley v. Missouri P. R. Co.* 118 Mo. 268, 24 S. W. 140; *The Oriental v. Barclay*, 16 Tex. Civ. App. 193, 41 S. W. 117; *Hunt v. Dubuque*, 96 Iowa, 314, 65 N. W. 319; *Elster v. Seattle*, 18 Wash. 304, 51 Pac. 394; *Erickson v. Barber Bros.* 83 Iowa, 367, 49 N. W. 838; *Rockford City R. Co. v. Blake*, 173 Ill. 354, 50 N. E. 1070, affirming 74 Ill. App. 175; *Martin v. Richards*, 155 Mass. 381, 29 N. E. 591.

According to *Woolsey v. Ellenville*, 84 Hun, 236, 32 N. Y. Supp. 543, evidence of the condition of a sidewalk, gutter, and culvert before the time of the accident, offered to show the condition of the *locus in quo* at the time of the injury, is competent.

The admissibility of evidence of condition before and after accident of property whose defects are alleged to have caused injury is discussed in note in 32 L.R.A.(N.S.) 1084.

² *Green v. Ashland Water Co.* 101 Wis. 258, 43 L.R.A. 117, 77 N. W. 722; *Jones v. New York, N. H. & H. R. Co.* 20 R. I. 210, 37 Atl. 1033; *The Edwin*, 87 Fed. 540.

³ In the following cases the evidence was held to have been properly admitted within this rule; *Sievers v. Peters Box & Lumber Co.* 151 Ind. 642, 662, 50 N. E. 877, 52 N. E. 399; *Schuenke v. Pine River*, 84 Wis. 669, 54 N. W. 1007; *Munger v. Waterloo*, 83 Iowa, 559,

49 N. W. 1028; *Birmingham Union R. Co. v. Alexander*, 93 Ala. 133, 9 So. 525; *Jacksonville & S. E. R. Co. v. Southworth*, 135 Ill. 280, 25 N. E. 1093; *Harroun v. Brush Electric Light Co.* 12 App. Div. 126, 42 N. Y. Supp. 716; *Roskee v. Mount Tom Sulphite Pulp Co.* 169 Mass. 528, 48 N. E. 766; *Rosenbaum v. Shoffner*, 98 Tenn. 624, 40 S. W. 1086; *Ahern v. Steele*, 48 Hun, 517, 1 N. Y. Supp. 259 (evidence of condition of hole in pier within two days; and of measurement six months afterward "of the same hole" through which deceased fell,—competent); *Chicago v. Dalle*, 115 Ill. 386, 5 N. E. 578, 580 (negligence in nonrepair of sidewalk; competent to show the condition at the time of the accident, by proof of its condition a few days—in this case three or four days—before and afterward); *Mackie v. Central R. Co.* 54 Iowa, 540, 6 N. W. 723 (condition of a gate at private crossing existing two or three days after an accident, competent; and in the absence of other evidence it will be presumed that its condition remained unchanged); *Clancy v. Byrne*, 56 N. Y. 129, 15 Am. Rep. 391, with note, reversing 65 Barb. 344 (a rotten plank in a pier will not, for the purpose of charging a lessor with damages for injuries, be presumed to have been in that condition five years previous to the injury caused by it); *Yates v. People*, 32 N. Y. 509, 512, 518 (to prove how much light was thrown by a street lamp, a witness cannot testify to an examination of it made four months afterwards, there being no proof that the structure or condition of the lamp or the fluid used was the same); *Holden v. New York C. R. Co.* 54 N. Y. 662 (condition of poultry, when ultimately received from a connecting carrier, admissible as tending to show its condition five days before, when delivered to such carrier by defendants after delay).

¶ *Hoyt v. Des Moines*, 76 Iowa, 430, 41 N. W. 63. And for instances of cases admitting evidence coming within this rule, see *Jessup v. Osceola County*, 92 Iowa, 178, 60 N. W. 485; *Gulf, C. & S. F. R. Co. v. Johnson*, 83 Tex. 628, 19 S. W. 151; *Johnson v. St. Paul*, 52 Minn. 364, 54 N. W. 735.

That it is admissible when the condition is a permanent one in its nature, and not liable to change, see *Marston & Dingley*, 88 Me. 546, 34 Atl. 414.

Sometimes the intervening time that has elapsed is so short as to preclude the probability of any change in the condition; and in such case the evidence is admissible. See, for example, *Shippy v. Au Sable*, 85 Mich. 280, 48 N. W. 584 (condition of a crosswalk the morning after an accident which occurred after dark); *Doyle v. Missouri K. & T. Trust Co.* 140 Mo. 1, 41 S. W. 255 (condition of scaffolding a few hours before an accident); *Woods v. Long Island R. Co.* 11 App. Div. 16, 42 N. Y. Supp. 140 (condition of certain appliances twenty minutes after an accident); *Lohr v. Philipsburg*, 165 Pa. 109, 30 Atl. 822 (condition of sidewalk two days after an

accident); *Chicago & N. W. R. Co. v. Gillison*, 173 Ill. 264, 50 N. E. 657 (condition of drawbar of car ten hours after accident).

⁵ *Standard Oil Co. v. Van Etten*, 107 U. S. 325, 27 L. ed. 319, 1 Sup. Ct. Rep. 178 (count of lumber at one end of route, competent to contradict count at the other end).

Lehigh Zinc & Iron Co. v. Trotter, 42 N. J. Eq. 661, 9 Atl. 694 (condition of ore in respect to moisture at the mine not provable by evidence of condition after transportation 62 miles in open car).

Reed v. New York C. R. Co. 45 N. Y. 574, overruling 56 Barb. 493 (evidence of the bad condition of railroad track half a mile away from the place of accident not admissible).

Murphy v. New York C. R. Co. 66 Barb. 125 (the same within a few rods admissible).

Belton v. Turner, — Tex. Civ. App. —, 27 S. W. 831 (defective condition of walks in the neighborhood of the place of the accident before the injury admissible to show that the city knew or ought to have known of the defect).

Haley v. Jump River Lumber Co. 81 Wis. 412, 51 N. W. 321 (an action for personal injuries alleged to have resulted in part from the roughness of the railroad roadbed, causing the fastenings of logs upon a car to give way; plaintiff may show that any part of the road over which the train had run on the trip was rough or uneven, but cannot go into proof of the general condition of the road in other respects or in other localities, except upon cross-examination of witnesses for the adverse party).

Alabama G. S. R. Co. v. Hill, 93 Ala. 514, 9 So. 722 (an action for personal injuries from the derailing of a railroad car by reason of the defective condition of the ties and rails; competent to show that other rails and ties in the neighborhood were also defective).

Jacksonville & S. E. R. Co. v. Southworth, 135 Ill. 250, 25 N. E. 1093 (competent to show the condition of the track over which the train had to pass before reaching the place of the accident).

Taylor, B. & H. R. Co. v. Taylor, 79 Tex. 104, 14 S. W. 918 (proper to show the condition of the roadbed immediately before and at the time a wreck occurred at places other than that of the wreck).

Fitzgerald v. Clark, 17 Mont. 100, 30 L.R.A. 803, 42 Pac. 273 (that the existence of a fault in one mineral vein cannot be proved by showing a fault in another vein which is claimed to be a continuity of the vein in question, in the absence of a showing of a continuity in the latter fault).

Haynes v. Hillsdale, 113 Mich. 44, 71 N. W. 466 (proper to show that portions of a plank walk other than that on which the accident occurred were out of repair, upon the question of notice to the city of the defective condition of the walk at the place where the accident occurred, where the different portions of the walk were built at the same time, and about twenty years before the accident).

Strudgeon v. Sand Beach, 107 Mich. 496, 65 N. W. 616 (proper to show generally defective condition of sidewalk in immediate vicinity of place where plaintiff was injured).

Alexandria Min. & Exploring Co. v. Irish, 16 Ind. App. 534, 44 N. E. 680 (evidence as to leak in natural gas company's main at point other than that from which gas claimed to have caused an explosion must have come, but in the same line of pipe, competent to show the general condition of the pipe). *Jessup v. Osceola County*, 92 Iowa, 178, 60 N. W. 485 (condition of roads and streams at other places held immaterial upon the condition of an approach to a bridge at which an accident occurred).

Ledgerwood v. Webster City, 93 Iowa, 726, 61 N. W. 1089 (in an action against a city for personal injuries caused by a loose plank in a sidewalk evidence of other loose planks in that particular part of the walk competent).

Texas Trunk R. Co. v. Johnson, 86 Tex. 421, 25 S. W. 417 (an action against a railroad company for injuries to a passenger, caused by the alleged unsafe condition of the roadbed; holding it proper to admit evidence of the general bad condition of the road, and that it is not necessary to confine the evidence to the place of the wreck of the train causing the injuries complained of).

Grant v. Raleigh & G. R. Co. 108 N. C. 462, 13 S. E. 209 (condition of a railroad track at places other than that at which the accident in question happened, not competent upon the condition of the track at the latter place).

Louisville & N. R. Co. v. Henry, 19 Ky. L. Rep. 1783, 44 S. W. 428 (the existence of other holes in defendant's depot platform than the hole by which plaintiff was injured, and that the attention of the station agent had been called to such other holes several weeks before the accident).

On an issue involving the degree of light in a tenement house hallway between 4 P. M. and 4:30 P. M. December 13, 1900, it was improper to allow witnesses to testify that they were able to read fine print in this hallway on March 18, 1902. *Bretsch v. Plate*, 82 App. Div. 399, 81 N. Y. Supp. 868.

On the question as to the condition of a highway at the place of an accident it was proper to ask a witness how long the highway had been out of repair. *Littebrandt v. Sidney*, 77 App. Div. 545, 78 N. Y. Supp. 890.

b. Laying foundation for the evidence.—Slight evidence of the relative condition at the respective times is sufficient, when necessary, to render the testimony competent, leaving its weight to be determined by the jury.¹

¹ *Nesbit v. Garner*, 75 Iowa, 314, 1 L.R.A. 153, 39 N. W. 516 (negligence

in condition of highway. Held, that measurement of depth of depression some time after the accident was competent, upon such comparison as to afford some *data* by which to determine what it was at the time of the accident).

Opinions as to whether the article transported would stand the journey excluded because involving the very question in issue against a carrier. *Gutwillig v. Zuberbier*, 41 Hun, 361.

A witness may properly be allowed to state how often he has been in the habit of seeing a river, for the purpose of laying a foundation for further testimony in reference to changes which have taken place in its course or channel during such time.¹

¹ *Bouvier v. Stricklett*, 40 Neb. 792, 59 N. W. 550.

7. Inspection in court.

For the purpose of proving the condition of a thing, other than the contents of a document, within the rule as to best and secondary evidence, its production in court is not necessary.¹

A party may produce it, if he choose,² but in a civil case cannot compel his adversary to do so.³ If produced it may be exhibited to the jury, and either party may examine a witness upon it, for the purpose of calling the attention of the jury to details pointed out by the witness,⁴ and of getting the description upon the record.

¹ Criminal Trial Brief.

² *McMurrin v. Rigby*, 80 Iowa, 322, 45 N. W. 877 (to the effect that in a civil action for rape the underclothing claimed to have been worn by the victim at the time, and which she testifies is in the same condition, except for having been washed, may be received in evidence); *Bender v. Appelbaum*, 123 App. Div. 563, 108 N. Y. Supp. 318 (production of horse). See more fully Civil Trial Brief (4th ed.) p. 432; Criminal Trial Brief.

³ I state this in reference to the ruling in *Hunter v. Allen*, 35 Barb. 42, but doubt its soundness. *Groundwater v. Washington*, 92 Wis. 56, 65 N. W. 871, however, holds it discretionary with the judge to grant an application for such compulsory inspection.

⁴ *King v. New York C. & H. R. Co.* 72 N. Y. 607. (A hook, the breaking of which caused the injury in issue, may, upon proof of its identity, and that it remains in the same condition as at the time of breaking, be shown to the jury; and a witness may be asked if he sees flaws or cross cracks in it.) See more fully on this question Civil Trial Brief (4th ed.) p. 432. And see HANDWRITING.

8. View by court or jury.

An application to have the jury view a place, whether made under the practice at common law or under the statutes,¹ may be granted if the judge, in the exercise of his discretion, deems it proper and necessary.² But it is not error to refuse a view where the conditions existing at the time in question have been changed materially.³ So, too, the court when conducting a trial without a jury may in his discretion view a place involved in the suit,⁴ even though outside the jurisdiction.⁵

¹ For a comprehensive review of the practice generally, see Civil Trial Brief, 4th ed. 437 *et seq.*

² *Banning v. Chicago, R. I. & P. R. Co.* 89 Iowa, 74, 56 N. W. 277. See also cases cited in note to *People v. Thorn*, 42 L.R.A. 372.

³ *Henderson & C. Gravel Road Co. v. Cosby*, 19 Ky. L. Rep. 1851, 44 S. W. 639; *Stewart v. Cincinnati, W. & M. R. Co.* 89 Mich. 315, 17 L.R.A. 539, 50 N. W. 852.

⁴ *Fowler v. Towle*, 49 N. H. 507, 523.

⁵ *Carpenter v. Carpenter*, 78 N. H. 440, L.R.A.1917F, 974, 101 Atl. 628. *Contra*, *State v. Hawthorn*, 134 La. 979, 64 So. 873.

For cases as to view by the jury outside the jurisdiction see note in L.R.A.1917F, 984.

9. Experiments.

The court may allow experiments or demonstrations to be made in open court, if the question is within the range of ordinary knowledge and experience.¹

¹ *Osborne v. Detroit*, 32 Fed. 36. See also note to *Leonard v. Southern P. Co.* 21 Or. 155, 15 L.R.A. 221, 28 Pac. 887; Civil Trial Brief, 4th ed. 444 *et seq.*

10. Official inspection.

An official certificate of inspection pursuant to law is evidence of the fact of inspection, but not of matters therein stated without being required by law, such as safety, etc.¹

A certificate of voluntary inspection, though official and pursuant to usage of trade, is not evidence of the facts stated in it;² but may be made so by testimony to it and its accuracy by those who made it.³

¹ *Erickson v. Smith*, 2 Abb. App. Dec. 64. Compare *The Charles Morgan*, 115 U. S. 69, 29 L. ed. 316, 5 Sup. Ct. Rep. 1172 (excluding finding

of board of inspectors, as to cause of collision, because made on an investigation only of facts bearing on conduct of an officer).

² *Murray v. Great Western Ins. Co.* 39 Hun, 581, and cases cited (survey of vessel).

³ *United States v. Mitchell*, 2 Wash. C. C. 478, Fed. Cas. No. 15,791, (survey of vessel).

11. Use of correct photograph or map.

A map¹ or photograph,² if proved to be correct as of the time to which the issue relates,³ is competent evidence, even though made for the purposes of the trial.⁴

¹ *Curtiss v. Ayrault*, 3 Hun, 487, 5 Thomp. & C. 611; *Missouri, K. & T. R. Co. v. Moore*, 4 Tex. App. Civ. Cas. (Willson) 323, 15 S. W. 714; *Bunker Hill & S. Min. & Concentrating Co. v. Schmelling*, 24 C. C. A. 564, 48 U. S. App. 331, 79 Fed. 263; *Com. v. Hourigan*, 89 Ky. 305, 12 S. W. 550; *Le Beau v. Telephone & Teleg. Constr. Co.* 109 Mich. 302, 67 N. W. 339; *Culbertson v. Holliday*, 50 Neb. 229, 69 N. W. 853; *Chicago, R. I. & P. R. Co. v. Buel*, 56 Neb. 205, 76 N. W. 571, and cases cited; *East Tennessee, V. & G. R. Co. v. Watson*, 90 Ala. 41, 7 So. 813; *Kankakee & S. R. Co. v. Horan*, 131 Ill. 288, 23 N. E. 621; *Adams v. State*, 28 Fla. 511, 10 So. 106.

² *People v. Buddensieck*, 103 N. Y. 487, 57 Am. Rep. 766, 9 N. E. 44 (photograph of a fallen building, in prosecution for negligent construction); *Blair v. Pelham*, 118 Mass. 420 (photograph of defective highway, in action for injuries sustained thereby); *Church v. Milwaukee*, 31 Wis. 512 (photograph of street, and premises injured by change of grade); *Chestnut Hill & S. H. Turnp. Co. v. Piper*, 15 W. N. C. 55 (photographs of bridges or turnpikes, obstructing ditch and endangering travel, admitted though it did not show the whole of the ground); *Locke v. Sioux City & P. R. Co.* 46 Iowa, 109 (photograph of bridge defectively constructed, taken after the accident); *Durst v. Masters*, L. R. 1 Prob. Div. 373 (photograph of altar and communion table or retable, to show relative positions of articles on it); *Cozzens v. Higgins*, 1 Abb. App. Dec. 451, 33 How. Pr. 436 (photograph of a cellar from which plaintiff had been excluded by a trespass). See also cases in note to *Dederichs v. Salt Lake City R. Co.* 35 L.R.A. 802.

Photographs of persons.—*Simpson v. Peoria R. Co.* 179 Ill. App. 307; *Davis v. Seaboard Air Line R. Co.* 136 N. C. 115, 48 S. E. 591, 1 Ann. Cas. 214; *Com. v. Keller*, 191 Pa. 122, 43 Atl. 198; *Young v. State*, 49 Tex. Crim. Rep. 207, 92 S. W. 841.

For additional cases and full discussion see note in 51 L.R.A. (N.S.) 850.

Photographs of places.—*Pickett v. Atlantic Coast Line R. Co.* 153 N. C. 148, 69 S. E. 8; *Zinser v. Sanitary Dist.* 175 Ill. App. 9; *Robinson v. St. Joseph*, 97 Mo. App. 503, 71 S. W. 465; *Raab v. Roberts*, 30 Ind.

App. 6, 64 N. E. 618, 65 N. E. 191; *Beals v. Brookline*, 174 Mass. 1, 54 N. E. 329; and for full explanation see 51 L.R.A.(N.S.) 850.

As to effect and conclusiveness of photographs introduced in evidence, see note in 15 L.R.A.(N.S.) 1162.

³ *Hollenbeck v. Rowley*, 8 Allen, 473 (photographs of rocks and rubbish deposited by trespass; excluded because not properly verified); *Harris v. Quincy*, 171 Mass. 472, 50 N. E. 1042 (photographs of sidewalk at place where a person slipped upon rough ice excluded because not showing slipperiness or roughness of the ice). See also cases in note to *Dederichs v. Salt Lake City R. Co.* 35 L.R.A. 802. See also PHOTOGRAPHS.

A plat purporting on its face to show the location and surroundings where an injury to plaintiff occurred should not be admitted in evidence, where it is not drawn to a scale, and no claim is made that it is any more than a reasonably correct representation of the location. *Pennsylvania Co. v. Reidy*, 72 Ill. App. 343.

But it is not an objection to the admission of a map or plat as explanatory of the testimony of a witness who made it from memoranda of a survey made by him, that it was not made until some time after the survey. *Justen v. Schaaf*, 175 Ill. 45, 51 N. E. 695.

⁴ *Curtiss v. Ayrault*, 3 Hun, 487, 490, 5 *Thomp. & C.* 611 (reversing judgment for refusal to receive it); *People v. Jackson*, 111 N. Y. 362, 19 N. E. 54 (photographs including figures of men stationed for the purpose of marking position of those who were present at the time of the offense).

12. Use of approximate maps, plans, etc.

a. In general.—On an issue involving the situation or condition of premises, a map, plan, or diagram, even though such as not to be competent as original evidence, may be used by counsel, in opening, to explain what he intends to prove.¹

Such a paper, if proved to be reasonably correct,² according to the object of the proposed testimony,³ may be used before the jury to enable a witness to explain to them the facts to which he testifies.⁴

¹ *Battishill v. Humphreys*, 64 Mich. 494, 31 N. W. 894, 903. But *Hill v. Watkins Water & Sewer Comrs.* 77 Hun, 491, 28 N. Y. Supp. 1089, holds it discretionary with the court to allow counsel to so use a map not then proved or put in evidence.

² According to *Jordan v. Duke*, 6 Ariz. 55, 53 Pac. 197, proof of the correctness of a map is not a prerequisite to its introduction, not as substantive evidence, but merely to enable a witness to illustrate his testimony.

³ *Calumet River R. Co. v. Moore*, 124 Ill. 329, 15 N. E. 764 (plan of a

contemplated improvement, which the proposed railway would prevent, admissible to show the uses of the property affected).

⁴ *Clapp v. Norton*, 106 Mass. 33 (holding that a plan so used does not thereby become evidence; and its going to the jury room without objection is no ground of exception).

b. Reasonable accuracy.—On an issue not involving precise extent or boundaries, as in an action for overflowing lands, a plan of the premises showing the general situation and area is competent, in the discretion of the court, for that purpose, though it be not an accurate survey.¹

But a calculatation of a witness, founded on a map or plan, is not competent unless the map is first shown to be reliable evidence.²

¹ *Paine v. Woods*, 108 Mass. 160, 169, *s. p.* *Barrett v. Murphy*, 140 Mass. 133, 144, 2 N. E. 833; *Armendaiz v. Stillman*, 67 Tex. 458, 3 S. W. 678 (map made during low water, not therefore inadmissible on issue as to injury at time of high water).

² *Johnston v. Jones*, 1 Black, 209, 225, 17 L. ed. 117, 121.

Opinion not admissible without facts. A witness who had gathered information from books, records and interviews, relative to the solvency of an association, was not permitted to express an opinion, no facts being disclosed on which his opinion was based. *Pioneer Savings & L. Co. v. Peck*, 20 Tex. Civ. App. 111, 49 S. W. 160.

CONSENT.

1. Unexpressed willingness.

2. Presumption and burden of proof.

See also ACQUIESCENCE; AGREEMENT; ASSENT; DELIVERY; ESTOPPEL; RATIFICATION.

1. Unexpressed willingness.

Unexpressed willingness is not equivalent to consent.¹

¹ *Ford v. Ford*, 143 Mass. 577, 10 N. E. 474.

2. Presumption and burden of proof.

Ordinarily the burden of proving consent is on the one claiming consent,¹ but consent may be presumed in many cases.² Indeed, mere silence may imply consent, if there is a duty to speak,³ though the rule is otherwise where there is no duty to speak out.⁴

¹ *Goodyear Dental Vulcanite Co. v. Bacon*, 151 Mass. 460, 8 L.R.A. 486, 24 N. E. 404 (consent of surety to delivery of bond without signature of principal),

* Thus a party who allows a surgical operation to be performed is presumed to have employed the surgeon for that purpose, and the burden of proof to show lack of consent is on the party alleging it. *State use of Janney v. Housekeeper*, 70 Md. 162, 2 L.R.A. 587, 16 Atl. 382.

And the consent of the mortgagee to the platting of the premises and the donating of streets, alleys, and grounds to the public by the mortgagor, will be presumed from his executing releases and accepting a certain sum per lot. *Boone v. Clark*, 129 Ill. 466, 5 L.R.A. 276, 21 N. E. 850.

And the consent of executors to a specific legacy is presumed where the legatees are in possession under it. *Schley v. Collis*, 13 L.R.A. 568, 47 Fed. 250.

* 1 Story, Eq. Jur. 13th ed. § 385; *Day v. Caton*, 119 Mass. 513, 20 Am. Rep. 347.

* *Ackerman v. True*, 175 N. Y. 353, 13 N. Y. Anno. Cas. 206, 67 N. E. 629, reversing 71 App. Div. 143, 75 N. Y. Supp. 695, *Knoedler v. Glaenzer*, 20 L.R.A. 733, 5 C. C. A. 305, 14 U. S. App. 336, 55 Fed. 895.

CONSIDERATION.

1. Value.
2. Seal.
3. Bona fide purchaser for value.
4. Disproving nominal consideration.
5. Effect of disproving.
6. Oral evidence to vary writing.
7. Presumption and burden of proof.
8. Executory consideration.
9. Executory agreement.
10. Legal, to displace recital of illegal, consideration.
11. Previous agreement.

See also COLLATERAL ORAL AGREEMENT; CONTRACT; DELIVERY.

1. Value.

Where only a money recovery is sought, a consideration of an indeterminate or exaggerated value, if fairly agreed on by

the parties, is sufficient in law to bind the promisor, though inadequate in fact,¹ unless the evidence suffices to show fraud.

¹ *Earl v. Peck*, 64 N. Y. 596 (services for a long time, held sufficient to sustain a promissory note exceeding in amount the value of the services. Judgment for plaintiff in action on note affirmed against defense of inadequacy of consideration); *Wolford v. Powers*, 85 Ind. 294, 44 Am. Rep. 16, and cases cited (note for \$10,000 in consideration of a father's naming a child after the promisor); *Tolman v. Ward*, 86 Me. 303, 29 Atl. 1081 (that a deed may be supported by evidence of a contemplated marriage as consideration, although money consideration is recited).

2. Seal.

At common law a seal raises a conclusive presumption of a consideration as between the parties and those claiming under them, even for the purpose of supporting an action on an executory covenant to pay money,¹ in the absence of fraud or mistake.

Under the American statute, the seal is presumptive evidence;² but is not conclusive³ unless the instrument is a release.⁴

¹ *Mather v. Corliss*, 103 Mass. 568. The latest English authorities prefer to state the rule as being that a sealed contract is valid without any consideration. (But a seal is not evidence that the consideration was adequate, where the law requires adequacy to be affirmatively shown. *Abbott*, Trial Ev. (3d ed.) pp. 1217, 1340, 2216.

² *Home Ins. Co. v. Watson*, 59 N. Y. 390, reversing 4 *Thomp. & C.* 226. 1 Hun, 643; *Best v. Thiel*, 79 N. Y. 15; *Robson v. Dayton*, 111 Mich. 440, 69 N. W. 834; *Durland v. Durland*, 153 N. Y. 67, 47 N. E. 42; *Rothschild v. Frank*, 14 App. Div. 399, 43 N. Y. Supp. 951; *Carey v. Dyer*, 97 Wis. 554, 73 N. W. 29.

³ *Duttera v. Babylon*, 83 Md. 536, 35 Atl. 64; *Pray v. Rhodes*, 42 Minn. 93, 43 N. W. 838. See also notes to *Ferguson v. Rafferty*, 6 L.R.A. 33; *Schneider v. Turner*, 6 L.R.A. 164, and *Velten v. Carmack*, 20 L.R.A. 101.

⁴ *Crossley v. The Louis*, 4 Ben. 510, Fed. Cas. No. 3,436; *Schmidt v. Herfurth*, 5 Robt. 124; *Waln v. Waln*, 58 N. J. L. 640, 34 Atl. 1068; *White v. Richmond & D. R. Co.* 110 N. C. 456, 15 S. E. 197; *Myron v. Union R. Co.* 19 R. I. 125, 32 Atl. 165. Compare *Stewart v. Chicago & E. I. R. Co.* 141 Ind. 55, 40 N. E. 67 (that a release may be shown by oral evidence to have been without consideration, although a consideration is recited); *Hill v. Whidden*, 158 Mass. 267, 33 N.

E. 526 (that the recited consideration in a release may be contradicted by proof that certain notes were given as part of the consideration, in addition to that mentioned); *Andrews v. Brewster*, 124 N. Y. 433, 26 N. E. 1024 (that a written release of a claim does not cut off proof of an oral promise to make compensation therefor in a will, where the promise is made in consideration of the release); *Dunn v. Price*, 112 Cal. 46, 44 Pac. 354 (that evidence as to the consideration for a release and transfer from two of the vendees of personal property to one claiming under the vendor is admissible in an action by the latter, a vendee of the interest of the original vendee).

3. Bona fide purchaser for value.

For the purpose of showing that a grantee was a purchaser for valuable consideration, within the protection of the recording act, it is enough to produce the deed to him reciting his payment of purchase money.¹

Otherwise, of one alleged to be, for valuable consideration, in good faith, a purchaser from a trustee conveying in fraud.²

¹ *Wood v. Chapin*, 13 N. Y. 509, 67 Am. Dec. 62; followed in *Hiller v. Jones*, 66 Miss. 636, 6 So. 465; *Turner v. Howard*, 10 App. Div. 558, 42 N. Y. Supp. 335; *Gratz v. Land & River Improv. Co.* 40 L.R.A. 393, 27 C. C. A. 305, 53 U. S. App. 499, 82 Fed. 381. *Contra*: *Lake v. Hancock*, 38 Fla. 53, 20 So. 811 (where the court discusses this question at considerable length, citing, distinguishing, and disapproving many cases, particularly *Wood v. Chapin*).

And even though no consideration is mentioned, the burden is on a subsequent purchaser to show that there was none, for the deed itself imports a consideration. *Boynton v. Rees*, 8 Pick. 329, 332, 19 Am. Dec. 326.

² *Bolton v. Jacks*, 6 Robt. 166, 234; *Rogers v. Verlander*, 30 W. Va. 620, 5 S. E. 847; *Miller v. Rowan*, 108 Ala. 98, 19 So. 9.

So, also, of the claim of protection against a mechanic's lien. *Bolton v. Johns*, 5 Pa. 145, 47 Am. Dec. 404.

4. Disproving nominal consideration.

If even a nominal consideration is recited, especially in a sealed instrument, evidence that it was not actually paid does not, without evidence that there was no agreement to pay it, disprove consideration, nor throw the burden on the other party.¹

In an unsealed instrument, if a nominal consideration is

recited as having been paid, evidence that it was not paid nor agreed to be paid throws the burden of proof on the party claiming under it to show that it was agreed to be paid, or that there was some other consideration.²

¹ Childs v. Barnum, 11 Barb. 14, affirming 1 Sandf. 58 (saying that "paid" means "paid or to be paid").

² Fargis v. Walton, 107 N. Y. 398, 403, 14 N. E. 303 (tenant's agreement that landlord might enter and repair, held, therefore, revocable).

5. Effect of disproving.

When, by reason of disproving the consideration recited in an instrument, the instrument is deprived of its validity as a contract, oral evidence is no longer incompetent to vary the effect sought to be given to it as a license¹ or admission, unless there is sufficient evidence to found an estoppel upon its language.

¹ Fargis v. Walton, 107 N. Y. 398, 14 N. E. 303.

6. Oral evidence to vary writing.

Oral evidence of the actual consideration of a deed may be given,¹ whether the deed states a greater² or a less³ consideration; or a nominal one,⁴ or one of a different nature,⁵ or none at all.⁶ And the same rules are generally applicable to other written instruments.⁷

This, however, cannot be done for the purpose of defeating the operative words of the transfer for which the consideration was acknowledged as received,⁸ unless there be also evidence of fraud, mistake, or usury or other illegality.⁹ Proving that the deed was only a mortgage is not defeating it within the meaning of this exception.¹⁰

Nor can it be done to impair the remedy of a purchaser under the grantee in the deed, against the grantor, upon the grantor's covenants for title.

¹ Prima facie the consideration clause of a deed names the true consideration; but it is always open to explanation for almost every purpose except to defeat the operative words of the transfer, where no fraud, mistake, or other illegality is shown. Hamaker v. Coons, 117 Ala. 603, 23 So. 655; Hoover v. Binkley, 66 Ark. 645, 51 S. W. 73;

Sullivan v. Lear, 23 Fla. 463, 2 So. 846; *Taylor v. Crockett*, 123 Mo. 300, 27 S. W. 620; *St. Louis, I. M. & S. R. Co. v. Berry*, 86 Ark. 309, 110 S. W. 1049; *Spence v. Central Acci. Ins. Co.* 236 Ill. 444, 19 L.R.A.(N.S.) 88, 86 N. E. 104; *Ellis v. Lehman*, 48 Tex. Civ. App. 308, 106 S. W. 453. And see notes 7 and 8 *infra*. See also, generally, on this question, cases in notes in 20 L.R.A. 201, and 25 L.R.A.(N.S.) 1194.

As to admissibility of parol evidence to show true nature of transaction where recited consideration of a deed is shown not to have been paid, see note in 24 L.R.A.(N.S.) 413.

§ *Baker v. Connell*, 1 Daly, 469. And that there was no consideration may be shown, see: *Crandall v. Willig*, 166 Ill. 233, 46 N. E. 755; *Brown v. Brown*, 106 Mo. 611, 17 S. W. 640; *Baird v. Baird*, 145 N. Y. 659, 28 L.R.A. 375, 40 N. E. 222; *Carter v. Day*, 59 Ohio St. 96, 51 N. E. 967.

So, nonpayment may be proved, in an action to recover the price. *Hebbard v. Haughian*, 70 N. Y. 54; *Beach v. Packard*, 10 Vt. 96, 33 Am. Dec. 185. See also cases in notes in 20 L.R.A. 102 and 25 L.R.A.(N.S.) 1197.

And a vendor to whom the land has been reconveyed upon failure to pay the purchase money may show that the consideration recited in the deed to himself was not in fact paid, and that the sole purpose of the reconveyance was to reinvest him with the title to the land. *Lanier v. Foust*, 81 Tex. 186, 16 S. W. 994.

§ *Belden v. Seymour*, 8 Conn. 304, 21 Am. Dec. 661; *Casto v. Fry*, 33 W. Va. 449, 10 S. E. 799; *Jackson v. Lewis*, 32 S. C. 593, 10 S. E. 1074; *Hattersley v. Bissett*, 51 N. J. Eq. 597, 29 Atl. 187 (that consideration of natural love and affection and one dollar was in fact services rendered by grantee, the child of the grantor); *Ferguson v. Harrison*, 41 S. C. 340, 19 S. E. 619 (that consideration in deed to grantor's wife reciting love and affection was in fact payment by her of his debts, securing such payment by mortgage on the land); *Herrin v. Abbe*, 55 Fla. 769, 18 L.R.A.(N.S.) 907, 46 So. 183. See also cases in notes in 20 L.R.A. 103, 105, and 25 L.R.A.(N.S.) 1194, 1198.

But in *Baum v. Lynn*, 72 Miss. 932, 30 L.R.A. 441, 18 So. 428, oral proof of a separate agreement to show that the consideration, which recited that the deed was in settlement and release of the claims of a guardian and ward against the grantor, included also release of the ward's claim against the guardian, was excluded.

§ *Hitz v. National Metropolitan Bank*, 111 U. S. 722, 28 L. ed. 577, 4 Sup. Ct. Rep. 613; *Westchester & P. R. Co. v. Broomall*, 1 Sadler (Pa.) 587, 18 W. N. C. 44, 3 Atl. 444 (reversing for exclusion); *Bank of United States v. Housman*, 6 Paige, 526, 535 (recital of money does not preclude evidence in support of the deed that the actual consideration was love and affection); *Carty v. Connolly*, 91 Cal. 15, 27 Pac. 599; *Poss v. Huff*, 98 Ga. 377, 25 S. E. 447; *Woolfolk v. Earle*, 19 Ky. L. Rep. 343, 40 S. W. 247; *Church v. Case*, 110 Mich. 621, 68 N. W.

424; *Clossen v. Whitney*, 39 Minn. 50, 38 N. W. 759; *Hattersley v. Bissett*, 50 N. J. Eq. 577, 25 Atl. 332; *Velten v. Carmack*, 23 Or. 282, 20 L.R.A. 101, and note, 31 Pac. 658.

Contra: *Burrage v. Beardsley*, 16 Ohio, 438, 47 Am. Dec. 382.

And in *Ogden State Bank v. Barker*, 12 Utah, 13, 40 Pac. 765, the recital of a nominal consideration was held conclusive upon the grantor and the grantee as against existing creditors of the grantor attacking the deed as fraudulent and as having been made to hinder and delay the collection of the debt.

⁵ *McCrea v. Purmort*, 16 Wend. 460 (recital of money consideration does not preclude evidence of agreement that consideration was merchandise at a price); *McKinster v. Babcock*, 26 N. Y. 378, reversing 37 Barb. 265 (recital of cash; evidence of indemnity against indorsement and future liabilities, competent); *Groves v. Steel*, 2 La. Ann. 480, 46 Am. Dec. 551 (recital, cash; evidence that it was satisfaction of a debt, competent); *Buford v. Shannon*, 95 Ala. 205, 10 So. 263 (recital of cash; evidence of pre-existing debt competent); *Cardinal v. Hadley*, 158 Mass. 352, 33 N. E. 575 (recited as being lump sum; evidence that it was to depend on quantity, competent); *Blazy v. McLean*, 129 N. Y. 44, 29 N. E. 6 (recited that deed given as collateral security for debts; evidence that it was in satisfaction of debts, competent). See also cases in notes to *Velten v. Carmack*, 20 L.R.A. 101; and 25 L.R.A.(N.S.) 1194.

⁶ *Goodell v. Pierce*, 2 Hill, 659; *Wallis v. Wallis*, 4 Mass. 135, 3 Am. Dec. 210.

⁷ *Langan v. Langan*, 89 Cal. 186, 26 Pac. 764 (note); *Holmes v. Horn*, 120 Ill. App. 359 (promissory note); *Cooper v. Potts*, 185 Pa. 115, 39 Atl. 824 (assignment); *Don Yook v. Washington Mill Co.* 16 Wash. 459, 47 Pac. 964 (bill of sale); *Burke v. Napier*, 100 Ga. 327, 32 S. E. 134 (note); *Zimmerman v. Adee*, 126 Ind. 15, 25 N. E. 828 (note); *Hawkins v. Collier*, 101 Ga. 145, 28 S. E. 632 (note); *Kelley v. Guy*, 116 Mich. 43, 74 N. W. 291 (note); *Luce v. Foster*, 42 Neb. 818, 60 N. W. 1027 (indemnity bond to sheriff). See also, for other cases instancing this rule and its exceptions, *Davis v. Evans*, 142 N. C. 464, 55 S. E. 344 (promissory note); *Ivey v. Bessemer City Cotton Mills*, 143 N. C. 189, 55 S. E. 613 (contract for services); *Scanlon v. Northwood*, 147 Mich. 139, 110 N. W. 493 (contract for services); *Hocking Valley R. Co. v. Barbour*, 192 App. Div. 654, 183 N. Y. Supp. 163 (bond recited invalid consideration and parol evidence admitted to show true consideration); and *Schneider v. Turner*, 6 L.R.A. 164. See also note in 20 Columbia L. Rev. 916. And see notes to *Ferguson v. Rafferty*, 6 L.R.A. 34, and *Potter v. Grim*, 12 A.L.R. 354.

As between the original parties to a note, failure of consideration may be shown by parol. *Muir v. Hamilton*, 152 Cal. 634, 93 Pac. 857.

⁸ *Grout v. Townsend*, 2 Hill, 554, affirmed in 2 Denio, 336; *Blodgett v. Hildreth*, 103 Mass. 484, 487; *Sterricker v. McBride*, 157 Ill. 70, 41

N. E. 744; *McGee v. Allison*, 94 Iowa, 527, 63 N. W. 322; *Ruggles v. Clare*, 45 Kan. 662, 26 Pac. 25.

⁹ See **ILLLEGALITY**.

¹⁰ See **DEFEASANCE**.

7. Presumption and burden of proof.

Every written contract is presumed to have been made upon a sufficient consideration,¹ and the burden is on the party alleging want of consideration,² or that the consideration named in the instrument is not the actual consideration.³

¹ *Kennedy v. Lee*, 147 Cal. 596, 82 Pac. 257; *Southern R. Co. v. Blunt*, 155 Fed. 496.

² *Grimsrud Shoe Co. v. Jackson*, 22 S. D. 114, 115 N. W. 656.

³ *Harraway v. Harraway*, 136 Ala. 499, 34 So. 836; *Strayer v. Dickerson*, 205 Ill. 257, 68 N. E. 767.

8. Executory consideration.

When the consideration clause is in the nature, not of a receipt, but of an executory stipulation, the parties may be deemed to have embodied their actual intention in the writing so as to exclude oral evidence to vary it.¹

¹ As for instance, for payment with a specified thing. *Maigley v. Hauer*, 7 Johns. 341 (expressed consideration a ground rent, and a share of grain to be raised. Evidence of oral promise to support, excluded). See also, for other instances of the rule as thus applied: *Hilgeman v. Sholl*, 21 Ind. App. 86, 51 N. E. 728 and cases cited; *Registerer v. Carpenter*, 124 Ind. 30, 24 N. E. 371; *Jackson v. Chicago, St. P. & K. C. R. Co.* 54 Mo. App. 636; *Baum v. Lynn*, 72 Miss. 932, 30 L.R.A. 441, 18 So. 428.

9. Executory agreement.

If the instrument is not an executed transfer, but a unilateral executory agreement, as, for instance, a guaranty, the recital of a nominal consideration does not exclude oral evidence that the true consideration was a promise which the party has refused to perform.¹

¹ *Unger v. Jacobs*, 7 Hun, 220 (reversing judgment for error in exclusion). And that oral evidence is admissible to show that a written guaranty of the payment of a note "for value received" with a waiver of demand, notice, and protest, was given in consideration of an agreement to forbear to sue, see *Citizens' Sav. Bank & T. Co. v. Babbitt*, 71 Vt. 182, 44 Atl. 71.

So, if the instrument is a subscription paper, the recital of a nominal consideration mutually paid does not preclude evidence that it was not paid, for the purpose of defeating the contract before any substantial consideration has arisen under it. *Presbyterian Church v. Cooper*, 112 N. Y. 517, 3 L.R.A. 468, 20 N. E. 352; *Thudium v. Yost*, 7 Sadler (Pa.) 306, 20 W. N. C. 217, 11 Atl. 436; *Cake v. Pottsville Bank*, 116 Pa. 264, 9 Atl. 302.

10. Legal, to displace recital of illegal, consideration.

The statements of an illegal consideration in a written instrument may be contradicted by oral evidence that the actual consideration was legal, even for the purpose of enforcing the instrument notwithstanding its apparent illegality.¹

¹ *Roosevelt v. Dreyer*, 12 Daly, 370 (pawnbroker's usurious ticket, explained by oral agreement for legal interest only).

11. Previous agreement.

The fact that the agreement constituting the actual consideration was made some time previous to the deed does not preclude the evidence, if it be shown that it was upon that consideration that the deed was founded.¹

¹ *Hays v. Peck*, 107 Ind. 389, 8 N. E. 274. This case goes to the extent of holding that, under the Indiana decisions, and as the necessary consequence of holding the consideration clause not conclusive, an oral promise of the grantee to pay a specified encumbrance may be proved in the grantor's action on the covenant against encumbrances. To the same effect: *Dobyns v. Rice*, 22 Mo. App. 448; *Logan v. Miller*, 106 Iowa, 511, 76 N. W. 1005; *Lowry v. Downey*, 150 Ind. 364, 50 N. E. 79; *Ballou v. Sherwood*, 32 Neb. 666, 49 N. W. 790, 50 N. W. 1131. See also *Fall v. Glover*, 34 Neb. 522, 52 N. W. 168, holding oral testimony admissible to show that the note on which the action was brought was for part of a loan the payment of which the plaintiff had assumed as a part of the purchase price of a place sold him by the defendant.

The mere fact that agreements between the parties testified to were made before the execution of the note sued on will not render them inadmissible if they tend to show, even slightly or remotely, the interest of the parties in the execution and acceptance of the note, and that the consideration mentioned therein was not the true consideration, or that the note was without consideration. *Hunter v. Lanius*, 82 Tex. 677, 18 S. W. 201.

Where, in pursuance of a previous parol agreement, a debtor conveys his entire interest in a mine to his creditor in satisfaction of the debt, upon condition that, whenever the creditor has realized sufficient

to reimburse himself for the debt and expenses of operating the mine, he shall reconvey to the debtor a portion of the property, parol evidence is admissible to prove the consideration, both of the deed and the parol agreement. *Adams v. Lambard*, 80 Cal. 426, 22 Pac. 180.

CONSPIRACY.

1. Circumstantial evidence.
2. Acts and declarations of conspirators.

1. Circumstantial evidence.

The joint undertaking,¹ and the unlawful object,² may be shown by circumstantial evidence without direct evidence of conspiracy.

¹ *Richl v. Evansville Foundry Asso.* 104 Ind. 70, 3 N. E. 633, 635 (letting in declarations of one confederate, as evidence against another); *Kelley v. People*, 55 N. Y. 565, 576, 14 Am. Rep. 342, affirming *Armsby v. People*, 2 Thomp. & C. 157; *Mussel Slough Case*, 5 Fed. 680 (charging jury that to prove conspiracy alleged, it is not necessary to show that the defendants came together, etc.) Compare *New York Guaranty & I. Co. v. Gleason*, 78 N. Y. 503, 7 Abb. N. C. 334. See also cases in notes to *People v. McQuade*, 1 L.R.A. 273 and *Casey v. Cincinnati Typographical Union No. 3*, 12 L.R.A. 197; *Brewster v. State*, 186 Ind. 369, 115 N. E. 54.

² *State v. Walker*, 98 Mo. 95, 118, 9 S. W. 646, 11 S. W. 1133; *People v. Van Tassel*, 156 N. Y. 561, 51 N. E. 274; *Ochs v. People*, 25 Ill. App. 379, affirmed in 124 Ill. 399, 16 N. E. 662; *Brindley v. State*, 193 Ala. 43, 69 So. 536, Ann. Cas. 1916E, 177.

As to declarations, etc., see CRIMINAL TRIAL BRIEF; and note in 19 L.R.A. 745.

As to order of proof, see *Ibid.* and *Abbott Trial Ev.* (3d ed.) pp. 542 et seq. Slight evidence sufficient to let in declarations, see CRIMINAL TRIAL BRIEF; *Weidner v. Phillips*, 39 Hun, 1.

2. Acts and declarations of conspirators.

Acts and declarations of conspirators are admissible against each other.¹ So declarations of a wife have been admitted as against her husband where both conspired to commit murder.²

¹ *People v. Cassidy*, 213 N. Y. 388, 107 N. E. 713, Ann. Cas. 1916C, 1009; *State v. Craft*, 168 N. C. 208, 83 S. E. 772, Ann. Cas. 1917B, 1013.

² *Thompson v. State*, 77 Tex. Crim. Rep. 417, 178 S. W. 1192, where statute provides that husband and wife can conspire. See also note in 29 Harvard L. Rev. 332.

CONSTRUCTION.

1. Judicial notice.
2. Opinion.
 - a. Matters requiring special knowledge.
 - b. Matters of common observation.
 - c. Quality of work; direct question.
3. Direct testimony.
4. Inspection.

For cognate topics, see CAPACITY; CARE; CAUSE; QUALITY.

1. Judicial notice.

Judicial notice may be taken of mode of construction of things in such common use that they may be regarded as forming part of the common knowledge of the people.¹

¹ Brown v. Piper, 91 U. S. 38, 43, 23 L. ed. 200, 202 (ice-cream freezer not novel); Richards v. Michigan C. R. Co. 40 Fed. 165; Studebaker Bros. Mfg. Co. v. Illinois Iron & Bolt Co. 42 Fed. 52.

Otherwise not. Kaolatype Engraving Co. v. Hoke, 30 Fed. 444. And see State v. Nelson, 52 Ohio St. 88, 26 L.R.A. 317, 39 N. E. 22 (that the court cannot know judicially that a cable car or horse car is so constructed and operated as to require the same means of protection for operators as is required on electric cars).

2. Opinion.

a. *Matters requiring special knowledge.*—An expert witness¹ may be asked how a structure of a special kind ought to be built so as to be safe, or so as not to cause injury to person or property.²

But the question should not state a hypothesis for which there is no basis in fact.³

¹ The witness must be qualified to speak as an expert, assuming, of course, that the question is one requiring special knowledge. As instances of witnesses held to be so qualified, see Bonner v. Mayfield, 82 Tex. 234, 18 S. W. 305 (construction of railroad; witness of twenty years' experience competent); Bier v. Standard Mfg. Co. 130 Pa. 446, 18 Atl. 637 (elevators; builder of elevators competent); Turner v. Haar, 114 Mo. 335, 21 S. W. 737 (building used for manufactory; architects and builders competent); Chicago v. Seben, 165 Ill. 371, 46 N. E. 244

(construction of sewer; one engaged in business eighteen years competent); *St. Louis, A. & T. R. Co. v. Johnston*, 78 Tex. 536, 15 S. W. 104 (construction of railroad; civil engineer competent. This case also holds that a witness of large experience as a railroad man, familiar with the railroad in question, and having knowledge of the locality or the place where the accident occurred, although not a civil engineer, was also competent to testify as an expert); *Brown v. Mohawk & H. R. Co.* How. App. Cas. 52, 124 (action for negligence in construction resulting in devastation of plaintiff's grounds in a freshet; judgment reversed for allowing opinion of unqualified witness).

² *Conrad v. Ithaca*, 16 N. Y. 158, 173 (proper construction of bridge); *Neubauer v. Northern P. R. Co.* 60 Minn. 130, 61 N. W. 912 (proper construction of ice-tongs); *Colorado Midland R. Co. v. O'Brien*, 16 Colo. 219, 27 Pac. 701 (proper construction of temporary railroad track used for construction train).

³ Thus, an expert cannot be asked whether he knows of any defect in the plan of construction of engines manufactured by plaintiff, where there is no evidence that the various kinds of engines so manufactured are built in accordance with any uniform plan or design. *Witte Iron Works v. Holmes*, 62 Mo. App. 372.

Experts may testify whether a coal pit was properly or improperly constructed (*Behsmann v. Waldo*, 36 Misc. 863, 74 N. Y. Supp. 929) and as to whether gasoline engine which exploded the first day it was used, was properly constructed. (*Charter Gas Engine Co. v. Kellam*, 79 App. Div. 231, 79 N. Y. Supp. 1019.)

b. Matters of common observation.—But an opinion which is matter of common observation and inference not requiring skill, or as a matter of inference from the facts in evidence, should be excluded.¹

¹ *Shelley v. Austin*, 74 Tex. 608, 12 S. W. 753.

Whether it is safe and proper to have draws with gates across the foot path of a bridge when the draw is open is not within the range of competent testimony, even from an expert. *Hart v. Hudson River Bridge Co.* 84 N. Y. 56. The court says it does not relate to the safety or strength of construction, but is matter of common judgment for the jury.

In *Lincoln & B. H. R. Co. v. Sutherland*, 44 Neb. 526, 62 N. W. 859, an action to recover damages for injuries to lands and crops caused by water in a ravine during a freshet caught by a railroad embankment and thrown back upon plaintiff's lands, the company contended that because there was no expert testimony that the embankment was improperly constructed, verdict for plaintiff was not justified; but the

court held that any person who was acquainted with the ravine, and the manner in which the embankment was constructed, and the manner in which it affected the waters collected in the ravine, was competent to state the facts, and that it was for the jury to say, from all the facts and circumstances in evidence, whether or not the embankment was negligently constructed.

c. Quality of work; direct question.—An expert may be asked the direct question whether a machine or other structure not within the ordinary knowledge and experience of men generally, in the common walks of life, was built in a good and workmanlike manner;¹ whether it was properly constructed;² whether it is of the best kind,³ or equal to the best in use;⁴ whether it was safe or faulty for the purposes for which it was being used;⁵ or whether it was constructed as such structures usually are,⁶ and the like; and it may be left for the cross-examination to call for details.⁷

¹ Ward v. Kilpatrick, 85 N. Y. 413, 39 Am. Rep. 674, affirming 9 N. Y. Week. Dig. 342 (cabinet work).

So, a witness who has examined buildings in question may, though he be neither a mason nor an expert, testify that in his opinion one of two buildings was built more compactly than the other; or that a wall was not worth covering; that the materials were worth more than the wall. Pullman v. Corning, 9 N. Y. 93, 14 Barb. 174. (Held, not error to allow these questions, justice having been done on the merits.)

In an action on a policy of insurance on "brick buildings," it appeared that the buildings in question were, in part, built of joists, filled in with brick. Held, not improper to allow plaintiff to ask a builder, acquainted with the houses, whether he would consider them, or they would be called, brick buildings. Mead v. Northwestern Ins. Co. 7 N. Y. 530, 537.

² Sheldon v. Booth, 50 Iowa, 209, 211 (action for price; defense, breach of warranty. Held, that a "foundry-man and machinist" is competent to state whether a machine had been properly constructed); St. Louis. A. & T. R. Co. v. Johnston, 78 Tex. 536, 15 S. W. 104, that a civil engineer may testify as to whether a railroad was properly constructed at a certain point).

³ Great Western R. Co. v. Haworth, 39 Ill. 346, 349 (negligent setting of fire; testimony to opinion that a certain spark arrester was the best known, allowed).

⁴ Scattergood v. Wood, 79 N. Y. 263, 35 Am. Rep. 515, affirming 14 Hun, 269 (quality of saw gin; allegation of breach of warranty. Testimony, whether it was equal in all respects to the best saw gin then in use, of which the witness had knowledge, allowable).

5 **Colorado Midland R. Co. v. O'Brien**, 16 Colo. 219, 27 Pac. 701 (temporary railroad track used by construction train).

Or whether, as constructed and operated, it would be a safe one. **Bier v. Standard Mfg. Co.** 130 Pa. 446, 18 Atl. 637.

6 **St. Louis, A. & T. R. Co. v. Johnston**, 78 Tex. 536, 15 S. W. 104.

7 **Curtis v. Gano**, 26 N. Y. 426 (action for breach of agreement to construct. Judgment reversed for excluding the question until plaintiff would offer to prove in what respect it was not so constructed).

3. Direct testimony.

A party to a contract for the construction of a structure may, after testifying fully as to the terms of the contract as he claims them to be, be asked whether or not the work has been done in accordance with the terms and specifications of the contract.¹

¹ Such a question does not call for an opinion, but for facts. **Kreuzberger v. Wingfield**, 96 Cal. 251, 31 Pac. 109.

4. Inspection.

A machine claimed to be imperfect in its construction may be introduced in evidence and operated in court for the purpose of showing the principles upon which it works, and whereby an error might be made by persons operating it, while the machine itself was correct.¹

¹ **National Cash Register Co. v. Blumenthal**, 85 Mich. 464, 48 N. W. 622.

CONTRACT.

1. Implied.
2. Presumptions and burden of proof.
3. Direct testimony.
4. Witness's understanding.
5. Probability or improbability of transaction.
6. Previous similar transactions.
7. *Res gestæ*.
8. Writing signed by one party only.
9. Writing signed but not delivered.
10. Writing not signed.
11. Declarations of agent.
12. Different contract admissible under general denial.
13. With whom.
14. Ignorance of effect.
15. Contract made merely to influence others.
16. Written contract obtained by fraud.
17. Implications of law may not be varied by parol evidence.

For cognate topics, see ABANDONMENT; ACCEPTANCE; ACQUIESCENCE; ADMISSIONS; AGENCY; ASSENT; COLLATERAL ORAL AGREEMENT; CONSIDERATION; CONTRADICTION; CONVERSATION; CORROBORATION; RATIFICATION.

1. Implied.

A contract may be expressly made, or it may be inferred or implied, when it is found that there is an agreement of the parties and an intention to create a contract, although that intention has not been expressed in terms of contract.¹ But a contract cannot be implied without writing, where the law requires a writing.² A contract may be implied from circumstances showing mutual intention³ or from the conduct of the parties.⁴

¹ *Milford v. Com.* 144 Mass. 64, 10 N. E. 516; *Minneapolis Mill Co. v. Goodnow*, 4 L.R.A. 202, and note (40 Minn. 497, 42 N. W. 356).

That mere delivery, without more, of money by one person to another, is not evidence of the taker's promise to repay it, see *Fall v. Haines*, 65 N. H. 118, 23 Atl. 79.

As to services rendered by one member of a family to or for another member thereof, the presumption is that they are gratuitous; but that presumption may be overcome by proof, either of an express contract, or of a contract inferred from such facts and circumstances as show that both parties contemplated pecuniary recompense other than that naturally arising out of the family relation. *Heffron v. Brown*, 155 Ill. 322, 40 N. E. 583; *Kloke v. Martin*, 55 Neb. 554, 76 N. W. 168; *Westcott v. Westcott*, 69 Vt. 234, 39 Atl. 199.

For an extended review of all the cases on the subject of implication of agreement to pay for services rendered by relative or member of household, see note in 11 L.R.A.(N.S.) 873.

As to implied contract to pay for services to relative not living as part of same family, see note in 1 L.R.A.(N.S.) 819.

As to implied contract to pay for household services where parties are living in illicit relations, the majority of the cases hold that no implied contract exists. *Swires v. Parsons*, 5 Watts & S. 357; *McDonald v. Fleming*, 12 B. Mon. 286; *Vincent v. Moriarity*, 31 App. Div. 484, 52 N. Y. Supp. 519; *Walraven v. Jones*, 1 Houst. (Del.) 355; *Brown v. Tuttle*, 80 Me. 162, 13 Atl. 583. But in *Viens v. Brickle*, 8 Mart. (La.) 11, it was held that recovery upon an implied contract to pay for such services will be allowed where it does not appear that the concubinage was the motive of the parties coming together.

And a majority of the cases hold that a woman deceived into the belief that she is married cannot sustain an action for services rendered by her as housekeeper for her supposed husband while she was living with him as his wife. *Robbins v. Potter*, 11 Allen, 588; *Cooper v. Cooper*, 147 Mass. 370, 9 Am. St. Rep. 721, 17 N. E. 892, cited with approval in *Ogden v. McHugh*, 167 Mass. 279, 57 Am. St. Rep. 456, 45 N. E. 731; *Cropsey v. Sweeney*, 27 Barb. 310, 7 Abb. Pr. 129.

Contra: *Higgins v. Breen*, 9 Mo. 497; *Fox v. Dawson*, 8 Mart. (La.) 94.

Placing one's child in another's custody has been held not to imply a contract not to reclaim the child. *State ex rel. Kearney v. Steele*, 121 La. 215, 16 L.R.A.(N.S.) 1004, 46 So. 215. For other cases see note in 16 L.R.A.(N.S.) 1004.

2 *Chase v. Second Ave. R. Co.* 97 N. Y. 384, 49 Am. Rep. 531.

3 *Rains v. Weiler*, 101 Kan. 294, L.R.A.1917F, 571, 166 Pac. 235; *People v. Dummer*, 274 Ill. 637, 113 N. E. 934.

4 *Norbeck & N. Co. v. State*, 32 S. D. 189, 142 N. W. 847, Ann. Cas. 1916A, 229; *Williams v. Jones*, 105 Kan. 282, 182 Pac. 391.

2. Presumptions and burden of proof.

A person who signs a contract is presumed to know its contents and to accept its burdens,¹ and one who attacks a contract as invalid has the burden of showing its invalidity.² Parties

are presumed to contract with reference to the law as declared by the highest courts of the state,³ and words in a contract are presumed to have been used with their customary meaning.⁴ So technical terms peculiar to a trade or profession are presumed to have been used with the trade or professional meaning.⁵ On an issue involving a waiver of a provision in a contract the burden is on the party alleging such waiver.⁶ So it is a general rule that the plaintiff must establish the contract as alleged by a preponderance of the evidence.⁷ Delivery of a written contract or a deed will be presumed from the fact of its possession, but such presumption may be rebutted or explained.⁸ The weight of authority holds that an employee originally hired for a definite term who continues to render the same services after the expiration of such term without explicitly entering into a new agreement is *prima facie* presumed to be serving under a new contract having the same terms and conditions as the original one.⁹

¹ Leicher v. Keeney, 98 Mo. App. 394, 72 S. W. 145.

² Horton v. Rohlf, 69 Neb. 95, 95 N. W. 36; Merriman v. Cover, 104 Va. 428, 51 S. E. 817; Stickney v. Hughes, 12 Wyo. 397, 75 Pac. 945, affirmed on rehearing 13 Wyo. 257, 79 Pac. 922; Watson v. Hazlehurst, 127 Ga. 298, 56 S. E. 459.

One who attacks a contract on the ground of fraud has the burden of establishing the fraud. Moore v. Baker, 65 N. J. Eq. 104, 55 Atl. 106; Fivey v. Pennsylvania R. Co. 67 N. J. L. 628, 91 Am. St. Rep. 445, 52 Atl. 472; Bayles v. Kansas P. R. Co. 13 Colo. 181, 5 L.R.A. 480, 2 Inters. Com. Rep. 643, 22 Pac. 341. But this rule should not apply where one partner having access to the books buys out another who has no such access. Gilbert v. Anderson, 73 N. J. Eq. 243, 66 Atl. 926. But if he had access and buys without examining the books the burden is held to be on the party alleging the fraud. Aronhime v. Levinson, 119 Va. 394, 89 S. E. 893.

And fraud is not to be presumed, but must be established by clear and satisfactory evidence. Edwards v. Story, 105 Ill. App. 433; Pittenger v. Pittenger, 208 Ill. 582, 70 N. E. 699; First Nat. Bank v. Buetow, 123 Wis. 285, 101 N. W. 927; United States v. Trans-Missouri Freight Asso. 24 L.R.A. 73, 4 Inters. Com. Rep. 443, 7 C. C. A. 15, 19 U. S. App. 36, 58 Fed. 58.

Where, however, a person signs by mark, being unable to read and write, and there is evidence that he did not understand the instrument, or that his signature was procured by fraud, the burden is

on the other party to show that the person so signing fully understood the contract. *Spelts v. Ward*, 1 Neb. (Unof.) 177, 96 N. W. 56.

Furthermore where a maker of a negotiable instrument has shown fraud on part of original payee, a subsequent holder has the burden of proving that he took without notice. *Lundean v. Hamilton*, 184 Iowa, 907, 169 N. W. 208. See also note in 32 Harvard L. Rev. 729.

³ *Graves County Water Co. v. Ligon*, 112 Ky. 775, 66 S. W. 725.

⁴ *Fitzgerald v. First Nat. Bank*, 52 C. C. A. 276, 114 Fed. 474.

⁵ *Seymour v. Armstrong*, 62 Kan. 720, 64 Pac. 612.

⁶ *Sessa v. Arthur*, 183 Mass. 230, 66 N. E. 804.

⁷ *Bracewell v. Self*, 109 Ill. App. 140; *Polstein v. Blauner*, 86 N. Y. Supp. 794.

⁸ *Dodd v. Kemnitz*, 74 Neb. 634, 104 N. W. 1029; *Strough v. Wildere*, 119 N. Y. 530, 7 L.R.A. 555, 23 N. E. 1057; *Devereux v. McMahon*, 108 N. C. 134, 12 L.R.A. 205, 12 S. E. 902; *Lewis v. Watson*, 98 Ala. 479, 22 L.R.A. 297, 39 Am. St. Rep. 82, 13 So. 570.

⁹ *Horton v. Wollner*, 71 Ala. 452; *Ewing v. Janson*, 57 Ark. 237, 21 S. W. 430; *Hermann v. Littlefield*, 109 Cal. 430, 42 Pac. 443; *State Bd. of Agriculture v. Meyers*, 20 Colo. App. 139, 77 Pac. 372; *Standard Oil Co. v. Gilbert*, 84 Ga. 714, 8 L.R.A. 410, 11 S. E. 491; *Fish v. Marzluff*, 128 Ill. App. 549; *Akron Mill Co. v. Leiter*, 57 Ind. App. 394, 107 N. E. 99; *Travelers' Ins. Co. v. Parker*, 92 Md. 22, 47 Atl. 1042; *Morris v. Z. T. Briggs Photographic Supply Co.* 192 Mo. App. 145, 179 S. W. 783; *Fitch v. Martin*, 74 Neb. 538, 104 N. W. 1072; *Capron v. Strout*, 11 Nev. 304, 9 Mor. Min. Rep. 391; *Passino v. Brady Brass Co.* 83 N. J. L. 419, 84 Atl. 615; *Mason v. New York Produce Exch.* 127 App. Div. 282, 111 N. Y. Supp. 163; *Ranck v. Albright*, 36 Pa. 367; *Booth v. National India Rubber Co.* 19 R. I. 696, 36 Atl. 714; *Houston Ice & Brewing Co. v. Nicolini*, — Tex. Civ. App. —, 96 S. W. 84; *Norfolk Hosiery & Underwear Mills Co. v. Westheimer*, 121 Va. 130, 92 S. E. 922; *Appleton Waterworks Co. v. Appleton*, 132 Wis. 563, 113 N. W. 44. For full discussion and additional cases see note in L.R.A.1918C, 706.

3. Direct testimony.

A witness may be asked to "state the terms" of an oral agreement. It is not necessary to ask him to state what was said.¹

And he may be asked as to how he understood a contract to which he is a party.²

But he cannot be asked in terms whether he accepted a proposition.³

Nor can he be asked to state with whom his contract was made.⁴

¹ *Frost v. Benedict*, 21 Barb. 247; *Bewick v. Butterfield*, 60 Mich. 203, 26 N. W. 881; *Haight v. Connors*, 149 Pa. 279, 24 Atl. 302; *Dutton v. Kneeb*s, 80 Iowa, 267, 45 N. W. 875.

² This both to establish the contract, and also to show his good faith in the transaction, which is questioned. *Wheeler v. Campbell*, 68 Vt. 98, 34 Atl. 35.

³ *Cogshall v. Pittsburg Roller Mill Co.* 48 Kan. 480, 29 Pac. 591. He must state the facts from which the conclusion is to be drawn. *Ibid.*

⁴ *Farmer v. Brokaw*, 102 Iowa, 246, 71 N. W. 246.

4. Witness's understanding.

A witness may be asked what he understood the parties agreed to in his presence, or what he understood they said;¹ or whether there was any agreement or understanding; subject to cross-examination, and the right to strike out the answer if it expresses an opinion.²

The witness cannot testify to his understanding or opinion of the effect of what was said.³

¹ *Printup v. Mitchell*, 17 Ga. 558, 63 Am. Dec. 258. And in *Perryman v. Wolfe*, 93 Ala. 290, 9 So. 148, testimony as to statements of the parties as to the terms of a contract, made in the presence and hearing of both parties a few minutes after the terms were agreed upon and before the persons present had dispersed, was held admissible, although the witness did not hear the contract when made.

² *Sperry v. Baldwin*, 46 Hun, 120. That such opinion or conclusion is properly excluded, see *E Goddard & Sons v. Garner Bros.* 109 Ala. 98, 19 So. 513. And *Durlacher v. Frazer*, 8 Wyo. 58, 55 Pac. 306, holds that it is incompetent for a witness to testify that a contract was or was not made, but that he may state what was done, leaving the conclusion for the court or jury.

³ *Ives v. Hamlin*, 5 Cush. 534.

5. Probability or improbability of transaction.

As to the competency of evidence as having a bearing on the probability or improbability of the transaction in question, see ¹

¹ *Roe v. Nichols*, 5 App. Div. 472, 38 N. Y. Supp. 1100 (habits of maker

of note not competent to show that he did or did not execute note in suit); *Pettiford v. Mayo*, 117 N. C. 27, 23 S. E. 252 (pecuniary circumstances of decedent not competent in an action on note the execution of which by decedent is denied); *Shrimpton v. Netzorg*, 104 Mich. 225, 62 N. W. 343 (evidence as tending to show unreasonableness of contract, and that it was improbable that party adducing proof would knowingly have made it, competent); *Glessner v. Patterson*, 164 Pa. 224, 30 Atl. 355 (proof that one making claim against decedent's estate, for which he has no written obligation, was without property at the time the alleged loan was made, competent); *Mudgett v. Emerson*, 67 N. H. 234, 30 Atl. 343 (evidence of financial condition of one sued for services rendered, as bearing on the probability of his hiring servants, where he claims the services were rendered without expectation of pay); *Dryer v. Brown*, 52 Hun, 321, 5 N. Y. Supp. 486 (evidence of lack of pecuniary means competent against one seeking to recover an alleged loan where the making of the loan is denied).

6. Previous similar transactions.

In a conflict of evidence as to the nature or terms of a contract, the nature and terms of previous transactions between the parties are not competent as bearing on the probabilities of the transaction or question.¹

But they are competent to aid in interpreting ambiguous language used by the parties.²

¹ *Bonynge v. Field*, 81 N. Y. 159, affirming 12 Jones & S. 581 (what was done in other transactions would not show what the contract was in reference to this one); *Groat v. Gile*, 51 N. Y. 431 (failure of the buyer to demand, on former sales, a right similar to that claimed in the present one, immaterial); *Stevens v. McLachlan*, 120 Mich. 285, 79 N. W. 627 (notes of similar character held by plaintiff not competent where they contain nothing tending to establish defenses to note in suit); *Graham v. Eiszner*, 28 Ill. App. 269 (former contract not competent).

And that the nature and terms of other similar transactions between one of the parties to a contract and third persons are inadmissible as to the nature and terms of the transaction in question, see: *Evans v. Koons*, 10 Ind. App. 603, 38 N. E. 350 (use of stallion); *Ham v. Wheaton*, 61 Minn. 212, 63 N. W. 495 (contract of hiring); *Lucia v. Meech*, 68 Vt. 175, 34 Atl. 695; *Brunnell v. Hudson Saw Mill Co.* 86 Wis. 587, 57 N. W. 364; *Palmer v. Hamilton*, 15 Ky. L. Rep. 677, 24 S. W. 613; *Davis v. Kneale*, 97 Mich. 72, 56 N. W. 220; *Thompson v. New York L. Ins. Co.* 21 Or. 466, 28 Pac. 628; *Potts v. Dunlap*, 110

Pa. 117, 20 Atl. 413; *Roberts v. Dixon*, 50 Kan. 436, 31 Pac. 1083; *Avery v. Mattice*, 29 N. Y. S. R. 706, 9 N. Y. Supp. 166. Compare *Gardner v. Crenshaw*, 122 Mo. 79, 27 S. W. 612 (that evidence of a prior contract with one person may be competent upon the issue as to a contract with another person, if the other person in speaking of the latter contract refers to the terms of the former); *McQuown v. Cavanaugh*, 14 Colo. 188, 23 Pac. 341 (that in determining the amount due for services, evidence of a contract made with defendant's husband before such service commenced is admissible, where defendant succeeded to his business, and it is admitted that the husband, as her agent, continued to pay plaintiff the same rate as before, and no intimation was made of any change in the contract).

² *Richards v. Millard*, 56 N. Y. 574, reversing 1 Thomp. & C. 247.

See also **AMBIGUITY**; **CONTRADICTION**; **CORROBORATION**.

✓ 7. *Res gestæ*.

When a transaction is disputed, anything said, done, or written in the presence of the parties, as the immediate, unpremeditated result of the transaction, is admissible in proof of the fact that the transaction occurred.¹

¹ *Monroe v. Snow*, 131 Ill. 126, 23 N. E. 401; *Bassett v. Rogers*, 162 Mass. 47, 37 N. E. 772. See also *Hooks v. Hays*, 86 Ga. 797, 13 S. E. 134 (holding that a statement to a disinterested person by one of the parties to a contract at the time it was made, and in the presence of the other party, that he had made the contract, is not inadmissible as hearsay).

And that declarations so made in the presence of an attorney are not privileged, see *Wyland v. Griffith*, 96 Iowa, 24, 64 N. W. 673.

Otherwise as to acts or declarations made subsequently to the transaction in question. *Baxter v. Camp*, 71 Conn. 245, 42 L.R.A. 514, 41 Atl. 803 (statement of the promisee, made when giving the contract to a third person for whose benefit the promise was made, that the maker would pay it); *McDermott v. Centennial Mut. Life Asso.* 24 Mo. App. 73 (that subsequent declarations of parties to a contract are not competent to alter or modify the contract, or to explain it, if the rights of third persons are thereby affected).

And that subsequent declarations of one of the parties to a contract, evidenced by two contemporaneous instruments, tending to show that a contract was made at that time different from that evidenced by the instruments, are not competent against the other party. *Dallas Nat. Bank v. Davis*, 78 Tex. 362, 14 S. W. 706.

8. Writing signed by one party only.

Where the Statute of Frauds requires that a memorandum of the contract be in writing "signed by the party charged" the weight of authority construes this to mean the party sued on the agreement.¹

¹ *Morrison v. Browne*, 191 Mass. 65, 77 N. E. 527; *Bristol v. Mente*, 79 App. Div. 67, 80 N. Y. Supp. 52, affirmed in 178 N. Y. 599, 70 N. E. 1096; *Harper v. Goldschmidt*, 156 Cal. 245, 28 L.R.A. (N.S.) 689, 134 Am. St. Rep. 124, 104 Pac. 451; note in 27 Harvard L. Rev. 397. *Contra*, *Wilkinson v. Heavenrich*, 58 Mich. 574, 55 Am. Rep. 708, 26 N. W. 139; *Kerr v. Finch*, 25 Idaho, 32, 135 Pac. 1165.

9. Writing signed but not delivered.

The cases in the United States are divided as to whether to satisfy the requirements of the Statute of Frauds it is necessary to show that the written memorandum was delivered. The better rule would seem to be that proof of such delivery is not necessary, since the possibility of fraud is eliminated where the defendant has himself retained possession of the memorandum.¹ So an undelivered deed may be sufficient to satisfy the statute,² but not unless it contains a recital of the parol contract.³

¹ *Johnston v. Jones*, 85 Ala. 286, 4 So. 748; *Drury v. Young*, 58 Md. 546, 42 Am. Rep. 343.

Contra, *Wilson v. Winters*, 108 Tenn. 398, 67 S. W. 800.

² *Jenkins v. Harrison*, 66 Ala. 345.

³ *Kopp v. Reiter*, 146 Ill. 437, 22 L.R.A. 273, 37 Am. St. Rep. 156, 34 N. E. 942; *Lowther v. Potter*, 197 Fed. 196.

10. Writing not signed.

An unsigned writing is in certain cases competent as evidence of the terms of the contract.¹

¹ *Eager v. Crawford*, 76 N. Y. 97 (draft of contract, competent as part of the *res gestæ*); *Freeman v. Bartlett*, 47 N. J. L. 33 (unsigned paper made by one, and interlined and returned by the other during negotiations, admissible as part of *res gestæ*); *Lathrop v. Bramhall*, 64 N. Y. 365, affirming 5 Thomp. & C. 680, 3 Hun, 394 (memorandum read over, competent to corroborate testimony to oral agreement); *Hazer*

v. Streich, 92 Wis. 505, 66 N. W. 720 (that memorandum of terms of contract written by third person, and read over in hearing of both parties and without dissent of either, competent as admission by parties); Conway v. Mitchell, 97 Wis. 290, 72 N. W. 752 (that memorandum written by one party, and submitted to other for signature, but never signed, competent to show that oral agreement was not within statute of frauds). Compare Kennedy v. Oswego & S. R. Co. 67 Barb. 169 (holding that draft approved, but not signed, was not competent, because not necessary for the purpose of refreshing the memory of a witness); Flood v. Mitchell, 68 N. Y. 507 (draft in which unauthorized additions were made, not competent because thereof, and because not made by common agent); Mumford v. Whitney, 15 Wend. 380, 30 Am. Dec. 60 (copy of proposed instrument taken for the purpose of consulting others, not admissible as evidence of a contract); Aguirre v. Allen, 10 Barb. 74, affirmed on other points in 7 N. Y. 543 (broker's memorandum for his own convenience, not competent); Gouverneur v. Elliott, 2 Hall, 211 (sealed agreement not validly executed as such); Brown v. Markland, 16 Utah, 360, 52 Pac. 597 (instrument made at time of written contract, but expressly stricken out, not admissible as constituting part of contract); Thomas v. Nelson, 69 N. Y. 118 (memorandum of agreement to lease, signed by one party only, not conclusive on him, nor excluding oral evidence). s. p., Errico v. Brand, 9 Hun, 654.

11. Declarations of agent.

The declarations of an agent, not made in the course of his employment as such, are not competent, either to show that he made a contract,¹ or its terms,² or that a contract made by him was broken.³

¹ Stone v. Northwestern Sleigh Co. 70 Wis. 585, 36 N. W. 248; Shiner v. Abbey, 77 Tex. 1, 13 S. W. 613; Commercial F. Ins. Co. v. Morris, 105 Ala. 498, 18 So. 34. Compare, however, Tufts v. Chester, 62 Vt. 353, 19 Atl. 988; Ferguson v. McBean, 4 Cal. Unrep. 429, 35 Pac. 559.

Otherwise of declarations made at the time of the alleged contract, and in the course of his employment. Atchison, T. & S. F. R. Co. v. Cameron, 14 C. C. A. 358, 32 U. S. App. 67, 66 Fed. 719.

² Warten v. Strane, 82 Ala. 311, 8 So. 231; Henkel v. Trubee, — Conn. —, 11 Atl. 722; Idaho Forwarding Co. v. Fireman's Fund Ins. Co. 8 Utah, 41, 17 L.R.A. 586, 29 Pac. 826; Wash v. Cary, 17 Ky. L. Rep. 1066, 33 S. W. 728. Compare, however, Gaither v. Clarke, 67 Md. 18, 8 Atl. 740; and Beaver v. Taylor, 1 Wall. 637, 17 L. ed. 601 (admitting agent's letters as part of the *res gestæ*).

Otherwise, however, as to declarations made at the time of the allege-

contract, and in the course of his employment. *Murray v. Weber*, 92 Iowa, 757, 60 N. W. 492; *Davis's Sons v. Sweeney*, 80 Iowa, 391, 45 N. W. 1040.

⁸ *Memphis & V. R. Co. v. Cocke*, 64 Miss. 713, 2 So. 495.

12. Different contract admissible under general denial.

Under a general denial of a complaint alleging a contract,¹ or a denial that the contract was as set forth in the complaint,² the contract really made, or the part which differs from that alleged, is admissible.

¹ *Gove v. Wooster*, Hill & D. Supp. 30 (inversion of place of covenant by mistake of scrivener); *Trumbull v. Jackman*, 9 Wash. 524, 37 Pac. 680 (proof that contract was several and not joint, competent under answer denying making of joint contract, without setting up several contract); *Ensign v. Hooker*, 6 App. Div. 425, 39 N. Y. Supp. 543 (proof of different agreement than the one alleged held competent). And that defendant in replevin may, under general denial, show by parol what was the real agreement between plaintiff and a third person from whom he obtained the property, even though it differs from the writing, see *Spooner v. Cummings*, 151 Mass. 313, 23 N. E. 839.

² *Marsh v. Dodge*, 66 N. Y. 533, reversing 4 Hun, 278. And see DENIAL.

13. With whom.

On the question whether an oral contract was made with one person or another, it is competent to ask a witness "On the part and behalf, and for whom were the services rendered?"¹ But he cannot be asked in terms with whom his contract was made.² Evidence of general reputation that services sued for were not performed for defendant but for a third party and that defendant was notoriously insolvent, is not competent.³

Nor are letters written by a corporation, the name of which contains the name of the person with whom the contract is alleged to have been made, admissible to prove the contract, unless it is shown that the two are identical.⁴

¹ *Sweet v. Tuttle*, 14 N. Y. 465, affirming 10 How. Pr. 40 (for the question calls for a fact, not a conclusion or opinion); quoted with approval in *People v. Mingey*, 190 N. Y. 61, 65, 82 N. E. 728. *Contrà*: compare CREDIT.

² *Farmer v. Brokaw*, 102 Iowa, 246, 71 N. W. 246.

³ Trowbridge v. Wheeler, 1 Allen, 162.

⁴ Foushee v. Owen, 122 N. C. 360, 29 S. E. 770.

14. Ignorance of effect.

It is not competent, for the purpose of impairing the legal effect of the terms of a contract, to show that the party claiming the right was ignorant when he made the contract that it would confer such right.¹

¹ Groat v. Gile, 51 N. Y. 431 (purchase of sheep, as including wool).

15. Contract made merely to influence others.

Whether it is competent to show that a written contract was not intended to bind the party, but only to influence third persons to whom it might be shown, see ¹

¹ Almon v. Hamilton, 100 N. Y. 527, 3 N. E. 580 (composition deed with secret agreement); Hickler v. Leighton, 70 N. Y. 610 (receipts signed for purpose of showing to another); Grierson v. Mason, 60 N. Y. 394, affirming 3 Thomp. & C. 185, 1 Hun, 113; Willse v. Whittaker, 22 Hun, 242, 244; Delamater v. Bush, 63 Barb. 168; Anthony v. Harrison, 14 Hun, 198, 213, affirmed in 74 N. Y. 613; Hutton v. Manes 68 Iowa, 650, 28 N. W. 9; Coffman v. Malone, 98 Neb. 819, L.R.A. 1917B, 258, 154 N. W. 726; Church v. Case, 110 Mich. 621, 68 N. W. 424; Oak Ridge Co. v. Toole, 82 N. J. Eq. 541, 88 Atl. 827; Colonial Park Estates v. Massart, 112 Md. 648, 77 Atl. 275. *Contra*: Grand Isle v. Kinney, 70 Vt. 381, 41 Atl. 130.

The competency of parol evidence to show that a writing was not intended to create legal relations but was executed as a sham is discussed in note in L.R.A.1917B, 263.

16. Written contract obtained by fraud.

Where a written memorandum of a contract does not express the true intention of the parties because of the fraud of one of the parties, the writing will not be admitted in evidence.¹

¹ Whipple v. Brown Bros. Co., 225 N. Y. 237, 121 N. E. 748; Shea's Appeal, 121 Pa. 302, 1 L.R.A. 422, 15 Atl. 629; Shores-Mueller Co. v. Lonning, 159 Iowa, 95, 140 N. W. 197. See also note in 32 Harvard L. Rev. 858.

17. Implications of law may not be varied by parol evidence.

Where a contract for sale of goods is silent concerning time of delivery the law implies that delivery is to be made within a reasonable time and parol evidence is not admitted to show a contemporaneous oral agreement that delivery was to be made at specified time.¹

¹ *Pond Creek Mill & Elevator Co. v. Clark* (C. C. A.) 270 Fed. 482; *Clark v. Townsend*, 96 Kan. 650, 153 Pac. 555; *Driver v. Ford*, 90 Ill. 595; *Atwood v. Cobb*, 16 Pick. 227, 26 Am. Dec. 657; *Stange v. Wilson*, 17 Mich. 342; *Cameron Coal & Mercantile Co. v. Universal Metal Co.* (*Cameron Coal & Mercantile Co. v. Block*) 26 Okla. 615, 31 L.R.A. (N.S.) 618, 110 Pac. 720. *Contra*: *S. F. Bowser & Co. v. Fountain*, 128 Minn. 198, L.R.A.1916B, 1036, 150 N. W. 795.

CONTRADICTION.**1. Contradicting witness.**

a. In general.

b. Own witness.

2. Usage to contradict contract.

See also **REBUTTAL**; **TAMPERING**; **USAGE**.

As to the right to corroborate after contradiction, see **CORROBORATION**.

1. Contradicting witness.

a. *In general*.—An adverse witness¹ may, on proper foundation being laid,² be contradicted or impeached by cross-examination,³ by proof of his statements⁴ or acts⁵ inconsistent with his testimony on the trial, by proof of hostility,⁶ bias⁷ or interest,⁸ or by proof as to character or reputation,⁹ or insanity or mental derangement,¹⁰ affecting the credibility of his evidence. Account books cannot be used to contradict a witness unless he was interrogated concerning them.¹¹

¹When a party to the suit is the witness sought to be contradicted, the rule is generally stated to be that he may be contradicted without any foundation being laid therefor, for the reason, it would seem, that the admissions of a party are always admissible in evidence

against him. See, for example, *Kennedy v. Wood*, 52 Hun, 46, 4 N. Y. Supp. 758; *Coffin v. Bradbury*, 3 Idaho, 770, 95 Am. St. Rep. 37, 35 Pac. 715; *Owens v. Kansas City, St. J. & C. B. R. Co.* 95 Mo. 169, 8 S. W. 350. See also *Civil Trial Brief*, 4th ed. pp. 265 et seq.

²For the rule that a foundation must be laid before a witness can be contradicted, and as to how it may be laid, see *Barkly v. Copeland*, 74 Cal. 1, 15 Pac. 307; *Ashton v. Ashton*, 11 S. D. 610, 79 N. W. 1001; *Ayers v. Watson*, 132 U. S. 394, 33 L. ed. 378, 10 Sup. Ct. Rep. 116; *Bogart v. Delaware, L. & W. R. Co.* 72 Hun, 412, 25 N. Y. Supp. 175. See also *Civil Trial Brief*, 4th ed. pp. 262 et seq.

³*Freeman v. Hensley*, 3 Cal. unrep. 536, 30 Pac. 792; *Robinson v. Craver* 88 Iowa, 381, 55 N. W. 492; *Southern Kansas R. Co. v. Michaels*, 49 Kan. 388, 30 Pac. 408; *Watts v. Stevenson*, 165 Mass. 518, 43 N. E. 497; *Beuerlien v. O'Leary*, 149 N. Y. 33, 43 N. E. 417; *Levine v. Carroll*, 121 Ill. App. 105. See also *Civil Trial Brief*, 4th ed. pp. 250 et seq.

But where such cross-examination while legitimately tending to impeach the witness also tends to prove the commission of other offenses by the defendant it will not be admitted. *People v. Richardson*, 222 N. Y. 103, 118 N. E. 514.

⁴For cases of contradiction by proof of inconsistent statements, see *Jordan v. McKinney*, 144 Mass. 438, 11 N. E. 702; *Spohn v. Missouri P. R. Co.* 101 Mo. 417, 14 S. W. 880; *Palmeri v. Manhattan R. Co.* 60 Hun, 579, 14 N. Y. Supp. 468; *Immaculate Conception Church v. Sheffer*, 88 Hun, 335, 34 N. Y. Supp. 724. See also *Civil Trial Brief*, 4th ed. pp. 270 et seq.

⁵*Daniels v. Weeks*, 90 Mich. 190, 51 N. W. 273; *Young v. Johnson*, 123 N. Y. 226, 25 N. E. 363; *Allin v. Whittemore*, 171 Mass. 259, 50 N. E. 618; *Barry v. People*, 29 Colo. 395, 68 Pac. 274. See also *Civil Trial Brief*, 4th ed. p. 270.

⁶*Lamb v. Lamb*, 146 N. Y. 317, 41 N. E. 26; *Battishill v. Humphreys*, 64 Mich. 514, 38 N. W. 581. See also *Civil Trial Brief*, 4th ed. p. 280.

⁷*Preferred Acci. Ins. Co. v. Gray*, 123 Ala. 482, 26 So. 517; *Tolbert v. Burke*, 89 Mich. 132, 50 N. W. 803. See also *Civil Trial Brief*, 4th ed. p. 280.

⁸*Elliott v. Luengene*, 20 Misc. 18, 44 N. Y. Supp. 775; *Jernigan v. Flowers*, 94 Ala. 508, 10 So. 437. See also *Civil Trial Brief*, 4th ed. p. 280.

⁹*Civil Trial Brief* 4th ed. pp. 282 et seq., where this question is treated at greater length.

Written statements by a witness out of court may be used for the purpose of impeaching or contradicting him, without first calling his attention to them. *Hanlon v. Ehrich*, 80 App. Div. 359, 80 N. Y. Supp. 692.

A witness cannot be impeached by showing inconsistent statements out of court unless he is first interrogated concerning them. *Geiser Mfg.*

Co. v. Taylor, 55 App. Div. 638, 67 N. Y. Supp. 30. Nor can a witness be impeached by what was said or done by another person in his presence. Stewart v. Long Island R. Co. 54 App. Div. 623, 66 N. Y. Supp. 436, affirmed without opinion in 166 N. Y. 604, 59 N. E. 1130.

¹⁰People v. Enright, 256 Ill. 221, 99 N. E. 936, Ann. Cas. 1913E, 318, holding that such mental derangement must affect the subject-matter of the testimony before it is admissible as to credibility.

¹¹Shepherd v. Denver & R. G. R. Co. 45 Utah 295, 145 Pac. 296; note in 13 Mich. L. Rev. 611.

b. Own witness.—One may contradict his own witness, on a question involved in the issue,¹ or on a question of tampering.²

¹The rule prohibiting a party from impeaching his own witness only applies in three cases, *viz*: (1) The calling of witnesses to impeach the general character of the witness; (2) the proof of prior contradictory statements by him; and (3) a contradiction of the witness by another, where the only effect is to impeach, and not to give any material evidence upon any issue in the case. Coulter v. American Merchants' Union Exp. Co. 56 N. Y. 585; Becker v. Koch, 104 N. Y. 394, 10 N. E. 701. Approved in 22 Am. Law Rev. 455, with the qualification that proof of contradictory statements ought to be allowed. Compare Hurley v. State, 46 Ohio St. 320, 4 L.R.A. 161, 21 N. E. 645, holding that such contradictory statements cannot be proved against the witness's denial of making them.

In Burgess v. New York C. & H. R. R. Co. 34 Hun, 233, s. o., more fully, 20 N. Y. Week. Dig. 249, affirmed, it seems, without opinion, in 98 N. Y. 641, contradiction as to the motives of the witness in the transaction in issue was held competent.

The rule is now generally recognized that such contradictory statements may be shown. Fox v. Forty-four Cigar Co. 90 N. J. L. 483, 5 A. L. R. 723, 101 Atl. 184. See also notes in 13 Mich. L. Rev. 421, and 28 Harvard L. Rev. 531.

²Comstock v. Handy, 23 N. Y. Week. Dig. 547.

2. Usage to contradict contract.

Evidence of a usage or custom is inadmissible to enlarge or diminish or affect the legal rights and liabilities of the parties, fixed by their written agreement in which there is no ambiguity.¹ And on the question whether an alleged contract was made, evidence that its terms were unusual is incompetent if it is in writing.²

If oral, evidence of a usage known to both parties is competent.³

¹Kuhl v. Long, 102 Ala. 563, 15 So. 267; Smith v. Provident Sav. Life Assur. Soc. 13 C. C. A. 284, 31 U. S. App. 163, 65 Fed. 765; Emery v. Atlanta Real Estate Exch. 88 Ga. 321, 14 S. E. 556; Bloomington Canning Co. v. Bessee, 48 Ill. App. 341; Capital Gas & Electric Light Co. v. Gaines, 20 Ky. L. Rep. 1464, 49 S. W. 462; Richard v. Haebler, 36 App. Div. 94, 55 N. Y. Supp. 583; Vollrath v. Crowe, 9 Wash. 374, 37 Pac. 474.

²Bean v. Carleton, 51 Hun, 318.

³Miller v. Insurance Co. of N. A., 1 Abb. N. C. 470.

As to the competency of evidence of usage or custom to explain an ambiguity, create a contract, etc., see **AMBIGUITY**; **USAGE**.

CONVERSATION.

1. Interpreted conversation.
2. Signs.
3. Denial and rebuttal.
4. Fact of conversation does not let in substance.
5. Calling for entire.

See also **ADMISSIONS**; **TELEPHONE**.

As to understanding of witness, see **BELIEF**.

1. Interpreted conversation.

A conversation with a party, ignorant of the language, being had through the medium of his friend or other agent as an interpreter in his presence, that which was said to and by the interpreter in English is competent against the party.¹ The interpreter is considered the party's agent even though he was a mere chance bystander.² An outside party who overheard the conversation interpreted is also a competent witness to it.³

¹Wright v. Maseras, 56 Barb. 521; Nadau v. White River Lumber Co. 76 Wis. 120, 43 N. W. 1135; Miller v. Lathrop, 50 Minn. 91, 52 N. W.

274 (that such a communication is not hearsay). *Contra*: Plymouth Coal Co. v. Kommiskey, 116 Pa. 365, 9 Atl. 646; Highstone v. Burdette, 61 Mich. 54, 27 N. W. 852, holds them inadmissible if it is not shown or offered to be shown that they were communicated to the other person.

As to the admissibility of evidence given through interpreter, see note to Com. v. Vose, 17 L.R.A. 813.

² *Groc v. Delaware & H. Co.* 174 App. Div. 505, 161 N. Y. Supp. 117. See also note in 30 Harvard L. Rev. 397.

³ *Com. v. Vose*, 157 Mass. 393, 17 L.R.A. 813, 32 N. E. 355.

2. Signs.

Dying declarations made by pressing the hand in answer to inquiry when unable to speak may be proved.¹

¹ *Com. v. Casey*, 11 Cush. 417, 59 Am. Dec. 150, and see notes in 56 L.R.A. 427, and 2 B. R. C. 922.

3. Denial and rebuttal.

Testimony merely denying that any such conversation ever occurred, given in contradiction of a specified interview, does not let in evidence, in rebuttal, as matter of right, of another such interview at another time.¹

¹ *Marshall v. Davies*, 78 N. Y. 414, 420, 58 How. Pr. 231. And *Miller v. Cook*, 124 Ind. 101, 24 N. E. 577, holds that one who testifies that he had no conversation with a witness at the time the latter has stated cannot, without asking him the proper impeaching question, testify as to a conversation had with him at a subsequent date, giving the substance thereof, as that would be to make original evidence his own declarations made in distinct and different conversations.

4 Fact of conversation does not let in substance.

An accidental disclosure of the nature of a communication, called out by a question only intended to elicit the fact of such a communication, is not necessarily a ground for allowing the adverse party to call for the consequent conversation.¹

¹ *Winchell v. Latham*, 6 Cow. 682; *Uhe v. Chicago, M. & St. P. R. Co.* 3 S. D. 563, 54 N. W. 601.

5. Calling for entire.

The introduction of a part of a conversation renders admissible as much of the remainder as tends to explain or qualify what has been received.¹

¹Lamwersick v. Boehmer, 77 Mo. App. 136; Louisville & N. R. Co. v. Earl, 94 Ky. 368, 22 S. W. 607; Schwartz v. Wood, 51 N. Y. S. R. 4, 21 N. Y. Supp. 1053; Gibson v. State, 91 Ala. 64, 9 So. 171. So held, even though it may contain self-serving statements. Emery v. State, 92 Wis. 146, 65 N. W. 848.

COPIES.

1. Copy proceeding from adverse party.
2. Where original is beyond the jurisdiction of the court.
3. Copy of filed or recorded instrument.
 - a. In general.
 - b. Sufficiency of foundation.
 - c. Instrument not entitled to record.
 - d. Effect of statute making copy equal evidence.
 - e. Form of authentication.
 - f. Defect in authentication superseded by oath to the truth of copy.
4. Imperfect or erroneous copy.
5. Oral, to vary.
6. Copies made by mechanical means as originals.
7. Copy of lost or destroyed will.

For the distinction between sworn, verified, and exemplified copies, see Abbott, Trial Ev. (3d ed.) pp. 1393 et seq.; also 1 Abbott, New Pr. & Forms, 80.

1. Copy proceeding from adverse party.

A document is admissible, though a copy, if it was received from the adverse party to be acted on.¹

¹Moore v. Belloni, 10 Jones & S. 184. So held of copies served of affidavits on file, when offered in evidence in the same action. Jackson ex dem. Wood v. Harrow, 11 Johns. 434. And in Purser v. Eagle Lake, Land & Irrig. Co. 111 Cal. 139, 43 Pac. 523, a certified copy of a resolution of the board of directors of a corporation, attested by the signatures of the president and secretary under the corporate seal, reciting its unanimous adoption at a special meeting, and especially ratifying and confirming a note and mortgage of the corporation, furnished to

the holder of the mortgage by the secretary, was held admissible, in the absence of evidence to prove that it was not the act of the corporation, to show the binding force of the mortgage.

Otherwise of a copy offered as evidence in another action. *Kellogg v. Kellogg*, 6 Barb. 116.

2. Where original is beyond the jurisdiction of the court.

Where the original document is in another county,¹ state or country,² and the party seeking to introduce the evidence has shown some diligence in an effort to produce it,³ a copy or other secondary evidence is admissible. A showing of diligence, however, is not universally required; it being sufficient in many jurisdictions to show that the original is in the custody of a person beyond the jurisdiction of the court.⁴

¹*Sayles v. Bradley & M. Co.* 92 Tex. 406, 49 S. W. 209, holding a copy of a statement to a mercantile agency admissible where the superintendent of the agency in another county refused to attach the statement to his deposition.

²*Peters & R. Furniture Co. v. Queen City F. Ins. Co.* 63 Or. 382, 126 Pac. 1005, where original fire insurance policies were shown to be in Philadelphia and London, and copies were therefore admitted in evidence. See also note in 11 Mich. L. Rev. 162.

³*Phillips v. United States Benev. Soc.* 125 Mich. 186, '84 N. W. 57, reviewing cases and holding that some diligence must be shown towards producing original.

⁴*Hoyle v. Mann*, 144 Ala. 516, 41 So. 835; *Ritter v. State*, 70 Ark. 472, 69 S. W. 262; *Gordon v. Searing*, 8 Cal. 49; *Pullin v. McGee*, 143 Ga. 184, 84 S. E. 443; *Waller v. Cralle*, 8 B. Mon. 11; *State v. Myer*, 259 Mo. 306, 168 S. W. 717; *Carpenter v. Bailey*, 56 N. H. 283; *Hagaman v. Gillis*, 9 S. D. 61, 68 N. W. 192; *Missouri P. R. Co. v. Gernan*, 84 Tex. 141, 19 S. W. 461; *Dwyer v. Salt Lake City Copper Mfg. Co.* 14 Utah, 339, 47 Pac. 311.

This entire question is discussed in an exhaustive note in L.R.A. 1917D, 530.

3. Copy of filed or recorded instrument.

a. In general.—An instrument recorded under statutes allowing record, but not making the record evidence equally with the original, cannot be proved by the record, nor by a certified copy of the record, without first laying a foundation for it as secondary evidence.¹

An instrument filed under statutes not making a certified

copy evidence cannot be proved by a certified copy, without first laying such foundation.²

But where a party offering the copy did not have custody or control of the original, and had no right thereto, the copy is competent without the usual preliminary proof to secure the right to read it as secondary evidence.³

¹State v. Penny, 70 Iowa, 190, 30 N. W. 561 (false pretenses, the falsity consisting in representation that there was no prior chattel mortgage on the property). The Iowa statute (Compiled Code of Iowa 1919, § 7337, p. 2122) makes duly certified copies evidence of equal credibility in all cases where the record would be admissible, but does not make the record admissible equally with the original. But McCollister v. Yard, 90 Iowa, 621, 57 N. W. 447, holds that the record of a deed of adoption is not admissible under § 3702, as it is not a paper belonging to a public office, or a paper required by law to be kept therein, but is a private contract required to be recorded, and such record, although open to inspection by the public, is not public in the sense that the paper itself must remain lodged in a public office.

Church of Jesus Christ, L. D. S. v. Church of Christ, 60 Fed. 937 (certified copy from recorder's office, of a deed, not competent where original is not produced, and there is no proof of its loss, or that it is not in possession of party offering copy).

Farrow v. Nashville, C. & St. L. R. Co. 109 Ala. 448, 20 So. 303 (certified copy of deed not competent unless original lost or destroyed or out of control or custody of the party offering copy). But under an Alabama statute making certified copies of records competent unless the court on motion requires production of the original; a certified copy of an instrument, required by another statute to be signed and recorded in the office of the probate judge, is competent where the court does not order the production of the original; and it makes no difference that it bears no certificate of acknowledgment, if that is not required as condition precedent to filing and recording. Schwartz v. Bajrd, 100 Ala. 154, 13 So. 947 (consent of husband to wife engaging in business).

Bell v. Kendrick, 25 Fla. 778, 6 So. 868 (an original is best evidence, and must be introduced if in custody or control of party offering copy; and he cannot use copy until he shows affirmatively that original is not in his custody or control).

Hayden v. Mitchell, 103 Ga. 431, 30 S. E. 287 (copy from proper registry of paper required to be recorded competent on proof of loss or destruction of original).

Phenix Ins. Co. v. Mechanics' & T. Sav. Loan & Bldg. Asso. 51 Ill. App. 479 (copy not competent unless it is shown that original cannot be procured).

Pierce v. Georger, 103 Mo. 540, 15 S. W. 849 (neither record of deed nor certified copy competent without first accounting for nonproduction of the original).

Thams v. Sharp, 49 Neb. 237, 68 N. W. 474 (certified transcript of record of duly recorded deed competent with same force and effect as original when original is shown to have been lost or not to belong to or be in control of party seeking to use it).

Oxsheer v. Watt, 91 Tex. 402, 44 S. W. 67 (certified copy of chattel mortgage competent when certificate of clerk of county court attached thereto shows original on deposit in his office). Compare *Gooch v. Addison*, 13 Tex. Civ. App. 76, 35 S. W. 83 (holding copy competent where the parties expressly waived filing of the original, and agreed that copy might be used if original was destroyed). As to what is a sufficient waiver for this purpose, see *Collins v. Durward*, 4 Tex. Civ. App. 339, 23 S. W. 561. But such waiver will not deprive the parties of the right to object to any deed because not duly registered or otherwise properly proved. *Robertson v. Du Bose*, 76 Tex. 1, 13 S. W. 309.

² *Bissell v. Pearce*, 28 N. Y. 252; *Fellows v. Van Hyring*, 23 How. Pr. 230 (chattel mortgage on file not provable by clerk's certificate to copy).

³ *Kenosha Stove Co. v. Shedd*, 82 Iowa, 540, 48 N. W. 933; *Frank v. Reuter*, 115 Mo. 517, 22 S. W. 812; *Florence Land, Min. & Mfg. Co. v. Warren*, 91 Ala. 533, 9 So. 384; *Blalock v. Miland*, 87 Ga. 573, 13 S. E. 551; *Eby v. Winters*, 51 Kan. 777, 33 Pac. 471; *Buck v. Gage*, 27 Neb. 306, 43 N. W. 110. Especially where he has called upon the proper persons for its production, and they do not comply with the demand. *Keller v. Ashford*, 133 U. S. 610, 33 L. ed. 667, 10 Sup. Ct. Rep. 494. *Contra*, however, in Florida. *Bell v. Kendrick*, 25 Fla. 778, 6 So. 868 (to effect that under art. 16, § 21, of the state Constitution a party offering copy must in any case account for nonproduction of original).

b. Sufficiency of foundation.—To secure the right to read secondary evidence of recorded instruments within the rule in the preceding section, it is sufficient if the facts and circumstances reasonably satisfy the court that the original is lost or destroyed, or is not within the custody or control of the party desiring to use it.¹

¹ *Kleimann v. Gieselmann*, 114 Mo. 437, 21 S. W. 796 (lost deed); *State v. Flanders*, 118 Mo. 227, 23 S. W. 1086 (testimony of party offering copy that person executing original had snatched it from his hand and torn it up); *Southall v. Southall*, 6 Tex. Civ. App. 694, 26 S. W. 150 (attorney's affidavit that neither he nor client can procure the

original); *Western U. Teleg. Co. v. Hearne*, 7 Tex. Civ. App. 67, 26 S. W. 478 (holding sufficient suppletory affidavits in words of statute, although they are not filed before trial). Compare *Bauman v. Chambers*, — Tex. Civ. App. —, 28 S. W. 917 (proof that original is on file in pending case in another county not enough without proof that case has not been finally disposed of, or that leave to withdraw it from file could not be obtained); *Western Union Beef Co. v. Thurman*, 17 C. C. A. 542, 30 U. S. App. 516, 70 Fed. 960 (claiming merely that original is in possession of counsel for opposite party, not enough without proof that he was such counsel, or that he controlled the case to such an extent that his possession could be treated as that of the party).

c. Instrument not entitled to record.—A certified copy of a recorded instrument which by reason of some defect was not entitled to be recorded cannot be received in evidence.¹

¹ *Union P. R. Co. v. Reed*, 25 C. C. A. 389, 49 U. S. App. 233, 80 Fed. 234; *Foxworth v. Brown Bros.* 114 Ala. 299, 21 So. 413; *Parker v. Cleveland*, 37 Fla. 39, 19 So. 344. Even on proper affidavit of the loss of the original. *Hill v. Taylor*, 77 Tex. 295, 14 S. W. 366. But according to *Apel v. Kelsey*, 47 Ark. 413, 2 S. W. 102, the certified copy is admissible if there has been a curative statute validating such defective instruments.

A copy of the register of a deed not entitled to be registered because not complying with the statute, is not admissible in evidence. *Bower v. Cohen*, 126 Ga. 35, 54 S. E. 918.

If the instrument has not been acknowledged so as to entitle it to record a copy made by the county clerk cannot be read in evidence. *Belcher v. Polly*, 32 Ky. L. Rep. 623, 106 S. W. 818.

But it may be proved according to the common law if material to any issue in the case. *Heintz v. Thayer*, 92 Tex. 661, 50 S. W. 929, 51 S. W. 640.

d. Effect of statute making copy equal evidence.—A statute making a certified copy evidence equally with the original¹ does not preclude showing that such copy is erroneous in special particulars in which it departs from the original.²

¹ For instances of cases admitting copies under such statutes, see: *Dawson v. Parham*, 55 Ark. 286, 18 S. W. 48; *Apel v. Kelsey*, 47 Ark. 413. 2 S. W. 102; *Gethin v. Walker*, 59 Cal. 502; *Anthony v. Chapman*, 65 Cal. 73, 2 Pac. 889; *Weaver v. McKay*, 108 Cal. 546, 41 Pac. 450; *Mills v. Snypes*, 10 Ind. App. 19, 37 N. E. 422; *Bowersock v. Adams*.

55 Kan. 681, 41 Pac. 971; *Stinson v. Geer*, 42 Kan. 520, 22 Pac. 586.

²*Campbell v. Laclede Gas Co.* 119 U. S. 445, 30 L. ed. 459, 7 Sup. Ct. Rep. 278.

e. Form of authentication.—As to the form of authentication to render copy admissible, see ¹

¹ *Abbott, New Pr. & Forms*, 727 et seq. See also *Huntoon v. O'Brien*, 79 Mich. 227, 44 N. W. 601 (that a certificate that copies are true copies as compared by the officer sufficiently shows that they were compared with the originals); *Lasater v. Van Hook*, 77 Tex. 650, 14 S. W. 270 (that a copy of a deed offered in evidence is not shown to be an examined copy by the fact that the witness producing it testifies that it is a true copy, and states that he had compared it with a certified copy taken from a record of the deed, the copy from the record being better evidence than that produced); *Wiggins Ferry Co. v. Illinois & St. L. R. & Coal Co.* 163 Ill. 238, 45 N. E. 285 (testimony of a witness that an uncertified paper purporting to be a copy of a public record corresponds with a copy formerly made by him, and that it was furnished as a certified copy by the custodian of the record, not sufficient to prove such copy and make it admissible in evidence); *Garden City Sand Co. v. Miller*, 157 Ill. 225, 41 N. E. 753 (authentication of copy from the records, by deputy register of deeds signing as deputy, sufficient when deputy authorized to act in case there is no register who can act); *Drumm v. Cessnum*, 58 Kan. 331, 49 Pac. 78 (certificate to render copies of papers filed in a public office admissible should show that they are copies of original papers, and not of a transcript of them); *Smith v. Gillum*, 80 Tex. 120, 15 S. W. 794 (that an examined copy of a record of a conveyance of lands in another state, compared with the original, the execution of which is proved by witnesses who testify that the copy was prepared by the notary before whom the original was executed, is sufficiently authenticated to render it admissible in evidence); *Richardson v. Shelby*, 3 Okla. 68, 41 Pac. 378 (that a copy of what purports to be a copy of a chattel mortgage executed and originally filed in Kansas, although certified by the register of deeds of the county where the purported copy is filed to be a "true copy of the original mortgage on file in this office," is not properly authenticated as a "true copy" of the original mortgage, within the meaning of Okla. Rev. Laws 1910, § 5099, vol. 2, p. 1389, requiring the authentication to come from the county wherein the original instrument is filed).

As to who is a proper officer to authenticate a copy, see *Benson v. Cahill*, — Tex. Civ. App. —, 37 S. W. 1088 (that clerk of the court in which administration proceedings are had is the proper person to authenticate the transcript of such proceedings when offered in evidence in an action in another county); *Ballew v. United States*, 160 U. S.

187, 40 L. ed. 388, 16 Sup. Ct. Rep. 263 (certificate by commissioner of pensions with certificate of the Secretary of the Interior certifying to official character of the former, sufficient authentication of a copy of a record in the pension office).

f. Defect in authentication superseded by oath to the truth of copy.—A certified copy, where authentication proves defective, may be proved as examined.¹

¹ *Society for Propagating the Gospel v. Young*, 2 N. H. 310, 312, s. p., *State v. Lynde*, 77 Me. 561, 1 Atl. 687 (admitting sworn copy to show contents of record).

4. Imperfect or erroneous copy.

A copy, if competent secondary evidence, may be received notwithstanding an error in it, if oral or other extrinsic evidence is given to show the error in the copy, and the proper correction.¹

¹ As, for instance, testimony of witnesses who have heard the original, stating their recollection of its contents. *Booth v. Tiernan*, 109 U. S. 205, 27 L. ed. 907, 3 Sup. Ct. Rep. 122. See, also, on the same question, *Reppard v. Warren*, 103 Ga. 198, 29 S. E. 817; *Emanuel v. Gates*, 53 Fed. 772; *Devereux v. McMahon*, 108 N. C. 134, 12 L.R.A. 205, 12 S. E. 902; *Hill v. Smith*, 6 Tex. Civ. App. 312, 25 S. W. 1079.

5. Oral, to vary.

When an instrument, the absence of which is accounted for, has been proved by secondary evidence, its contents thus shown are protected by the same rule against oral evidence to vary a writing, that the original would have been had it been produced.¹

¹ *Reed v. United States Exp. Co.* 48 N. Y. 462; *Campbell v. Laclede Gas Co.* 119 U. S. 445, 30 L. ed. 459, 7 Sup. Ct. Rep. 278.

6. Copies made by mechanical means as originals.

Carbon copies are generally received in evidence as duplicate originals.¹ So placards printed from the same press have been held to be duplicate originals.² But the authorities agree that letterpress copies are not admissible as originals,³ and photo-

graphic copies are not originals and can be used only as secondary evidence.⁴

¹ *International Harvester Co. v. Elfstrom*, 101 Minn. 263, 12 L.R.A. (N.S.) 343, 118 Am. St. Rep. 626, 112 N. W. 252, 11 Ann. Cas. 107; *Wright v. Chicago, B. & Q. R. Co.* 118 Mo. App. 392, 94 S. W. 555; *Cole v. Ellwood Power Co.* 216 Pa. 283, 65 Atl. 678; *Virginia-Carolina Chemical Co. v. Knight*, 106 Va. 674, 56 S. E. 725; *Waterman v. Davis*, 66 Vt. 83, 28 Atl. 664.

² *Rex v. Watson*, 2 Starkie, 116.

³ *Menasha Wooden Ware Co. v. Harmon*, 128 Wis. 177, 107 N. W. 299; *Haas v. Chubb*, 67 Kan. 787, 74 Pac. 230; *Anglo-American Packing & Provision Co. v. Cannon*, 31 Fed. 313.

⁴ *Eborn v. Zimpelman*, 47 Tex. 503, 26 Am. Rep. 315; *Howard v. Illinois Trust & Sav. Bank*, 189 Ill. 568, 59 N. E. 1106.

7. Copy of lost or destroyed will.

Where it is proved that a will has been duly executed and that it has been lost or destroyed without the knowledge or consent of the testator, the best evidence of its contents is a copy or draft of the will, if it can be obtained, and this is sufficient, when satisfactorily proved.¹

¹ *Burls v. Burls*, 36 L. J. Prob. N. S. 125, L. R. 1 Prob. & Div. 472, 16 L. T. N. S. 677, 15 Week. Rep. 1090; *Graham v. O'Fallon*, 3 Mo. 507; *Hildreth v. Schillenger*, 10 N. J. Eq. 196; *James v. James*, 3 Hagg. Eccl. Rep. 184, note; *Hamilton v. Lightbody*, 21 U. C. C. P. 126; *Jackson ex dem. Schuyler v. Russell*, 4 Wend. 543; *Forbing v. Weber*, 99 Ind. 589; *Payne's Will*, 4 T. B. Mon. 423.

CORROBORATION.

1. Reason for positiveness.
2. Corroboration of hearsay.
3. Corroboration before contradiction.
4. Corroboration let in by contradiction.
 - a. Probability of truth.
 - b. Conduct of adverse party.
 - c. Accounts.
 - d. Subsequent memorandum.
 - e. Character of witness.
 - f. Prior consistent statements.
 - g. *Ex parte* declarations in own favor.
5. Contradicting corroboration.

See also **CHARACTER; REBUTTAL.**

1. Reason for positiveness.

A witness may be asked why he is confident he is correct; for a reason for the positiveness of relevant knowledge is relevant.¹

¹Blackwell v. Hamilton, 47 Ala. 472; Angell v. Rosenbury, 12 Mich. 241, 256; Cole v. Lake Shore & M. S. R. Co. 105 Mich. 549, 63 N. W. 647; Thomas v. State, 27 Ga. 287.

But he cannot, under pretense of giving reasons for his recollection, state facts material to the issue, but inadmissible by the rules of evidence. McBride v. Cicotte, 4 Mich. 478.

Nor can a party bolster up testimony of his own witness by asking for the reasons which induced the conclusions to which he has just testified. Sprenger v. Tacoma Traction Co. 15 Wash. 660, 43 L.R.A. 706, 47 Pac. 17.

2. Corroboration of hearsay.

A bank officer having testified without objection to a fact occurring in the ordinary course of business under his supervision, but not within his personal knowledge, evidence of the custom and usage of the bank is competent in corroboration.¹

¹Knickerbocker L. Ins. Co. v. Pendleton, 115 U. S. 339, 344, 29 L. ed. 432, 434, 6 Sup. Ct. Rep. 74 (but qualifying this by saying this does not excuse the nonproduction of written entries, if such exist, as to the transaction in question. For this rule, see **BUSINESS, § 3**).

3. Corroboration before contradiction.

The rule that a party who has testified to a fact in issue directly discernible by the senses is not entitled, as of right, to fortify his testimony by proof of other facts, merely to render it more probable that what he swore to was true, where no evidence of its improbability has been adduced,¹ does not preclude him from putting in other evidence which may afford independent evidence of the same fact.²

¹ *Delano v. Smith Charities*, 138 Mass. 63. And see *State v. Guillory*, 45 La. Ann. 31, 12 So. 314 (holding that hearsay testimony cannot be admitted as part of the affirmative for the prosecution in a criminal trial on the ground that it is in supposed corroboration of the statement of another witness which may later be the subject of attack).

² *Sawyer v. Orr*, 140 Mass. 234, 5 N. E. 822 (an action on note, the nature of the consideration being in issue,—held, error to exclude a document which on its face suggested that it probably referred to the note).

In *Thiele v. Citizens' R. Co.* 140 Mo. 319, 41 S. W. 800, it is held that a defendant whose application for a continuance on account of absent witnesses is defeated, as provided by the Missouri statutes, by the admission of plaintiff that such witnesses would testify as stated in the affidavit, may corroborate such statutory evidence at every point, either by oral testimony as to the facts, or any additional fact or circumstance legitimately bearing on the issues.

4. Corroboration let in by contradiction.

a. Probability of truth.—In case of a conflict of testimony, either party may be allowed to show any incidents connected with the fact in question which tend to render probable the truth of his evidence, or to render improbable that of his adversary.¹

This rule allows evidence as to motive² for an act in dispute, the possession of the means of performing it,³ preparations or connected conduct leading up to it,⁴ and its consequences or results.⁵

The courts have a discretionary power to exclude what is too remote to have a reasonable tendency for the purpose.⁶

And the rule does not allow proof of a fact otherwise irrele-

• vant, if the only point in respect to which it tends to show the truth of the evidence is immaterial to the issue.⁷

¹ *Platner v. Platner*, 78 N. Y. 90, followed in *National Ulster County Bank v. Madden*, 41 Hun, 113 (holding contemporaneous memorandum on check stub, competent to corroborate the testimony of the drawer of the check, even when not necessary to refresh his memory); *People v. Sherman*, 103 N. Y. 513, 9 N. E. 178 (evidence that witnesses visited an office and made investigation preliminary to requesting the accused to retract libel, having been contradicted by defendant's evidence in reply, other testimony that they did visit such place held competent in rebuttal); *People v. Wentworth*, 4 N. Y. Crim. Rep. 207 (cohabitation, habit, and repute are made competent on the question of marriage even in prosecution for bigamy, by conflict in direct testimony); *People v. Bragle*, 10 Abb. N. C. 300 (criminal case: On the question whether the accused, as a public officer, made a fraudulent claim for money paid for services in burial in addition of price of coffin, held, that to contradict testimony that the price paid for the coffin was to include the services, it was competent for him to show a previous understanding with a third person, by which the latter was to furnish both coffin and services at a sum greater than the aggregate he alleged he had paid); *Hamilton use of Warn-McClain Co. v. Hastings*, 172 Pa. 308, 34 Atl. 43 (an action for the price of lumber sold by a member of a firm who was a member of another firm with whom defendant had a previous contract; evidence relating to the state of the accounts between defendant and the latter firm and the extent to which that contract had been performed, competent when introduced merely for the purpose of corroboration); *Birmingham Electric R. Co. v. Clay*, 108 Ala. 233, 19 So. 309 (holding evidence that a witness who testified that a train was moving from 4 to 6 miles an hour when plaintiff's intestate tried to board it had his attention called to the fact that the latter was about to get in a place of danger just before he saw him running towards the train, competent to show that his attention was called to the rate the train was moving); *Blomgren v. Anderson*, 48 Neb. 240, 67 N. W. 186 (an action to recover wages under special contract, the defense being that the services were by agreement performed in payment of board and lodging; evidence that about the time of agreement alleged by defendant a third person, in defendant's presence and hearing, had offered to employ plaintiff at substantial wages, competent).

Contra: *People v. Hurtado*, 63 Cal. 288 (held, that evidence of the truth of a charge is not competent to corroborate evidence of a confession of it, when the truth is not in issue, but the fact of confession is only relevant as showing knowledge or belief on the part of the one to whom the confession was made. Wife's confession to husband, of having committed adultery with deceased); *Obermeier v. Whalen*.

21 Misc. 37, 46 N. Y. Supp. 872 (holding stub in receipt book inadmissible in corroboration of the testimony of the one giving the receipt, as to its contents, admitted without laying the proper foundation for secondary evidence).

Compare *Edgerton v. Wolf*, 6 Gray, 453, 457 (holding that where the testimony of a witness to an interview has been contradicted by another witness testifying that the interview related to a different transaction, the party has not a right to corroborate the latter witness by proof that there actually was such a transaction, for this would be a collateral question). See, further, on this question, *Civil Trial Brief* (4th ed.) p. 312.

² *Upton v. Winchester*, 106 Mass. 330 (action for price. Denial of having agreed. Errors to exclude evidence of actual value being below alleged price); *Knallakan v. Beck*, 47 Hun, 117 (conflict as to rate of wages agreed on; evidence of fair market value competent); *Cornell v. Markham*, 19 Hun, 275 (error to exclude evidence of unreasonableness of terms alleged, as tending to corroborate denial); *Parker v. Coburn*, 10 Allen, 82 (vendor against purchaser for price. In a conflict of evidence as to agreed price, error to exclude deeds by which plaintiff had previously conveyed away the right to cut timber, which had reduced the actual value far below the alleged agreed price); *Blackburn v. Weisgerber*, 13 N. Y. Week. Dig. 263 (in a conflict of testimony as to whether defendant suffered his property to be bought in by plaintiff at a low price for benefit of both, held, error to exclude evidence of a large actual value); *Schmidt v. Schanzlin*, 21 Jones & S. 498 (holding that in a conflict of evidence on the question whether consignments were a bailment or a sale, it is competent to show that the consignee was insolvent, because if insolvent he would be more likely to solicit consignments as agent, rather than defraud by buying with an intent not to pay); *Jones v. Eaton*, 27 N. Y. Week. Dig. 356; *Turver v. Field*, 13 N. Y. S. R. 12 (in conflict of testimony as to whether A employed B it is competent to prove that he already had a contract for the same thing with C).

³ *Pontius v. People*, 82 N. Y. 339, affirming, 21 Hun, 328 (holding financial means and necessities of a person competent, on the question whether he made a large loan as sworn by him). *s. p.*, *Nicholls v. Van Valkenburgh*, 15 Hun, 230 (holding the like evidence competent on the question whether an alleged obligation was invalid, or whether omission to attempt to enforce it during life was mere forbearance); *Burlew v. Hubbell*, 1 Thomp. & C. 235 (action on note. Making denied. Plaintiff relied on evidence that it was given for a loan to defendant when he was pressed for money to pay a certain debt. Held, error to exclude evidence offered by defendant that he obtained the money he needed for that purpose from another); *Nicholson v. Waful*, 70 N. Y. 604, reversing 6 Hun, 655 (holds that possession of means to make an alleged loan at the time of making it being shown beyond

question, it was not error to exclude evidence of impecuniosity during several years previous).

⁴ *Stone v. Hubbardston*, 100 Mass. 49 (error to exclude testimony that plaintiff was driving at a reckless speed an eighth of a mile before he reached the place of casualty, to corroborate a witness who had testified that he was so driving at the time of the casualty. *Gray, J.*); *Lindsay v. People*, 63 N. Y. 143, affirming 5 Hun, 104, s. c. more fully, 67 Barb. 548 (homicide; accomplice having testified that they removed the body on a certain night, evidence that he was away from home that night is admissible to corroborate. So, after it has been shown that the removal was in a sleigh, evidence that the accused was seen passing in a sleigh in that direction at the time stated is admissible).

⁵ In an action against a railroad company for killing a mare upon its track, evidence that an engine coming from the direction of the place where the mare was killed, on the morning of the accident, had upon it fresh blood, dung, and hair, is admissible. *International & G. N. R. Co. v. Hughes*, 81 Tex. 184, 16 S. W. 875.

Holyoke Paper Co. v. Conklin, 2 Allen, 326 (defendant's testimony denying the sale alleged, and stating that he has only purchased a less quantity, which was no part of that alleged to have been sold to him,—held, properly corroborated by showing what he had done with all he had purchased of plaintiff, and that the results were such as were inconsistent with the use of the quantity alleged); *Lindsay v. People*, 63 N. Y. 143, affirming 5 Hun, 104, more fully, 67 Barb. 548 (discovery of blood stains six months after alleged homicide, competent; lapse of time being for consideration of the jury); *Chester v. Dickerson*, 54 N. Y. 1, affirming 52 Barb. 349 (see *Whisler v. Drake*, 35 Iowa, 103), (witness having testified to receiving money, the fact that he immediately thereafter exhibited money as having been so received is competent in corroboration).

⁶ *Platner v. Platner*, 78 N. Y. 90, 97 (*dictum* by Folger, J.).

⁷ *Gorham v. Price*, 25 Hun, 11 (the question at issue being whether an adverse party was in possession as a tenant or as a purchaser,—held, error to allow party who had proved declaration of his adversary of readiness to pay rent, and that he had money in bank to pay it with, to go on and prove the fact of the money being in bank, as corroboration of admission that he was tenant); *People v. Haynes*, 55 Barb. 450, 457 (error to receive evidence that accomplice did pay a sum to witness, to corroborate the testimony of the accomplice that the accused paid the accomplice a large sum for the criminal act, and that the accomplice had used part of it to pay witness). Distinguished in *People v. Sherman*, 103 N. Y. 513, 9 N. E. 178.

b. Conduct of adverse party.—In a conflict of testimony it is competent to show that the adverse party has dealt with a

third person in a manner which would indicate bad faith if the fact were as he now testifies.¹

This is a result of the general rule as to conduct in the nature of admissions.

¹ *Hickler v. Leighton*, 70 N. Y. 610 (an action by subcontractor for compensation; defense, accord and satisfaction at less than subcontract price, supported by defendant's testimony that plaintiff's work was badly done. Held, that in a conflict of evidence as to this last point, the plaintiff might show that defendant had claimed and received a sum in excess of the main contract price for the work done).

c. Accounts.—In a conflict of testimony, accounts of the parties,¹ and accounts and memoranda of a person who is since deceased,² may be received as corroborating the testimony of a witness to the facts entered in the accounts, although the accounts are not competent as original evidence.

¹ *Charles v. Bishoff*, 1 Sadler (Pa.) 260, 1 Atl. 572; *Bean v. Lambert*, 77 Fed. 862 (holding books of account competent as entries made at the time of the transactions, for the purpose of corroborating the testimony of a witness as to the date of such transactions, without being proved in accordance with state statutes relating to account books). But a party cannot corroborate his testimony to the effect that he was interested in a business merely as a creditor, and not as a partner of the proprietor, by introducing his books of account. *Cohen v. Green*, 21 Misc. 334, 47 N. Y. Supp. 136.

² *Moffat v. Moffat*, 10 Bosw. 468 (testimony as to the nature and contents of documents long since destroyed being in conflict, entries in the account books of the counsel who drafted the documents relating thereto, his drafts thereof, and other papers drafted by him at the same time relative to the same subject, the counsel being deceased, are admissible as corroborative).

d. Subsequent memorandum.—A subsequent memorandum made by a witness, of facts to which he has testified of his own recollection, is inadmissible to corroborate him.¹

¹ *Cunard v. Manhattan R. Co.* 1 Misc. 151, 20 N. Y. Supp. 724.

e. Character of witness.—When a witness's credibility has been directly attacked by proof as to character or facts affecting it,¹ evidence is admissible to sustain him in respect thereto.²

As to whether general good character or reputation for truth and veracity may be shown where a witness has been impeached by proof of contradictory statements, the authorities are divided.³

The sustaining witness must, in order to testify as to character, show his knowledge thereof.⁴

The mere fact that a witness's testimony is contradicted by opposing testimony does not warrant the introduction of evidence of his reputation for truth and veracity.⁵

¹ As to whether one may give evidence of good character where his character is not put in issue by the pleadings, or evidence of general bad character has been received against him, see CHARACTER.

² *Gertz v. Fitchburg R. Co.* 137 Mass. 77, 50 Am. Rep. 285; *Post Pub. Co. v. Hallan*, 8 C. C. A. 201, 16 U. S. App. 613, 59 Fed. 530. See also *Civil Trial Brief*, 4th ed. pp. 312, 315.

So where a witness has been impeached by an admission made on cross-examination that he had previously been convicted of forgery, his testimony may be sustained by proof of his general reputation. *Derrick v. Wallace*, 217 N. Y. 520, 112 N. E. 440; *First Nat. Bank v. Blakeman*, 19 Okla. 106, 12 L.R.A. (N.S.) 364, 91 Pac. 868.

But see *Contra*: *Mack v. Porter*, 18 C. C. A. 527, 25 U. S. App. 595, 72 Fed. 236; *Munroe v. Godkin*, 111 Mich. 183, 69 N. W. 244.

³ That he may be so sustained, see, for example, *Louisville, N. A. & C. R. Co. v. Frawley*, 110 Ind. 18, 9 N. E. 594; *Berryman v. Cox*, 73 Mo. App. 67; *United States v. Lancaster*, 10 L.R.A. 333, 44 Fed. 896.

That he may not, see *Russell v. Coffin*, 8 Pick. 143; *Wertz v. May*, 21 Pa. 274; *First Nat. Bank v. Commercial Assur. Co.* 33 Or. 43, 52 Pac. 1050. See more fully on this question, *Civil Trial Brief*, 4th ed. pp. 312, 316.

⁴ *Cook v. Hunt*, 24 Ill. 536. But see more fully on this question, *Civil Trial Brief*, 4th ed. pp. 313, 321.

⁵ *Mobile & G. R. Co. v. Williams*, 54 Ala. 168; *People v. Bush*, 65 Cal. 129, 3 Pac. 590, 5 Am. Crim. Rep. 459; *Rogers v. Moore*, 10 Conn. 14; *Saussy v. South Florida R. Co.* 22 Fla. 327; *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751, 12 S. E. 18; *Pruitt v. Cox*, 21 Ind. 15; *State v. Archer*, 73 Iowa, 320, 35 N. W. 241; *Vance v. Vance* 2 Met. (Ky.) 581; *Vernon v. Tucker*, 30 Md. 459; *Atwood v. Dearborn*, 1 Allen, 483, 79 Am. Dec. 755; *People v. Hulse*, 3 Hill, 309; *Osmun v. Winters*, 25 Or. 260, 35 Pac. 250; *Braddee v. Brownfield*, 9 Watts,

124; *Tomson v. Heidenheimer*, 16 Tex. Civ. App. 114, 40 S. W. 425; *Stevenson v. Gunning*, 64 Vt. 601, 25 Atl. 697; *Spurr v. United States*, 31 C. C. A. 202, 59 U. S. App. 663, 87 Fed. 701; *First Nat. Bank v. Blakeman*, 19 Okla. 106, 12 L.R.A. (N.S.) 364, 91 Pac. 868.

Contra: *State v. Desforbes*, 48 La. Ann. 73, 18 So. 912; *George v. Pilcher*, 28 Gratt. 299, 26 Am. Rep. 350; *Davis v. State*, 38 Md. 75.

For other cases, see note in 12 L.R.A. (N.S.) 364.

f. Prior consistent statements.—Prior statements consistent with present testimony are usually inadmissible to corroborate an impeached witness,¹ unless it has been charged that such present testimony is the result of recent fabrication, or given under the influence of a motive which did not exist at the time of the making of the prior statements.²

¹*Marx Bros. v. Leinkauff*, 93 Ala. 453, 9 So. 818; *Baxter v. Camp*, 71 Conn. 245, 42 L.R.A. 514, 41 Atl. 803; *Dudley v. Bolles*, 24 Wend. 465; *Baxter v. Camp*, 71 Conn. 245, 42 L.R.A. 514, 71 Am. St. Rep. 169, 41 Atl. 803; *Com. v. Tucker*, 189 Mass. 457, 7 L.R.A. (N.S.) 1056, 76 N. E. 127. See also Civil Trial Brief, 4th ed. pp. 313, 320.

The entire subject of the admissibility of previous statements by a witness out of court consistent with his testimony is discussed in a note reviewing all the cases in 41 L.R.A. (N.S.) 857.

²*Barkly v. Copeland*, 74 Cal. 1, 15 Pac. 307; *Herrick v. Smith*, 13 Hun, 448; *Glass v. Bennett*, 89 Tenn. 478, 14 S. W. 1085. See also Civil Trial Brief, 4th ed. pp. 313, 320; *People v. Katz*, 209 N. Y. 311, 103 N. E. 305, Ann. Cas. 1915A, 501; *Lyke v. Lehigh Valley R. Co.* 236 Pa. 38, 84 Atl. 595; *Wigmore, Ev.* § 1129 and case cited.

g. Ex parte declarations in own favor.—In a conflict of testimony of the parties, neither can corroborate his testimony by evidence that at or about the time in question he stated the same facts to a third person, in the absence of adverse party.¹

¹*Wallace v. Story*, 139 Mass. 115, 29 N. E. 224; *Eggleston v. Columbia Turnp. Road*, 82 N. Y. 278, reversing 18 Hun, 146, for error in this respect. See also Civil Trial Brief, 4th ed. 313.

Whether evidence of the woman's declarations to third persons about the engagement are competent to corroborate her testimony to the fact of the man's promise to marry her,—query. *McPherson v. Ryan*, 59 Mich. 33, 26 N. W. 321.

That an accusation by the mother of a bastard child, that defendant is its father, made during travail, is admissible to corroborate her testimony, see *Scott v. Donovan*, 153 Mass. 378, 26 N. E. 871 (holding that they are admissible when made at any time after labor pains commence and before delivery of the child); *Mann v. Maxwell*, 83 Me. 146, 21 Atl. 844; *Leonard v. Bolton*, 148 Mass. 66, 18 N. E. 879.

5. Contradicting corroboration.

Where a witness has sought to corroborate his testimony in a conflict of evidence, by stating an otherwise irrelevant fact as corroboration, it is competent to give evidence tending to establish the contrary as to that fact.¹

¹ *Hickler v. Leighton*, 70 N. Y. 610. (To controvert the plaintiff's evidence that defendant procured receipts to be given by representing that he wanted to show them to his partner, defendant testified that he had no partner. Held, competent to show by cross-examination that a third person had claimed to be his partner, and sued to establish his partnership.)

CREDIT.

1. Presumptions and burden of proof.
2. Subsequent promise by agent.
3. Direct testimony.
 - a. In general.
 - b. Concurrent intent.
 - c. One act on the faith of another.
4. Subsequent credit.
5. Account not conclusive.
6. Other like purchases.
7. *Res gestæ*.
8. General reputation.
9. Rebuttal of presumption of credit.

For kindred topics, see ACCOUNTS; AGENCY; CORROBORATION; INDUCEMENT; INSOLVENCY.

1. Presumptions and burden of proof.

It is ordinarily presumed that a sale is for cash, and evidence is necessary to overcome this presumption and show that credit was to be allowed.¹ And it will be presumed, where a known agent deals or contracts within the scope of his authority, that credit is extended to the principal, and not to the agent; and one who seeks to charge the agent personally has the burden of proof.²

¹ *Lamb v. Utley*, 146 Mich. 654, 110 N. W. 50.

² *Anderson v. Timberlake*, 114 Ala. 377, 22 So. 431; *John Spry Lumber Co. v. McMillan*, 77 Ill. App. 280, and cases cited. But according to *Kelley v. Faulhaber*, 18 Misc. 64, 41 N. Y. Supp. 26, a wife is presumed, in the absence of contrary evidence, to be acting for herself in employing counsel in a matter in which both she and her husband are beneficially interested; and the attorney is presumed to be dealing, to the extent of her interest, on her individual credit, and not solely on the credit of her husband.

2. Subsequent promise by agent.

On the question whether the credit was extended to the agent alone, or whether it was his intention to bind himself and not his

principal, it is proper to show a subsequent promise by the agent to pay a debt contracted by him for his principal.¹

¹ *Anderson v. Timberlake*, 114 Ala. 377, 22 So. 431.

3. Direct testimony.

a. In general.—On a question to which of two persons credit was given, in a transaction the details of which have been proved, it is not competent to ask the party, as a witness in his own behalf, to state to which of such persons he gave credit.¹

¹ *Betjemann v. Brooks*, 39 Hun, 649; *Nichols v. Kingdom Iron Ore Co.* 56 N. Y. 618 (error to allow plaintiff to be asked in his own behalf whether, in making a demand for payment on defendant's lessee, he asked the lessee for payment as his debtor, because this called for a construction of what was said, and not for the language; also error to allow a witness who did the work in part to be asked, "For whom did you do it as you supposed?"); *Merritt v. Briggs*, 57 N. Y. 651 (error to allow defendant, as a witness in his own behalf, to be asked, "State on whose credit the cattle were bought," as it called for the witness's conclusion or opinion; but a general objection was unavailing. The defense was that defendant bought as a broker on the credit of another person, as plaintiff knew); *Kellar v. Richardson*, 5 Hun, 352 (error to allow the question, "To whom did you look for performance?" for it called merely for thoughts).

(This rule depends, not on the incompetency of a person to testify to his own intent [see INTENT], but on the irrelevancy or immateriality of the uncommunicated intent of one party to the transaction; and therefore the rule is subject to the qualification that if evidence of the intent of the adverse party has been given the party may prove his own concurrent intent. See § 3, b. this title).

b. Concurrent intent.—On the question whether credit was given to defendant or a third person to whom the charge on plaintiff's books was made, it is proper, after evidence tending to show that the order was given on the authority of defendant, to ask the plaintiff's salesman upon whose credit the goods were delivered, and to whom he looked for payment.¹

¹ This was allowed for the purpose of explaining the charges on the books. *Lee v. Wheeler*, 11 Gray, 236. Opinion by Metcalf, J.

When such evidence has been received, if there is conflict or doubt, the question, To whom was credit given? is for the jury under instructions from the court. *Maryland Coal Co. v. Edwards*, 4 Hun, 432.

So, on the question whether plaintiff gave credit to the defendants as partners,—after evidence of holding out had been received,—held, that, as his belief in the existence of partnership at the time of the contract was material, he might be asked what he believed and relied on in that respect. *DeCordova v. Powter*, 16 N. Y. S. R. 1006, 1 N. Y. Supp. 147. Opinion by Daniels, J.

So, to prove oneself to be a purchaser for value, he may testify, on his own behalf, that the supplies furnished after the delivery of the note were furnished on the note. For this, if matter of intent, is competent under the rule in *Seymour v. Wilson*, 14 N. Y. 567; but it may rather be regarded as matter of fact under the rule in *Sweet v. Tuttle*, 14 N. Y. 465; *Lewis v. Rogers*, 2 Jones & S. 64, 67, 75.

Sweet v. Tuttle, 14 N. Y. 471, sustained such a question upon the ground that it did not call for an opinion; and if it called for a conclusion deducible from other special circumstances this should be shown by cross-examination.

c. One act on the faith of another.—When the inducement to the doing of an act in evidence is material, the party who did it, and even another person having adequate acquaintance with the facts, may testify that it was done on the faith of another fact; subject, of course, to cross-examination as to details.¹

¹ *Richmondville Union Seminary v. McDonald*, 34 N. Y. 379 (testimony of vice president and trustee of corporation, that debts were contracted on the faith of defendant's subscription, competent).

It is competent for a party to a transaction, cognizant of all the circumstances and a witness of the act, to state its purpose, subject to cross-examination. *National Bank v. Kennedy*, 17 Wall. 19, 26, 21 L. ed. 554, 557 (the cashier of a bank was here allowed to testify that the purpose of the delivery of drafts was to pay for purchase of stock).

4. Subsequent credit.

Subsequent credit extended within a few months of an original credit given upon the faith of particular property will be presumed to have been given on the faith of the same property.¹

¹ *White v. Magarahan*, 87 Ga. 217, 13 S. E. 509.

5. Account not conclusive.

A party's entry in his own account, charging one person, is

not conclusive evidence that the transaction was not in fact had on the credit of another.¹

¹ James v. Spaulding, 4 Gray, 451; John Spry Lumber Co. v. McMillan, 77 Ill. App. 280, and cases cited; Mackey v. Smith, 21 Or. 598, 28 Pac. 974; Welch v. Ricker, 69 Vt. 239, 39 Atl. 200; Steen v. Sanders, 116 Ala. 155, 22 So. 498 (*dictum*); Buckingham v. Murray, 7 Houst. (Del.) 176, 30 Atl. 779; Wilshusen v. Binns, 19 Misc. 547, 43 N. Y. Supp. 1085.

But it is a circumstance requiring satisfactory explanation. Cosh-Murray Co. v. Adair, 9 Wash. 686, 38 Pac. 749; Meeker v. Claghorn, 44 N. Y. 349; Swift v. Pierce, 13 Allen, 136 (holding that even the fact that suit was brought against the person charged on the books is not conclusive).

To the same effect, see ACCOUNTS, § 25.

6. Other like purchases.

Evidence that one made other purchases in his own name and on his own credit, to be used in a business in which he is manager, is competent to show that the goods sued for were sold to, or on, his credit.¹

¹ Moore v. Schrader, 14 Ind. App. 69, 42 N. E. 490.

7. Res gestæ.

Instructions as to filling an order, given by the seller to his employee after the order has been entered and the person has left, are not admissible as part of the *res gestæ* of the purchase, nor to show to whom credit was intended to be given.¹

¹ Tolbert v. Burke, 89 Mich. 132, 50 N. W. 803.

8. General reputation.

General reputation of the insolvency and inability to pay, of one of two persons, is not alone competent for the purpose of showing whether credit was given to him or not.¹

¹ Trowbridge v. Wheeler, 1 Allen, 162, Hoar, J., says, if plaintiff relied on an implied contract, general reputation or even knowledge would not be material unless there was holding out. If he relied on an express contract, reputation or knowledge as to solvency would not be material. Compare CORROBORATION. But Plumb v. Curtis, 66 Conn. 154, 33 Atl. 998, holds that to allow plaintiff to testify that the person

ordering goods was a man of no property so far as he knew was proper in that case, when taken in connection with other evidence already in.

9. Rebuttal of presumption of credit.

In order to rebut the presumption that materials furnished and work done were on the credit of the buildings liened upon, where a materialman seeking to enforce a mechanic's lien has complied with the statute relating to such liens, it is proper to ask the contractor in what buildings the materials were used.¹

¹ Green v. Thompson, 172 Pa. 609, 33 Atl. 702.

DATE.

1. Hearsay as evidence to fix date.
2. Refreshing memory.
3. Collateral record and memoranda.
4. Date of letter received.
5. Contradicting or corroborating.
6. Part of document.
7. Day of the week of a given date.
8. Presumptions.
9. Contradicting documentary date by oral evidence.
10. Date of filing.

Judicial notice as to, see JUDICIAL NOTICE.

See also AGE; DELIVERY; TIME.

1. Hearsay as evidence to fix date.

As a means of fixing the dates of any transaction you may prove by a witness that at a specified time he heard of the occurrence.¹

But the conversation itself does not thereby become compe-

tent; and if its import tends to affect the issues between the parties, it is error to receive it.²

¹ *Fisher v. People*, 103 Ill. 101; *McDonald v. Savoy*, 110 Mass. 49.

² *New York Lumber & Wood-Working Co. v. Schneider*, 15 N. Y. Civ. Proc. Rep. 30, 1 N. Y. Supp. 441.

2. Refreshing memory.

A witness, in fixing the date of a transaction, may refer to a book or diary to refresh his recollection; and may state that the entries of events were made therein at the times of their occurrence, respectively, and that he is enabled thereby to fix the date with accuracy.

But this does not of itself make the entry evidence, nor need the book be produced for the inspection of the jury.¹

¹ *First Nat. Bank v. First Nat. Bank*, 114 Pa. 1, 6 Atl. 366 (holding, therefore, that a deposition containing such testimony was admissible without the books referred to).

It is not essential that the paper be contemporaneous with the event. A written statement made by the witness at any time during his recollection of the date is available. *Wood v. Cooper*, 1 Car. & K. 645. That a witness in refreshing his memory as to date may be confined to the part which states the date, see *Smith v. Morgan*, 2 Moody & R. 257. See also *Salo v. Duluth & I. R. R. Co.* 121 Minn. 78, 140 N. W. 188, holding introduction in evidence of entire telegrams and newspaper clippings was reversible error where their only proper purpose was to refresh the recollection of a witness as to the date of a fire.

3. Collateral record and memoranda.

Collateral records and memoranda may serve as evidence of date.¹

¹ *Livingston v. Arnoux*, 56 N. Y. 507, Affirming 15 Abb. Pr. N. S. 158 (entries by attorney since deceased, in his register, pursuant to duty and against interest); *Lewis v. Burlington Ins. Co.* 80 Iowa, 259, 45 N. W. 749 (indorsement on proof of loss when received to show date of receipt); *Stoker v. Patton*, — Tex. Civ. App. —, 35 S. W. 64 (return on marriage license to show date of marriage); s. p., *Doe ex dem. Reece v. Robson*, 15 East, 32, 104 Eng. Reprint, 756, 13 Revised Rep. 361; *Bridgewater v. Roxbury*, 54 Conn. 213, 6 Atl. 415; *Coan v. Flagg*, 123 U. S. 117, 31 L. ed. 107, 8 Sup. Ct. Rep. 47 (copies of official letters by public officer verified by clerk who prepared the originals).

4. Date of letter received.

To prove that an occurrence was at or before a given date, a

witness having testified that it was at the time when he received a certain specified letter, the letter cannot be put in evidence, for it would furnish no evidence of the time when he received it.¹

¹ Com. v. Burns, 7 Allen, 540.

(It might be otherwise when the object was to prove the lateness of the date, for if the letter be presumed or proved to have been written at its date, the receipt of the letter would tend to fix the date at or after the date of the letter.)

5. Contradicting or corroborating.

After a witness has fixed a date as to which he is otherwise uncertain, by referring to an occurrence at about the same time, the details of such occurrence, if not relevant to the case or prejudicial to the adverse party, may be proved so far as tending to contradict or corroborate the conclusion as to the date in question.¹

¹ Blake v. Damon, 103 Mass. 199 (not error to receive details of a transaction which has no bearing on the case, for the purpose of showing that the adverse party, who has used evidence of the transaction merely to fix a date, was mistaken in that respect); Topham v. M'Gregor, 1 Car. & K. 320, holding that to corroborate a witness who had fixed a date by referring to the weather at the time, a newspaper containing an article on the weather published at the time is admissible, the editor testifying as to who wrote it, and that the original manuscript is lost, and the writer testifying that he had no recollection of writing the article, but that he was then writing articles on the weather and that the statements therein were true.

6. Part of document.

When a part of a document is admitted to fix a date, the whole is not thereby made evidence; but that only is admissible which relates to, or modifies, what has been introduced.¹

¹ Bellows v. Sowles, 59 Vt. 63, 7 Atl. 542.

7. Day of the week of a given date.

The court may take judicial notice as to what day of the week a given day of a month and year did, or will, fall upon.¹

¹ Ecker v. First Nat. Bank, 64 Md. 292, 1 Atl. 849 (Sunday); Reed v.

Wilson, 41 N. J. L. 29 (holding that for this purpose the court may refer to an almanac); Morgan v. Burrow, — Miss. —, 16 So. 432; Said v. Stromberg, 55 Mo. App. 438; First Nat. Bank v. Kingsley, 84 Me. 111, 24 Atl. 794; Swales v. Grubbs, 126 Ind. 106, 25 N. E. 877; Brennan v. Vogt, 97 Ala. 647, 11 So. 893; Campbell v. West, 86 Cal 197, 24 Pac. 1000. And that the jury may take such notice without proof, see Cohn v. Kahn, 14 Misc. 255, 35 N. Y. Supp. 829; Canafax v. Bank of Commerce, 76 Okla. 289, 8 A.L.R. 59, 184 Pac. 1014. Note in 8 A.L.R. 63.

Table of years, except leap years.											31 Jan.	28 Feb.	31 Mar.	30 Apr.	31 May	30 June	31 July	31 Aug.	30 Sept.	31 Oct.	30 Nov.	31 Dec.
1901	1907	1918	1929	1946	1946	1957	1968	1974	1985	1991	2	6	5	1	3	6	1	4	7	2	5	1
1902	1913	1919	1930	1941	1947	1958	1969	1975	1986	1997	3	7	6	2	4	7	2	5	1	3	6	2
1903	1914	1925	1931	1942	1953	1964	1970	1981	1987	1998	4	8	7	3	5	1	3	6	2	4	7	3
1905	1911	1922	1933	1939	1950	1961	1967	1978	1989	1995	5	9	8	4	6	2	4	7	3	5	1	3
1906	1917	1923	1934	1945	1951	1962	1973	1979	1990	"	6	10	9	5	7	3	5	1	4	6	2	4
1909	1915	1926	1937	1948	1954	1965	1971	1982	1993	1999	7	11	10	6	8	4	6	2	5	1	3	6
1910	1921	1927	1938	1949	1956	1966	1977	1983	1994	2000	8	12	11	7	9	5	7	3	6	2	4	7
Explanation—To ascertain any day of the week in any year of the present century, first look in the table of years for the year required, and at the right hand in the same line, and in the column headed by the month in question is a figure which indicates in which of the columns below the day of the week will be found.											Leap years.											
											1904	1932	1960	1988	5	1	3	5	7	9	1	4
											1906	1936	1964	1992	6	2	4	6	8	1	3	5
											1912	1940	1968	1996	7	3	5	7	9	2	4	6
											1918	1944	1972	"	8	4	6	8	1	3	5	7
											1920	1948	1976	"	9	5	7	9	2	4	6	8
											1922	1952	1980	"	10	6	8	1	3	5	7	9
											1928	1956	1984	"	11	7	9	2	4	6	8	1

Thus:—To know what day of the week July 4 falls upon in the year 1978, look in the table of years for 1978, and in a parallel line under July is figure 6 directing to column 6, where it is seen that July 4 falls on Tuesday.

Table of Days.

8. Presumptions.

The date of a contract is *prima facie* evidence of the date of its execution.¹ So, the date of a letter is presumed to be the date on which the letter was written,² though the date of a letter is no evidence of the time of its receipt.³

The presumption that the date in a document is correct,⁴ which exists unless the competency of the document depends on the date,⁵ is a legal presumption, and conclusive in the absence of evidence to the contrary.⁶

¹ *Harden v. Card*, 17 Wyo. 210, 97 Pac. 1075.

² *Dowie v. Sutton*, 126 Ill. App. 47, affirmed in 227 Ill. 183, 118 Am. St. Rep. 266, 81 N. E. 395.

³ *Uhlman v. Arnholdt & S. Brewing Co.* 53 Fed. 485.

⁴ *Cowing v. Altman*, 71 N. Y. 435, 27 Am. Rep. 70, reversing 5 Hun, 556 (bank check); *Robinson v. Wheeler*, 25 N. Y. 252 (deed); *Lauder v. Peoria Agri. & Trotting Soc.* 71 Ill. App. 475; *Currie v. Hawkins*, 118 N. C. 593, 24 S. E. 476. s. p. as to date in account book; *Sickles v. Mather*, 20 Wend. 72, 32 Am. Dec. 521. See DELIVERY.

⁵ *Smith v. Shoemaker*, 17 Wall. 630, 637, 21 L. ed. 717, 719; *Jermain v. Denniston*, 6 N. Y. 276; *Foster v. Beals*, 21 N. Y. 247, 250. In *Bates v. Prickett*, 5 Ind. 22, 61 Am. Dec. 73, this exception was disregarded.

⁶ *St. John v. American Mut. L. Ins. Co.* 2 Duer, 419, s. c. less fully, 12 N. Y. Legal Obs. 264, affirmed on other points in 13 N. Y. 31; *National Cash Register Co. v. Lamson Consol. Store-Service Co.* 60 Fed. 603; *Springer v. Orr*, 82 Ill. App. 558; *Faulkner v. Adams*, 126 Ind. 459, 26 N. E. 170; *Abel v. Brewster*, 58 Hun, 605, 12 N. Y. Supp. 331. Compare *Jackson ex dem. Hardenberg v. Schoonmaker*, 2 Johns. 230, where mistake in date was presumed, from apparent incongruity.

When blank, the party who seeks to enforce the instrument has the burden of showing the true date, if material. *Abbott*, Trial Ev. (3d ed.) p. 1318.

9. Contradicting documentary date by oral evidence.

Whenever the time of execution of any writing becomes material, it may be proved by parol; not merely to supply an omission, where the paper is without date,¹ but in opposition to the date, where it contains one.²

¹ *Burditt v. Hunt*, 25 Me. 419, 43 Am. Dec. 289 (date supplied for chattel mortgage, although statute required such mortgages to be in writing); *Modern Woodmen Acci. Asso. v. Kline*, 50 Neb. 347, 69 N. W. 943; *Head v. Cleburne Bldg. & L. Asso.* — Tex. Civ. App. —, 25 S. W. 810. In *Cliver v. Heil*, 95 Wis. 364, 70 N. W. 346, it is held, however, that

oral evidence is inadmissible of verbal agreement that services performed under a written contract to perform them, which was silent as to the time of payment therefor, were to be paid at a specified time after the performance of the contract, since under the written contract they are to be paid for on demand after the performance of the work.

² *Draper v. Snow*, 20 N. Y. 331, affirming 6 Duer, 662 (holding that the time when a contract is executed is no more a part of the contract than the place where it is executed. Both belong to that class of attendant circumstances which may always be resorted to to explain and apply the terms of the contract). To the same effect, see *Troy Fertilizer Co. v. Norman*, 107 Ala. 667, 18 So. 201; *Merrill v. Sybert*, 65 Ark. 51, 44 S. W. 462, and cases cited; *Knowles v. Martin*, 20 Colo. 393, 38 Pac. 467; *District of Columbia v. Camden Iron Works*, 15 App. D. C. 198; *McComb v. Council Bluffs Ins. Co.* 83 Iowa, 247, 48 N. W. 1038; *McFall v. Murray*, 4 Kan. App. 554, 45 Pac. 1100; *Macomber v. Wright*, 108 Mich. 109, 65 N. W. 610.

So, date on postmark is not conclusive. *Ellis v. Commercial Bank*, 7 How. (Miss.) 294, 40 Am. Dec. 63 (*dictum*). *Contra*: Where the date is made a part of the terms of the contract, as, for instance, where the performance is deferred as depending on it. *Barlow v. Buckingham*, 68 Iowa, 169, 26 N. W. 58.

10. Date of filing.

As to date or term of filing, see ¹

¹ 1 Abbott, New Pr. & Forms, 88-91.

According to *First Nat. Bank v. Cody*, 93 Ga. 127, 19 S. E. 831, an unsigned entry upon a deed is not competent to show the time it was filed for record.

DEATH.

1. Mode of proving generally.
2. Presumptions and burden of proof.
 - a. In general.
 - b. Time of death.
 - c. Substitution of presumption of death based on actuarial tables for seven-year presumption.
3. Hearsay; general report.
4. Order of substitution.
5. Letters of administration.
6. Record of death.
7. Undelivered letter.

See also **CAUSE**.

1. Mode of proving generally.

Death, like all other facts, may be established by circumstantial evidence, when from the nature of the case direct evidence is not accessible.¹ It is not necessary to prove it by an eye-witness to the fact, nor by any more conclusive or peculiar evidence than any other fact material to recovery in an action.² Aside from direct testimony to the fact, death may be proved by a church or other registry of burial properly kept; by the official registry of death kept pursuant to statute; or by an entry in a hospital register.³ It may also be proved by recitals in a deed,⁴ or recitals in ancient documents, such as conveyances and court records of fifty years' standing,⁵ or by entries in a family Bible,⁶ or by inscription on tombstone,⁷ or by the fact of the family wearing mourning.⁸

¹ *Boyd v. New England Mut. L. Ins. Co.* 34 La. Ann. 848; *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751, 12 S. E. 18.

² *John Hancock Mut. L. Ins. Co. v. Moore*, 34 Mich. 41.

³ *Scheel v. Eidman*, 77 Ill. 301; *Secrist v. Green*, 3 Wall. 744, 18 L. ed. 153; *Doe ex dem. France v. Andrews*, 15 Q. B. 759, 117 Eng. Reprint, 644; *Ridgeley v. Johnson*, 11 Barb. 527; *Lewis v. Marshall*, 5 Pet. 470, 8 L. ed. 195.

⁴ *Postlewaite v. Wise*, 17 W. Va. 1. But see *Ross v. Loomis*, 64 Iowa, 432, 20 N. W. 749, and *Costello v. Burke*, 63 Iowa, 361, 19 N. W. 247, holding such recitals not admissible as between persons not parties to the deed or claiming under such parties.

⁵ *Norris v. Hall*, 124 Mich. 170, 82 N. W. 832.

⁶ *Lewis v. Marshall*, 5 Pet. 470, 8 L. ed. 195; *Berkeley's Case*, 4 Campb 401, 14 Revised Rep. 782, 11 Eng. Rul. Cas. 310.

⁷ *Roscoe*, N. P. 47; *North Brookfield v. Warren*, 16 Gray, 171.

⁸ *Jones's Succession*, 12 La. Ann. 397.

2. Presumptions and burden of proof.

a. In general.—A living person is presumed to continue to live until the contrary is shown or is presumed from the nature of the case;¹ and the party asserting death has the burden of proving it.² The civil law presumes a person to be living at one hundred years of age, and it has been declared that the common law does not stop much short of this.³ Where there is no definite evidence of death, evidence of all the circumstances is received, and the question is whether they are such as show a strong probability of death upon which a court should act.⁴ Death within a very recent time may be inferred from the circumstances of absence or disappearance;⁵ but sudden disappearance alone is not enough in the case of a man without a fixed abode or social or pecuniary ties.⁶ Evidence that at last accounts the absentee was exposed to great peril may, in connection with failure of further tidings, raise a presumption of death consequent on the peril.⁷ And evidence that insurers of a vessel have paid insurance as a total loss is admissible as tending to prove death of one on board, and so is the concurrence of a particular storm or hurricane season with the route of the voyage.⁸

By analogy to the English statutes of 1 Jac. I. chap. 11 (exempting from the penalties of bigamy any person whose husband or wife should be continuously beyond the seas, or should absent himself or herself for the space of seven years together), and 19 Car. II. chap. 6 (providing that persons in leases for lives who shall remain beyond the seas or absent themselves from the realm for more than seven years shall, in the absence of proof to the contrary, be deemed naturally

dead), there has arisen a legal presumption of death from absence of seven years; and now practically all the authorities agree that the presumption of life continues for seven years only, after the unexplained disappearance of a man under ordinary circumstances, from whom no tidings return to his friends or acquaintances, and that then the presumption of life ceases and a presumption of death arises.⁹ The authorities are divided as to whether this presumption can be overcome by a by-law of a mutual benefit insurance society specifically refusing to pay any benefit based on such a presumption.¹⁰ But to raise the presumption of death from absence, there must be affirmative proof of absence and of a reasonable inquiry at the last place of residence, and of persons likely to know, and his relatives.¹¹ And this presumption of death is rebutted by very slight evidence; a single letter from the person within the seven years destroys it, or testimony of a witness that he has heard the person is living.¹²

¹ *Northwestern Mut. L. Ins. Co. v. Stevens*, 18 C. C. A. 107, 36 U. S. App. 401, 71 Fed. 258; *Lewis v. People*, 87 Ill. App. 588; *Peabody v. Hewett*, 52 Me. 33, 83 Am. Dec. 486; *Miller v. Beates*, 3 Serg. & R. 490, 8 Am. Dec. 658; *Stroebe v. Fehl*, 22 Wis. 337; *O'Gara v. Eisenlohr*, 38 N. Y. 296; *Duke of Cumberland v. Graves*, 9 Barb. 595; *Sprigg v. Moale*, 28 Md. 497, 92 Am. Dec. 698; *Hayes v. Berwick*, 2 Mart. (La.) 138; 5 Am. Dec. 727; *Rosenblum v. Eisenberg*, 123 App. Div. 896, 108 N. Y. Supp. 350; *Grier v. Canada*, 119 Tenn. 17, 107 S. W. 970; 1 Greenl. Ev. 16th ed., § 41.

² *Miller v. Beates*, 3 Serg. & R. 490, 8 Am. Dec. 658; *Manley v. Pattison*, 73 Miss. 417, 55 Am. St. Rep. 543, 19 So. 236; *Emerson v. White*, 29 N. H. 482.

³ *Willet v. Andrews*, 51 La. Ann. 486, 25 So. 391; *Watson v. Tindal*, 24 Ga. 494, 71 Am. Dec. 142; *Hammond v. Inloes*, 4 Md. 138; *Miller v. Beates*, 3 Serg. & R. 490, 8 Am. Dec. 658.

⁴ *Merritt v. Thompson*, 1 Hilt. 550; *Kelly v. Drew*, 12 Allen, 107, 90 Am. Dec. 138; *Smith v. Knowlton*, 11 N. H. 191.

⁵ *Lancaster v. Washington L. Ins. Co.* 62 Mo. 121; *Re Beasney*, L. R. 7 Eq. 498, 38 L. J. Ch. N. S. 159, 19 L. T. N. S. 630; *Stouvenel v. Stephens*, 2 Daly, 319; *John Hancock Mut. L. Ins. Co. v. Moore*, 34 Mich. 41; *Sheldon v. Ferris*, 45 Barb. 124; *Hancock v. American L. Ins. Co.* 62 Mo. 26; *Garden v. Garden*, 2 Houst. (Del.) 574; *Nepean v. Doe*, 2 Mees. & W. 913, 150 Eng. Reprint, 1021, *Murph. & H.* 291, 2 *Smith, Lead. Cas.* 8th 584, 7 L. J. Exch. 335, 8 Eng. Rul. Cas. 512.

⁶ *Hancock v. American L. Ins. Co.* 62 Mo. 26.

- ⁷ *Merritt v. Thompson*, 1 Hilt. 550; *Gerry v. Post*, 13 How. Pr. 118; *White v. Mann*, 26 Me. 361; *Eagle's Case*, 3 Abb Pr. 218, 4 Bradf. 117; *Lancaster v. Washington L. Ins. Co.* 62 Mo. 121.
- ⁸ *Hutton's Goods*, 1 Curt. Eccl. Rep. 595, 163 Eng. Reprint, 208; *Gibbes v. Vincent*, 11 Rich. L. 323; *Main's Goods*, 1 Swabey & T. 11, 164 Eng Reprint, 606, 27 L. J. Prob. N. S. 5, 6 Week. Rep. 262; *Sillick v. Booth*, 1 Younge & C. Ch. Cas. 177, 62 Eng Reprint, 816, 6 Jur. 142.
- ⁹ *Northwestern Mut. L. Ins. Co. v. Stevens*, 18 C. C. A. 107, 36 U. S. App. 401, 71 Fed. 258; *Hitz v. Ahlgren*, 170 Ill. 60, 48 N. E. 1068; *Com. v. Thompson*, 6 Allen, 591, 83 Am. Dec. 653; *Bailey v. Bailey*, 36 Mich. 181; *Sheldon v. Ferris*, 45 Barb. 124; *Esterly's Appeal*, 109 Pa. 229; *Evans v. Stewart*, 81 Va. 724; *Cowan v. Lindsay*, 30 Wis. 586; *Whiting v. Nicholl*, 46 Ill. 230, 92 Am. Dec. 248; *Davie v. Briggs*, 97 U. S. 628, 24 L. ed. 1086; *Re Losee*, 46 Misc. 363, 94 N. Y. Supp. 1082; *Hackett's Appeal*, 27 R. I. 587, 65 Atl. 268; *Heagany v. National Union*, 143 Mich. 186, 106 N. W. 700; *Morrow v. McMahon*, 35 Misc. 348, 71 N. Y. Supp. 961; *Vreeland v. Vreeland*, 78 N. J. Eq. 256, 34 L.R.A.(N.S.) 940, 79 Atl. 336; 1 Greenl. Ev. 16th ed. § 40, p. 139.
- Stevenson v. Montgomery*, 263 Ill. 93, 104 N. E. 1075, Ann. Cas. 1915C, 112; *Werner v. Fraternal Bankers' Reserve Soc.* 172 Iowa, 504, 154 N. W. 773, Ann. Cas. 1918A, 1005; *Hannon v. Grand Lodge A. O. U. W.* 99 Kan. 734, L.R.A. 1917C, 1029, 163 Pac. 169; *New York L. Ins. Co. v. Brame*, 112 Miss. 828, L.R.A. 1918B, 86, 73 So. 806; *Grimes v. Miller*, 221 Mo. 636, 133 Am. St. Rep. 501, 121 S. W. 21; *McLaughlin v. Sovereign Camp*, W. W. 97 Neb. 71, 149 N. W. 112, Ann. Cas. 1917A, 79, and note in L.R.A. 1915B, 756; *Modern Woodmen v. Ghromley*, 41 Okla. 532, L.R.A. 1915B, 728, 139 Pac. 306, Ann. Cas. 1915C, 1063; *Marquet v. Aetna L. Ins. Co.* 128 Tenn. 213, L.R.A. 1915B, 749, 159 S. W. 733, Ann. Cas. 1915B, 677; *Page v. Modern Woodmen*, 162 Wis. 259, 156 N. W. 137, Ann. Cas. 1918D, 756 and note in L.R.A. 1916F, 438. See also *Richey v. Sovereign Camp*, W. W. 184 Iowa, 10, L.R.A. 1916F, 1116, 168 N. W. 276, and notes in L.R.A. 1915B, 729 and 26 Harvard L. Rev. 378.
- See also *Re Benjamin* 155 App. Div. 233, 139 N. Y. Supp. 1091, holding the presumption is only applicable when it is an irresistable inference from the facts found.
- ¹⁰ See cases cited herein supra under the title CHANGING RULES OF EVIDENCE, II. 4a. For other cases pro and con and discussion of principle see notes in L.R.A.1915B, 793, L.R.A.1917C, 1032, and 17 Columbia L. Rev. 444.
- ¹¹ *Stinchfield v. Emerson*, 52 Me. 465, 83 Am. Dec. 524; *McCartee v. Camel*, 1 Barb. Ch. 455; *Doe ex dem. France v. Andrews*, 15 Q. B. 760; *Clarke v. Cummings*, 5 Barb. 339; *Spurr v. Trimble*, 1 A. K. Marsh. 278; *Gall v. Gall*, 114 N. Y. 109, 21 N. E. 106; *Modern Woodmen v. Gerdorn*, 72 Kan. 391, 2 L.R.A.(N.S.) 809, 82 Pac. 1100, 7 Ann. Cas.

570; *Shriver v. State*, 65 Md. 278, 4 Atl. 679; *Bailey v. Bailey*, 36 Mich. 181; *Hyde Park v. Canton*, 130 Mass. 505; *Brown v. Grand Lodge, A. O. U. W.* 13 Cal. App. 537, 110 Pac. 351; *Modern Woodmen v. Ghromley*, 41 Okla. 532, L.R.A. 1915B, 728, 139 Pac. 306, Ann. Cas. 1915C, 1063.

In the case of one who had been absent for twenty years, it was held that there must be proof of an unsuccessful attempt to find him, in order to raise a presumption of death. *Ulrich's Estate*, 14 Phila. 243. And the same steps were required in the case of a youth who changed his name and took shipping on a whaler and had not been heard of in thirty years. *Dunn v. Travis*, 56 App. Div. 317, 67 N. Y. Supp. 743.

And one who was known to be alive on a certain day is presumed to be alive thirty years from that time, in the absence of diligent effort to locate him, where he left home suddenly and disappeared. *Dworsky v. Arndstein*, 29 App. Div. 274, 51 N. Y. Supp. 597.

And in *Vought v. Williams*, 120 N. Y. 253, 8 L.R.A. 591, 17 Am. St. Rep. 634, 24 N. E. 195, where it did not appear that any effort was ever made to find the absentee, it was held that the presumption of death of one who left home for causes unknown, and has not been seen or heard of by his family or friends for upwards of twenty-four years, and who when last seen was about twenty-three years old, unmarried, dissipated, in feeble health, and in destitute condition, is not sufficiently strong to make marketable a title to real estate which depends on his death.

But in *Miller v. Sovereign Camp*, W. W. 140 Wis. 505, 28 L.R.A.(N.S.) 178, 133 Am. St. Rep. 1095, 122 N. W. 1126, it was held that proof of diligent search and inquiry is not required to establish the presumption of death, when a person has absented himself from his home or place of residence for seven years.

For other cases as to necessity of inquiry to raise presumption of death from seven years' absence, see notes in 2 L.R.A.(N.S.) 809, and 28 L.R.A.(N.S.) 178, and L.R.A. 1915B, 728, 740.

For cases discussing place from which absence must be shown see note in L.R.A. 1915B, 749.

¹² *Smith v. Smith*, 49 Ala. 158; *Flynn v. Coffee*, 12 Allen, 133; *American Life Ins. & T. Co. v. Rosenagle*, 77 Pa. 507; *Brown v. Jewett*, 18 N. H. 230; *Keech v. Rinehart*, 10 Pa. 240.

For other cases as to rebuttal of this presumption of death, see notes L.R.A. 1915B, 728 and 741.

b. Time of death.—There is an irreconcilable conflict of authority as to whether or not the presumption of death from absence raises any presumption as to the precise time of the death,—a conflict of opinion which arises largely from the dif-

ferent views taken of the nature of the presumption of life. Some of the courts assert that, inasmuch as a person once shown to be alive must be presumed to continue to live, and as such presumption ceases to operate only when cut off by the presumption of death, such person cannot be presumed to have died before the expiration of the seven years, and that therefore, in the absence of any evidence otherwise, he will be presumed to have lived during the entire period.¹ On the other hand, it is asserted that this presumption of life cannot have any such effect, and that, when the presumption of death arises, the precise date of the death is still altogether in doubt, and must be shown by evidence of some sort.² The question as to the presumption of time of death arises, of course, only when there is a complete lack of evidence as to the time of death. If circumstances are shown from which death may be inferred, it then becomes a question of fact to be proved like any other fact.³

¹ *Montgomery v. Bevans*, 1 Sawy. 653, Fed. Cas. No. 9,735; *Whiting v. Nicholl*, 46 Ill. 230, 92 Am. Dec. 248; *Reedy v. Millizen*, 155 Ill. 636, 40 N. E. 1028; *Clarke v. Canfield*, 15 N. J. Eq. 119; *Burr v. Sim*, 4 Whart. 150, 33 Am. Dec. 50; *Schaub v. Griffin*, 84 Md. 557, 36 Atl. 443; *Hancock v. American L. Ins. Co.* 62 Mo. 26; *Smith v. Knowlton*, 11 N. H. 191; *Re Sullivan*, 51 Hun, 378, 4 N. Y. Supp. 59; *Re Davenport*, 37 Misc. 455, 75 N. Y. Supp. 934; *Whiteside's Appeal*, 23 Pa. 114; *Corley v. Holloway*, 22 S. C. 380.

The Illinois cases above cited were followed in *Donovan v. Major*, 253 Ill. 179, 97 N. E. 231, but see *contra*, at least in part, *National Zinc Co. v. Industrial Commission*, 292 Ill. 598, 127 N. E. 135.

See also *Baker v. Fidelity Title & T. Co.* 55 Pa. Super. Ct. 15.

And in *Cone v. Dunham*, 59 Conn. 145, 8 L.R.A. 647, 20 Atl. 311, which was an action by the executors of one presumed to be dead, from absence, to establish a claim against the estate of another deceased person, and in which it appeared that the claim was barred unless the plaintiffs could show that there was no one to present it within the period of limitation, it was held that there was no legal presumption that the plaintiff's testate was not living when the time limited for the presentation of the claim expired.

² *Doe ex dem. Knight v. Nepean*, 5 Barn. & Ad. 86, 110 Eng. Reprint, 724, 2 Nev. & M. 219, 2 L. J. K. B. N. S. 150; *Nepean v. Doe*, 2 Mees. & W. 894, 150 Eng. Reprint, 1021, Murph. & H. 291, 2 Smith, Lead. Cas. 8th ed. 584, 7 L. J. Exch. N. S. 335, 8 Eng. Rul. Cas. 512; *Re Phene*,

L. R. 5 Ch. 139, 39 L. J. Ch. N. S. 316, 22 L. T. N. S. 111, 18-Week. Rep. 303; *Davie v. Briggs*, 97 U. S. 628, 24 L. ed. 1086; *Kendrick v. Grand Lodge, A. O. U. W.* 8 Ky. L. Rep. 149; *Spahr v. Mutual L. Ins. Co.* 98 Minn. 471, 108 N. W. 4; *Butler v. Supreme Court, I. O. F.* 53 Wash. 118, 26 L.R.A.(N.S.) 293, 101 Pac. 481; *Bradley v. Modern Woodmen*, 146 Mo. App. 428, 124 S. W. 69; *Re Allen*, 24 N. Y. S. R. 251, 5 N. Y. Supp. 566; *Chapman v. Cooper*, 39 S. C. L. (5 Rich.) 452; *Evans v. Stewart*, 81 Va. 724; *Whiteley v. Equitable Life Assur. Soc.* 72 Wis. 170, 39 N. W. 369; *National Zinc Co. v. Industrial Commission*, 292 Ill. 598, 127 N. E. 135, *supra*.

For other cases on this subject, see notes in 26 L.R.A.(N.S.) 294 and L.R.A. 1915B, 756.

¹ 1 Greenl. Ev. 16th ed. 41; 1 Elliott, Ev. 114; *Cooper v. Cooper*, 86 Ind. 75; *Leach v. Hall*, 95 Iowa, 619, 64 N. W. 792; *Bailey v. Bailey*, 36 Mich. 181; *Sheldon v. Ferris*, 45 Barb. 124; *Seligman v. Sonneborn*, 1 How. Pr. N. S. 465; *Shown v. McMackin*, 9 Lea, 601, 42 Am. Rep. 680; *Hess v. Webb*, — Tex. Civ. App. —, 113 S. W. 618; *Dowley v. Winfield*, 14 Sim. 277, 8 Jur. 972; *Ommaney v. Stilwell*, 23 Beav. 328, 2 Jur. N. S. 1058; *Re Beasney*, L. R. 7 Eq. 498, 38 L. J. Ch. N. S. 159, 19 L. T. N. S. 630.

c. Substitution of presumption of death based on actuarial tables for seven-year presumption.—At least one court has held that evidence of an actuarial mortality table supplemented by evidence of family longevity would prevail over the presumption of death by seven years' absence.¹

¹ The goods of Thomas Rowe (Surrogates Court of New York) 56 N. Y. L. J. 1669, 58 N. Y. L. J. 1961, holding that such evidence established that a man who disappeared in 1872 and was last heard from in 1894 died subsequent to 1915. See also notes in 30 Harvard L. Rev. 654, and 18 Columbia L. Rev. 486.

3. Hearsay; general report.

Hearsay information of death, derived from the immediate family of the deceased, has been held sufficient *prima facie* to establish the fact of death and to be properly admitted in evidence,¹ though declarations of a member of the family to prove death are not admissible when self-serving.² And hearsay evidence has been held not to be admissible until after a consid-

erable lapse of time.³ Declarations of a living person, not shown to be unavailable as a witness, to the fact of death, cannot be received in lieu of his sworn testimony,⁴ but it has been held otherwise as to declarations of deceased persons.⁵ General reputation in the community where he lived has been held competent to show the death of a person,⁶ though there is authority to the contrary.⁷

¹ *Anderson v. Parker*, 6 Cal. 197.

² *Turner v. Sealock*, 21 Tex. Civ. App. 594, 54 S. W. 358.

³ *Stouvenel v. Stephens*, 2 Daly, 319.

⁴ *Nolan v. Nolan*, 35 App. Div. 339, 54 N. Y. Supp. 975.

General reputation in a family as to the death of a member of it, which is not derived from declarations of any deceased member of the family, is held not admissible to show the fact of his death prior to the death of his father, in *Re Hurlburt*, 68 Vt. 366, 35 L.R.A. 794, 35 Atl. 77.

⁵ *Davidson v. Wallingford*, 88 Tex. 619, 32 S. W. 1030.

⁶ *Houston City Street R. Co. v. Richart*, — Tex. Civ. App. —, 27 S. W. 920; *Secrist v. Green*, 3 Wall. 744, 18 L. ed. 153; *Jackson ex dem. People v. Etz*, 5 Cow. 314.

Evidence of a witness that he was told of the death of a person was admitted in *Scott v. Ratliffe*, 5 Pet. 81, 1 L. ed. 54.

⁷ *Re Hurlburt*, 68 Vt. 366, 35 L.R.A. 794, 35 Atl. 77, holding that general repute among a person's friends and acquaintances at the time of his disappearance, that he was killed or drowned, is inadmissible to prove the fact of his death.

And mere rumor of death was held inadmissible in *Johnson v. Johnson*, 114 Ill. 611, 55 Am. Rep. 883, 3 N. E. 232.

And evidence of one witness that he had heard a person was dead, and of another that he had so heard and such was the general report, was held not sufficient in *State v. Wright*, 70 Iowa, 152, 30 N. W. 388.

4. Order of substitution.

An order of substitution of a successor in interest, in place of a party suggested to be deceased, is *prima facie* evidence in the same cause that such death occurred.¹

¹ *Stebbins v. Duncan*, 108 U. S. 32, 27 L. ed. 641, 2 Sup. Ct. Rep. 313, S. P., ASSIGNMENT.

5. Letters of administration.

In all cases in which the administrator as such is a party, for the purpose of showing his representative capacity and his authority to act for, and enforce or protect the rights of, the estate he assumes to represent, letters of administration are at least *prima facie* evidence of every fact upon which such capacity and authority depend, including the death of the person upon whose estate they issued.¹ But on the question whether the grant of letters of administration or the probate of a will establishes of itself the fact of the death of the testator in other cases, in which the administrator is not a party, the authorities are not in harmony.²

¹ *Pick v. Strong*, 26 Minn. 303, 3 N. W. 697; *Ketland v. Lebering*, 2 Wash. C. C. 201, Fed. Cas. No. 7,744; *Seibert v. True*, 8 Kan. 52; *French v. Frazier*, 7 J. J. Marsh, 425; *Ruoff v. Greenpoint Sav. Bank*, 40 Misc. 549, 82 N. Y. Supp. 881; *Re Ketcham*, 5 N. Y. Supp. 566; *Cunningham v. Smith*, 70 Pa. 450; *Lancaster v. Washington L. Ins. Co.* 62 Mo. 121. See also note in *Ann. Cas.* 1918A, 1011.

And such evidence is held conclusive where no plea in abatement is filed. *Cunningham v. Smith*, 70 Pa. 450; *Newman v. Jenkins*, 10 *Pick.* 515. Though in *Lancaster v. Washington L. Ins. Co.* 62 Mo. 121, it is said that such proof is of the weakest and most inconclusive character, and that slight evidence is sufficient to rebut it.

² That the grant of letters of administration is *prima facie* evidence of death in such cases is declared in *Davis v. Gillilan*, 71 Mo. App. 498; *Jeffers v. Radcliff*, 10 N. H. 242; *Brown v. Elwell*, 17 Wash. 442, 49 Pac. 1068. And some of the cases cited in the preceding note state the rule broadly enough to include all cases, without limiting the effect of such letters as evidence to cases in which the administrator is a party, although, as a matter of fact, the administrator was in each case a party. Thus, in *Cunningham v. Smith*, 70 Pa. 450, it is said that letters of administration are in all cases *prima facie* evidence of the death of the person on whose estate they are granted.

Such letters of administration were held inadmissible to prove death in *Werner v. Fraternal Bankers' Reserve Soc.* 172 Iowa, 504, 154 N. W. 773, *Ann. Cas.* 1918A, 1005.

In the New Hampshire case cited above—*Jeffers v. Radcliff*, 10 N. H. 242—there was evidence to sustain the ruling independently of the

letters of administration, and the case concedes that the law is otherwise in England (citing *Thompson v. Donaldson*, 3 Esp. 63, 6 Revised Rep. 812, 1 Phillipps, Ev. 246; *Blackham's Case*, 1 Salk. 290, 91 Eng. Reprint, 257; 11 State Trials, 261), but adds that the rule adopted by the English courts cannot be sustained on good grounds, and may have arisen from collisions and jealousies betwixt the courts of common law and the ecclesiastical courts, which had an entirely distinct and independent jurisdiction.

The rule of the English courts, that the letters are evidence only in actions in which the administrator is a party, has, however, been followed by the Supreme Court of the United States (*Mutual Ben. L. Ins. Co. v. Tisdale*, 91 U. S. 238, 23 L. ed. 314, and by the following state courts: New York (*Carroll v. Carroll*, 60 N. Y. 121, 19 Am. Rep. 144, reversing 2 Hun, 609); Iowa (*Werner v. Fraternal Bankers' Reserve Soc.* 172 Iowa, 504, 154 N. W. 773, Ann. Cas. 1918A, 1005, overruling the earlier decision of *Tisdale v. Connecticut Mut. L. Ins. Co.* 26 Iowa, 170, 96 Am. Dec. 136, which had held letters of administration to be *prima facie* evidence of death); Texas (*English v. Murray*, 13 Tex. 366). See also note in 16 Columbia L. Rev. 160.

6. Record of death.

A record of death made pursuant to the statutes of another state, or a certified copy duly authenticated, is admissible at common law to prove death.¹

¹ *Nolan v. Nolan*, 35 App. Div. 339, 54 N. Y. Supp. 975 (holding, however, the authentication of the record offered insufficient). The *Nolan* case is also cited in a general note on admissibility of records in other states in 5 L.R.A.(N.S.) 938.

See also note in 91 Am. Dec. 528, as to proof of death by an official registry kept pursuant to law.

7. Undelivered letter.

Within the rule that cessation of communication is a circumstance from which death may be inferred, a letter addressed to a person at his last known place of residence, and returned uncalled for, is competent.¹

¹ *Hurlburt v. Hurlburt*, 63 Vt. 667, 22 Atl. 850.

DEFEASANCE.

1. Presumption; burden of proof.
2. Oral evidence.
3. Direct question.
4. Documentary evidence.
5. Admissions.
6. Declarations.
7. General denial.
8. Cogency of proof.

See also **INTENT**.

1. Presumption; burden of proof.

A deed absolute in form is presumed to be a conveyance, and not a mortgage.¹ And the burden of proving that a deed absolute on its face was intended as a mortgage rests on the party asserting that claim.²

¹ *Betts v. Betts*, 132 Iowa, 72, 106 N. W. 928.

² *Reeves v. Abercrombie*, 108 Ala. 535, 19 So. 41; *Story v. Springer*, 155 Ill. 25, 39 N. E. 570; *Runyon v. Pogue*, 19 Ky. L. Rep. 940, 42 S. W. 910; *Kellogg v. Northrup*, 115 Mich. 327, 73 N. W. 230; *Merchants' Nat. Bank v. Stanton*, 62 Minn. 204, 64 N. W. 390; *Kleinschmidt v. Kleinschmidt*, 9 Mont. 477, 24 Pac. 266; *Winters v. Earl*, 52 N. J. Eq. 52, 28 Atl. 15; *Fullerton v. McCurdy*, 55 N. Y. 637; *Haussknecht v. Smith*, 11 App. Div. 185, 42 N. Y. Supp. 611; *Bradsher v. Hightower*, 118 N. C. 399, 24 S. E. 120; *Morrow v. Letcher*, 10 S. D. 33, 71 N. W. 139; *McLean v. Ellis*, 79 Tex. 398, 15 S. W. 394; *Ewing v. Keith*, 16 Utah, 312, 52 Pac. 4; *Coates v. Marsden*, 142 Wis. 106, 124 N. W. 1057; *Mintz v. Soule*, 182 Mich. 564, L.R.A. 1916B, 15, 148 N. W. 769; *Howland v. Blake*, 97 U. S. 628, 24 L. ed. 1029; *Shattuck v. Bascom*, 55 Hun, 14, 28 N. Y. S. R. 333, 9 N. Y. Supp. 934.

For additional cases and full discussion see note in L.R.A.1916B, 185.

Nor will the presumption that a deed absolute on its face is intended as a mortgage, arising from a gross inadequacy of consideration, control where the accompanying circumstances warrant the inference that it was the intention that the grantee should share in the profits expected to be realized from a subsequent sale of the land. *Story v. Springer*, 155 Ill. 25, 39 N. E. 570.

But according to the Missouri court, if the transaction had its inception in an application for a loan, it will be presumed, in the absence of evidence to the contrary, that the deed was intended as a mortgage. *Cobb v. Day*, 106 Mo. 278, 17 S. W. 323.

And a prima facie presumption that the deed and a lease back to the grantor were intended as a mortgage, arising from their execution on the same day, is not overcome by proof of the refusal of the grantee to loan the money and take a mortgage, where the circumstances tend to show that the purpose was to evade the law requiring foreclosure before possession could be obtained. *Mears v. Strobach*, 12 Wash. 61, 40 Pac. 621.

A deed absolute in form, accompanied by the grantee's agreement to reconvey to the grantor, constitutes a prima facie conveyance of the land, and the burden is on the party claiming it to show that the transaction is a mortgage. *Johnson v. Scrimshire*, 42 Tex. Civ. App. 611, 93 S. W. 712; *McGuin v. Lee*, 10 N. D. 160, 86 N. W. 714.

2. Oral evidence.

Oral evidence is admissible to show that a conveyance absolute in form was intended as a mortgage.¹

¹ The right to establish by oral evidence the defeasible character of an absolute written conveyance is too well fixed to be questioned, according to *Reeves v. Abercrombie*, 108 Ala. 538, 19 So. 41; and where the effort is made the only inquiry is whether it has been sustained by the necessary measure of proof. To the same effect, see: *Helbreg v. Schumann*, 150 Ill. 12, 37 N. E. 99; *German Ins. Co. v. Gibe*, 162 Ill. 251, 44 N. E. 490; *Bever v. Bever*, 144 Ind. 157, 41 N. E. 944 (*dictum*); *Loeb v. McAlister*, 15 Ind. App. 643, 41 N. E. 1061, 44 N. E. 378; *Barnes v. Crockett*, 4 Kan. App. 777, 46 Pac. 997; *Libby v. Clark*, 88 Me. 32, 33 Atl. 657; *Backus v. Burke*, 63 Minn. 272, 65 N. W. 459; *Langer v. Meservey*, 80 Iowa, 158, 45 N. W. 732; *Ensign v. Ensign*, 120 N. Y. 655, 24 N. E. 942; *Farmers' & M. Bank v. Smith*, 61 App. Div. 315, 70 N. Y. Supp. 536; *Wasatch Min. Co. v. Jennings*, 5 Utah, 243, 385, 15 Pac. 65, 16 Pac. 399; *Cobb v. Day*, 106 Mo. 278, 17 S. W. 323; *Winters v. Earl*, 52 N. J. Eq. 52, 28 Atl. 15; *Barry v. Colville*, 129 N. Y. 302, 29 N. E. 307; *Weiseham v. Hocker*, 7 Okla. 250, 54 Pac. 464; *Lewis v. Bayliss*, 90 Tenn. 280, 16 S. W. 376; *Shank v. Groff*, 43 W. Va. 337, 27 S. E. 340. And *Watkins v. Williams*, 123

N. C. 170, 31 S. E. 388, holds admissible facts and circumstances *dehors* the deed inconsistent with the idea of an absolute purchase, but that that fact cannot be established by simple declarations of the parties. But *Christ Church v. Trustees of Donations & Bequests*, 67 Conn. 554, 35 Atl. 552, holds that evidence of statements and representations by members of a church, made at the time of the execution of the deed, is inadmissible; and *Mitchell v. Fullington*, 83 Ga. 301, 9 S. E. 1083, holds that a deed absolute, and accompanied with possession, cannot, under § 3659 Park's Ann. Code of Georgia, 1915, vol. 3, p. 2002 (formerly § 3809), be proved by oral evidence to be a mortgage, in the absence of fraud in its procurement.

It is well settled that the true consideration of the deed may be proved by parol evidence, and that a deed absolute on its face may be shown to have been executed in fact as a security for money, and for that reason be treated as a mortgage. The rule does not depend upon the manner of statement of the consideration in the deed. The right is a substantial one, not to be varied or defeated by any form of expression or character of recitals in the instrument itself. *McLean v. Ellis*, 79 Tex. 398, 15 S. W. 394.

Parol evidence is admissible in equity to show that a deed of conveyance, absolute upon its face, was intended as a mortgage; and where it is shown that such a conveyance has been executed to secure the payment of money, equity will treat it as a mortgage. The court looks beyond the terms of the instrument to the real transaction, or what was intended to be effected by the parties, and any evidence, whether written or oral, tending to show this, is admissible. The admission of oral testimony for such purpose is not a violation of the rule which precludes such admission for the purpose of varying or contradicting the terms of a written instrument; that rule has reference to the language of which the instrument is the repository, but this permits an inquiry into the objects of the parties in executing and receiving the instrument, and equity exercises its jurisdiction to carry out such object, and to prevent fraud and imposition, and to promote justice. *First Nat. Bank v. Ashmead*, 23 Fla. 379, 2 So. 657, 665.

And the rule applies with equal force to an assignment of a contract of sale of land claimed to have been given as a mortgage or pledge. *Lovejoy v. Chapman*, 23 Or. 571, 32 Pac. 687; *Gettelman v. Commercial Union Assur. Co.* 97 Wis. 237, 72 N. W. 627.

Within this rule, a grantor may testify as to facts and circumstances showing that the deed was but a mortgage, or that the grantee agreed to resell and reconvey upon the performance of certain conditions. *Beroud v. Lyons*, 85 Iowa, 482, 52 N. W. 486.

A party is not precluded from showing, by parol evidence, that a deed absolute on its face was intended as a mortgage, by the fact that written instruments were executed contemporaneously with the deed, importing a right and privilege in the grantor to repurchase the

property by the payment of specified sums within specified times, in the absence of evidence showing that the grantees had relied on such instruments in such manner as to constitute an estoppel. *Wiggins v. Wiggins*, 16 Tex. Civ. App. 335, 40 S. W. 643.

The rule cannot be invoked, however, in the case of a contract upon its face a conditional sale of land providing for forfeiture of payments in the event of the purchaser's failure fully to perform,—at least if the transaction was not confessedly a loan. *Pease v. Baxter*, 12 Wash. 567, 41 Pac. 899.

And a grantor's wife cannot testify that she understood when she signed the deed that it was not an absolute conveyance, and that she was not examined privily and apart from her husband, in conflict with recitals of her certificate of acknowledgment, of the falsity of which the grantee is not shown to have had any knowledge. *Gray v. Shelby*, 83 Tex. 405, 18 S. W. 809. But allowing her to so testify is not in itself fatal error, where there is other testimony sufficient to sustain the conclusion that the deed was in effect a mortgage.

In Pennsylvania a statute (act of June 8, 1881, Purdon, 651 [Digest Pa. Stat. Law, 1920, § 8930, p. 8481]) provides that no deed regular and absolute on its face shall be reduced to a mortgage unless the defeasance is in writing and made at the time of the deed. But this statute does not forbid the admission of oral evidence to defeat a deed made prior to the passage of the act. *Selby's Estate*, 7 Pa. Dist, R. 171.

Extrinsic evidence is competent to show that a deed absolute in form was intended as a mortgage, but such evidence is not competent to show that the instrument, in form a mortgage, was intended to be an absolute conveyance. *Johnson v. Prosperity Loan & Bldg. Asso.* 94 Ill. App. 260. See as to the first proposition: *Bigler v. Jack*, 114 Iowa, 667, 87 N. W. 700; *Farmers' & M. Bank v. Smith*, 61 App. Div. 315, 70 N. Y. Supp. 536; *Beebe v. Wisconsin Mortg. Loan Co.* 117 Wis. 328, 93 N. W. 1103.

The general question of the admissibility of parol evidence to show that an instrument which purports to be an absolute transfer is in fact a mortgage is discussed in note in L.R.A. 1916B, 18.

3. Direct question.

A witness may be asked how he held a deed, absolute or as a mortgage.¹

But a grantor cannot be asked whether he has ever sold the land in controversy.²

¹ *Raynor v. Page*, 2 Hun, 652. But see *Watkins v. Williams*, 123 N. C. 170, 31 S. E. 388, where it is said that the intention must be established, not by simple declarations of the parties, but by proof of facts and

circumstances *dehors* the deed inconsistent with the idea of an absolute purchase; otherwise, the solemnity of deeds would always be exposed to the "slippery memory of witnesses."

So, also a grantee under a deed which is alleged to have been given to secure the support for life of the grantor by the grantee may be asked whether there was any agreement to reconvey. *Langer v. Meservey*, 80 Iowa, 158, 45 N. W. 732.

² *Ashton v. Ashton*, 11 S. D. 610, 79 N. W. 1001. Such a question calls for the witness's opinion as to a fact which is for the jury to determine; that is, the issue,—Has he sold the land or mortgaged it?

4. Documentary evidence.

Tax books showing the return of lands for taxation by the grantee of a deed absolute in form, but not including the land conveyed, are admissible on the question whether the deed was absolute or intended as a mortgage.¹ And a receipt from the grantor to the grantee for money stated to be paid for the purchase of land according to a specified deed is admissible on the question whether the transaction was an absolute conveyance or a mortgage.²

¹ *Jones v. Grantham*, 80 Ga. 472, 5 S. E. 764.

² *Holmes v. Warren*, 145 Cal. 457, 78 Pac. 954.

5. Admissions.

An admission in an answer of a personal representative of a grantor, that an absolute deed was intended as a mortgage, is not evidence against infant heirs of the grantor.¹

¹ So held in an action to have the deed declared a mortgage, and for its foreclosure. *Ingram v. Illges*, 98 Ala. 511, 13 So. 548.

6. Declarations.

Declarations of the grantor, made subsequent to the execution and delivery of the deed sought to be impeached, are not competent to establish a defeasance.¹

¹ *Jones v. Jones*, 137 N. Y. 610, 33 N. E. 479; *Hyde v. Buckner*, 108 Cal. 522, 41 Pac. 410.

So held, although when they were made the grantor had not surrendered actual possession of the land. *Hart v. Randolph*, 142 Ill. 521, 32 N. E. 517; *Wallace v. Berry*, 83 Tex. 328, 18 S. W. 595, and cases cited.

7. General denial.

Evidence by defendant to establish a defeasance is competent under a general denial.¹

¹ Wakefield v. Day, 41 Minn. 344, 43 N. W. 71; Hamilton v. Byram, 122 Ind. 283, 23 N. E. 795. Or under a plea of not guilty. Herring v. White, 6 Tex. Civ. App. 249, 25 S. W. 1016.

8. Cogency of proof.

The burden resting upon a party seeking to have an absolute deed declared a mortgage must be met by proof establishing the defeasance clearly, convincingly, and beyond a reasonable doubt.¹

¹ Runyon v. Pogue, 19 Ky. L. Rep. 940, 42 S. W. 910; Haussknecht v. Smith, 11 App. Div. 185, 42 N. Y. Supp. 611; Ewing v. Keith, 16 Utah, 212, 52 Pac. 4; Wakefield v. Day, 41 Minn. 344, 43 N. W. 71; Barton v. Lynch, 69 Hun, 1, 23 N. Y. Supp. 217; Lewis v. Bayliss, 90 Tenn. 280, 16 S. W. 376; Watkins v. Williams, 123 N. C. 170, 31 S. E. 388; Langer v. Meservey, 80 Iowa, 158, 45 N. W. 732; Erwin v. Curtis, 43 Hun, 292. But see Wallace v. Berry, 83 Tex. 328, 18 S. W. 595 (holding that to so charge the jury is error); Winters v. Earl, 52 N. J. Eq. 52, 28 Atl. 15 (where it is held that the proof of the party attacking the deed must "outweigh that of his adversary"). It is not sufficient to raise a suspicion of doubt as to whether the instrument which the parties had adopted as the evidence of their agreement correctly states the contract; but the party seeking to defeat the deed must establish his case by clear and convincing evidence, or, as has been otherwise expressed, by "strong and stringent evidence." Reeves v. Abercrombie, 108 Ala. 535, 91 So. 41.

Its existence, and also its precise terms, must be established by clear and conclusive evidence; otherwise the strong presumption that the deed expresses the entire contract between the parties to it is not overcome. A conveyance of land in fee, so executed, acknowledged, and recorded, is of too great solemnity and of too much importance to be set aside or converted into a mere security upon loose or uncertain testimony, and it will not be unless the existence of the alleged oral defeasance is established beyond a reasonable doubt. Ensign v. Ensign, 120 N. Y. 655, 24 N. E. 942; Re Holmes, 79 App. Div. 264, 79 N. Y. Supp. 592.

DELIVERY.

1. Direct testimony.
2. Contemporaneous records and entries.
3. Presumptions.
 - a. Presumption from possession of instrument.
 - b. Presumption from record.
 - c. Presumption of delivery when a voluntary settlement is shown.
 - d. Presumption of delivery from mailing of deed.
4. Constructive delivery.
5. Parol evidence.
6. Rebutting delivery by proof of a condition.
7. Evidence of condition.
8. Presumption as to date.
 - a. In general.
 - b. Undated instrument.
 - c. Exception in case of private unauthenticated paper.

For cognate topics, see ASSIGNMENT; CONTRACT; DATE; LETTERS.

1. Direct testimony.

A witness who was present may testify directly as to whether an instrument was delivered,¹ or possession of property was delivered;² leaving details to be called for on cross-examination.

¹Hincken v. Mutual Ben. L. Ins. Co. 50 N. Y. 657, affirming 6 Lans. 21 (where the party himself was asked if he had delivered the preliminary proofs of interest and of death as required by the insurance policy). According to Burnap v. Sharpsteen, 149 Ill. 225, 36 N. E. 1008, however, a general statement that a deed and mortgage were delivered, made by witnesses who do not testify to any acts or words amounting to a delivery, is a mere legal conclusion, and is not competent upon the question whether a delivery was actually made.

In Phoenix F. & M. Ins. Co. v. Shoemaker, 95 Tenn. 72, 31 S. W. 270, it was held that, as to the question of delivery of a deed from husband to wife when no third person was present, neither the husband nor the wife could testify directly to that fact, but that she might testify that it had been in her possession since a certain date, and might show by the testimony of a third person that she had it.

² *Collins v. Manning*, 1 N. Y. S. R. 204 (reversing for error on excluding question. Opinion by Daniels, J.). (But a witness who has stated the facts cannot give his opinion as to whether they constituted delivery; yet, if an actor in the transaction, he may state the purpose of an act. See INTEREST; POSSESSION).

2. Contemporaneous records and entries.

Contemporaneous records and entries may be competent to show delivery.¹

¹ *Barry v. Foyles*, 1 Pet. 311, 7 L. ed. 157 (agent's acknowledgment of a number of articles delivered at different times); *Digby v. Stedman*, 1 Esp. 328 (shop books); *New York v. Second Ave. R. Co.* 102 N. Y. 572, 7 N. E. 905 (entries by one on information of others); *Champneys v. Peck*, 1 Starkie, 404 (indorsement by clerk, since deceased); *Owen v. Williams*, 114 Ind. 179, 15 N. E. 678 (statement indorsed by grantor on sealed envelop); *Davis v. Pacific Improv. Co.* 118 Cal. 45, 50 Pac. 7 (copy of record of deed). But *Powell v. Murphy*, 18 App. Div. 25, 45 N. Y. Supp. 374, holds merchant's account books made up from tickets for sales, returned by drivers, not competent in his favor to show testimony of the drivers that the goods represented by the tickets were actually delivered.

3. Presumptions.

a. Presumption from possession of instrument.—Possession of an executed¹ instrument by party thereto,² or his successor in interest claiming thereunder,³ is sufficient prima facie evidence of delivery.⁴ But possession of a written instrument does not imply delivery if the instrument on its face shows that something is yet to be done to complete the transaction.⁵

¹ *Abbott*, Trial Ev. (3d ed.) pp. 1029, 1312, 1882. Otherwise of an instrument not countersigned when the terms of it require countersigning. *Prall v. Mutual Protection Life Assur Soc.* 5 Daly, 298, affirmed in 63 N. Y. 608, without opinion.

² If there is a misnomer the burden is on the party producing the instrument to prove his identity with the one named. *Andrews v. Dyer*, 78 Me. 427, 6 Atl. 833 (deed to Mercy A. produced by Melissa A.).

³ Compare *Cowee v. Cornell*, 75 N. Y. 91, 31 Am. Rep. 428.

⁴ Possession of tickets issued as tokens for delivery for successive loads, presumptive evidence of such deliveries. *Bumsted v. Hoadley*, 11 Hun, 487.

Possession of a promissory note coupled with proof of signing establishes a prima facie case of delivery. *Deeter v. Burk*, 59 Ind. App. 449, 107 N. E. 304.

So the presumption that a deed found in the possession of the grantee was delivered can only be overcome by clear evidence that no delivery was intended. *Brock v. Stines*, 258 Ill. 346, 101 N. E. 585. Where the proof shows such a deed was intended to take effect only on death of grantor this presumption is overcome. *Jones v. United States*, 126 C. C. A. 407, 209 Fed. 585. See also note in 9 Ill. L. Rev. 207.

For further applications of the rule, see: *Toms v. Owen*, 52 Fed. 417; *Arrington v. Arrington*, 122 Ala. 510, 26 So. 152; *Campbell v. Carruth*, 32 Fla. 264, 13 So. 432; *Byers v. Gilmore*, 10 Colo. App. 79, 50 Pac. 370; *Carusi v. Savary*, 6 App. D. C. 330; *Massachusetts Ben. Life Assn. v. Sibley*, 158 Ill. 411, 42 N. E. 137; *Rohr v. Alexander*, 57 Kan. 381, 46 Pac. 699; *Jones v. New York L. Ins. Co.* 168 Mass. 245, 47 N. E. 92; *Allen v. DeGroodt*, — Mo. —, 15 S. W. 314, 105 Mo. 442, 16 S. W. 494; *Vought v. Vought*, 50 N. J. Eq. 177, 27 Atl. 489; *Strough v. Wilder*, 119 N. Y. 530, 7 L.R.A. 555, 23 N. E. 1057; *Devereux v. McMahon*, 108 N. C. 134, 12 L.R.A. 205, 12 S. E. 902; *Snodgrass v. Knight*, 43 W. Va. 294, 27 S. E. 233; *Studebaker Bros. Mfg. Co. v. Langson*, 89 Wis. 200, 61 N. W. 773.

⁶ *Amos-Richia v. Northwestern Mut. L. Ins. Co.* 143 Mich. 684, 107 N. W. 707.

b. Presumption from record.—The general rule undoubtedly is that a presumption of delivery arises from the fact that a deed has been recorded. The weight of authority establishes that the record of a deed, even when it appears that it was at the instance of the grantor, raises a presumption of delivery, so far as delivery is dependent upon his acts.¹ So the delivery of a mortgage to the recorder, and subsequent possession by the grantee, are evidence of a delivery to him.²

But the rule that an instrument which has been recorded pursuant to statute may be received in evidence without further proof of delivery³ rests on the presumption that a beneficial instrument has been accepted; and does not avail to charge the grantee with personal liability, where he had no personal interest to accept.⁴

And the presumption of delivery arising from record may be repelled by circumstantial evidence.⁵

¹ *Younge v. Guilbeau*, 3 Wall. 636, 18 L. ed. 262; *Lewis v. Watson*, 98 Ala. 480, 22 L.R.A. 297, 39 Am. St. Rep. 82, 13 So. 570; *Ellis v. Clark*, 39 Fla. 714, 23 So. 410; *Gordon v. Trimmier*, 91 Ga. 472, 18 S. E. 404; *Bovee v. Hinde*, 135 Ill. 140, 25 N. E. 694; *Colee v. Colee*, 122 Ind. 109, 17 Am. St. Rep. 345, 23 N. E. 687; *Hutton v. Smith*,

88 Iowa, 238, 55 N. W. 326; Bunnell v. Bunnell, 111 Ky. 566, 64 S. W. 420, 65 S. W. 607; Cowell v. Daggett, 97 Mass. 434; Holmes v. McDonald, 119 Mich. 562, 75 Am. St. Rep. 430, 78 N. W. 647; Babbitt v. Bennett, 68 Minn. 260, 71 N. W. 22; Messelback v. Norman, 46 Hun, 414; Mitchell v. Ryan, 3 Ohio St. 387; Swiney v. Swiney, 14 Lea, 316; Bjmerland v. Eley, 15 Wash. 101, 45 Pac. 730; Rogers v. Jones, 172 N. C. 156, 90 S. E. 117.

For notes discussing at length the question of record of deed or delivery for record, by grantor, see 54 L.R.A. 865, and 9 L.R.A.(N.S.) 224.

² Foster v. Perkins, 42 Me. 168; Oxnard v. Blake, 45 Me. 602; Kuh v. Garvin, 125 Mo. 547, 28 S. W. 847; Wallis v. Taylor, 67 Tex. 431, 3 S. W. 321; McCourt v. Myers, 8 Wis. 236.

³ Munoz v. Wilson, 111 N. Y. 295, 304, 18 N. E. 855, and cases cited; Geissmann v. Wolf, 46 Hun, 289 (holding also that delivery of the bond recited in the mortgage may be inferred from record of the mortgage); Fair Haven Marble & Marbleized Slate Co. v. Owens, 69 Vt. 246, 37 Atl. 749; Cumberland Land Co. v. Daniel, — Tenn. Ch. App. —, 52 S. W. 446; Mabe v. Mabe, 122 N. C. 552, 29 S. E. 843; Gustin v. Michelson, 55 Neb. 22, 75 N. W. 153; Hamilton v. Armstrong, 120 Mo. 597, 25 S. W. 545; Heil v. Redden, 45 Kan. 562, 26 Pac. 2; Flynn v. Sullivan, 91 Me. 355, 40 Atl. 136; Harshbarger v. Carroll, 163 Ill. 636, 45 N. E. 565; Estes v. German Nat. Bank, 62 Ark. 7, 34 S. W. 85.

⁴ Gifford v. Corrigan, 105 N. Y. 223, 227, 11 N. E. 498, approving and affirming, with modification, Gifford v. McCloskey, 38 Hun, 350.

⁵ Knolls v. Barnhart, 71 N. Y. 474, affirming 9 Hun, 443 (fact that possession of the land, though valuable, was never delivered, sufficient); Younge v. Guilbeau, 3 Wall. 636, 18 L. ed. 262 (especially with ignorance on part of grantee). See more fully on this question cases in note to Taylor v. Street (Ga.) 5 L.R.A. 121; Konser v. Konser, 219 Ill. 466, 76 N. E. 846; Hogadone v. Grange Mut. F. Ins. Co. 133 Mich. 339, 94 N. W. 1045; Lynch v. Lynch, 121 Miss. 752, 83 So. 807, where grantee was unaware of deed. See also note 20 Columbia L. Rev. 706. King v. Antrim Lumber Co. — Okla. —, 4 A.L.R. 21, 172 Pac. 958.

c. Presumption of delivery when a voluntary settlement is shown.—Where the evidence shows a voluntary settlement upon a member of the grantor's family a presumption of delivery arises¹ which may of course be rebutted and overcome by the proof of other facts inconsistent with such delivery.²

¹ Jones v. Schmidt, 290 Ill. 97, 124 N. E. 835.

² Nofftz v. Nofftz, 290 Ill. 36, 124 N. E. 838.

This presumption is rebutted by proof that the grantor intended the deed to operate as a will. Weigand v. Rutschke, 253 Ill. 260, 97 N. E. 641.

d. Presumption of delivery from mailing of deed. Where the grantor deposits the deed in the mail a presumption of delivery will arise.¹

¹Taylor v. Sanford, 108 Tex. 340, 5 A.L.R. 1660, 193 S. W. 661, and note in 5 A.L.R. 1664.

4. Constructive delivery.

In case of a deed remaining in the possession of a grantor, there must be some evidence from which it may be inferred that the parties regarded it as delivered.¹

Evidence that both parties were present and the usual formalities of execution took place, and the contract was to all appearances consummated without any condition or qualification annexed, is sufficient evidence of a complete and valid deed, notwithstanding it was left in the custody of the grantor.²

¹Fisher v. Hall, 41 N. Y. 416; Kanawell v. Miller, 262 Pa. 9, 104 Atl. 861. See also O'Brien v. O'Brien, 285 Ill. 570, 121 N. E. 243.

So delivery of a deed to an attorney by the grantor of which grantee was aware, was sufficient to establish delivery even though deed afterward turned back to grantor who held it at his death. Gomel v. McDaniels, 269 Ill. 362, 109 N. E. 996.

Likewise a deed retained by the grantor where his son who was grantee took possession of the land was held delivered. Vaughn v. Vaughn, 272 Ill. 11, 111 N. E. 566.

See also note in 44 L.R.A. (N.S.) 528.

²4 Kent, Com. 456.

Approved in Wallace v. Berdell, 97 N. Y. 13, 22. The language of Spencer, J., in Jackson ex dem. Eames v. Phipps, 12 Johns. 418, 421, that delivery of a deed "must be either actual, by doing something and saying nothing, or else verbal, by saying something and doing nothing, or it may be by both," is approved in 1 Thompson on Trials, 873.

See more fully on this question note to Lee v. Fletcher, 12 L.R.A. 171.

5. Parol evidence.

Parol evidence is admissible to show the delivery of a deed.¹

Parol evidence is also admissible to show the purpose of delivery and that a parol condition attached to such delivery.²

¹Whitney v. Dewey, 10 Idaho, 633, 69 L.R.A. 572, 80 Pac. 1117.

²Whitaker v. Lane, 128 Va. 317, 11 A.L.R. 1157, 104 S. E. 252.

6. Rebutting delivery by proof of a condition.

Evidence that an unsealed contract or obligation was delivered by the maker to the other party may be rebutted by showing that the delivery was upon an oral condition that the instrument should not take effect except in a contingency which has not occurred.¹

In the case of a sealed instrument the older cases denied the admissibility of evidence of an oral condition.² But a tendency appears in the modern cases to make no distinction between sealed and unsealed instruments in this regard.³

An oral condition that the instrument after taking effect should become void, or cease to have effect, is not competent as rebutting delivery.⁴

¹ Seymour v. Cowing, 4 Abb. App. Dec. 200 (notes; leading case); Reynolds v. Robinson, 110 N. Y. 654, 18 N. E. 127 (contract for sale of merchandise, delivered on condition that reports of commercial agencies as to the buyer's responsibility should be sufficient. *Dictum*, that the evidence is subject to suspicion and that the rule should be cautiously applied, and confined strictly to cases clearly within its reason); Brewers' F. Ins. Co. v. Burger, 10 Hun, 56 (subscription paper; evidence of previous oral agreement to subscribe on conditions, and that when paper was afterward signed it was on those conditions, competent); Biederman v. O'Conner, 117 Ill. 493, 7 N. E. 463 (contract to sell and deliver; evidence of condition that part payment should be made next day, competent. Conditional delivery may be proved under general denial); Burke v. Dulaney, 153 U. S. 228, 38 L. ed. 698, 14 Sup. Ct. Rep. 816 (note given for price of mining property; evidence that it was to be relinquished by holder at any time before maturity if the maker chose to relinquish his option of purchase, competent); Tug River Coal & Salt Co. v. Brigel, 30 C. C. A. 415, 58 U. S. App. 320, 86 Fed. 818 (evidence that a contract was to take effect and become binding only after being submitted to, and approved by, counsel, competent); White v. Kahn, 103 Ala. 308, 15 So. 595 (subscription paper); Trumbull v. O'Hara, 71 Conn. 172, 41 Atl. 546, and cases cited (oral evidence that note given for price of horse never became a binding contract because it was delivered on condition that it should be returned if the horse was not as warranted, competent); Cleveland Refining Co. v. Dunning, 115 Mich. 238, 73 N. W. 239 (evidence that written order for purchase of goods was given with the understanding that it was to be obligatory only in case the purchaser should be allowed to cancel a similar order previously given to another person, competent); Smith v. Mussetter, 58 Minn. 159, 59 N. W. 995 (note; where it was said that the dangers

from this rule, and the consequent caution that should be exercised in considering a defense of this nature, were adverted to in *Minneapolis Threshing Mach. Co. v. Davis*, 40 Minn. 110, 3 L.R.A. 796, 41 N. W. 1026, but that the rule was too firmly established in the law to be changed); *Gallo v. New York*, 15 App. Div. 61, 44 N. Y. Supp. 143, *McCormick Harvesting Mach. Co. v. Faulkner*, 7 S. D. 383, 64 N. W. 163; *Gilman v. Gross*, 97 Wis. 224, 72 N. W. 885, and cases cited (subscription for corporate stock); *Nutting v. Minnesota F. Ins. Co.* 98 Wis. 26, 73 N. W. 432, and cases cited (insurance policy). And see *Champion Empire Min. Co. v. Bird*, 7 Colo. App. 523, 44 Pac. 764, where the principle was recognized, but held inapplicable to the case at bar. See also cases reviewed in *Browne on Parol Testimony*, 52-55; *Curry v. Colburn*, 99 Wis. 319, 67 Am. St. Rep. 860, 74 N. W. 778; *Tewksbury v. Tewksbury*, 222 Mass. 595, 111 N. E. 394.

² *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330. (leading case); *Van Bokkelen v. Taylor*, 62 N. Y. 105, reversing 2 Hun, 138, 4 Thomp. & C. 422 (holding declarations that a composition deed was executed on parol conditions, incompetent); *Mowry v. Heney*, 86 Cal. 471, 25 Pac. 17 (where it was attempted to show that a deed delivered to the grantee was to take effect only in the event of the grantor's death); *Ryan v. Cooke*, 172 Ill. 302, 50 N. E. 213. Compare *Blewitt v. Boorum*, 142 N. Y. 357, 37 N. E. 119 (where it was held that the rule did not apply if the contract did not relate to real estate, and the presence of a seal was not necessary to its validity). See *Browne on Parol Testimony*, 279, where this question is treated at length.

³ *Whitaker v. Lane*, 128 Va. 317, 11 A.L.R. 1157, 104 S. E. 252, a decision admitting a parol condition to be attached to a delivery to the vendor of a sealed contract to purchase real estate. The opinion contains an excellent discussion of the admissibility of parol evidence in such cases. Where owner gives a deed to his broker to facilitate a sale delivery is conditional and insufficient to pass title: *Phillips v. Farmers' Mut. F. Ins. Co.* 208 Mich. 84, 7 A.L.R. 1606, 175 N. W. 144. And see note in 11 A.L.R. 1174.

See *Jones on Constr. or Interp. of Contr.* 225, to the effect that the rule applies to sealed instruments, citing *Ford v. James*, 2 Abb. App. Dec. 159, 163, and other cases.

The rule as to sealed instruments does not exclude evidence to charge the obligee of a bond with notice that an obligor signed upon condition that the bond should not be delivered unless another signed also. See *Belloni v. Freeborn*, 63 N. Y. 383; 1 Abb. New Pr. & F. 68; *Whitford v. Laidler*, 94 N. Y. 145, 46 Am. Rep. 131, reversing 25 Hun, 136.

⁴ *Tower v. Richardson*, 6 Allen, 351 (notes); *Hodge v. Security Ins. Co.* 33 Hun, 583, 586 (policy); *Lunsford v. Malsby*, 101 Ga. 39, 28 S. E. 496 (notes). And see *Trumbull v. O'Hara*, 71 Conn. 172, 41 Atl. 546, *dictum* to the effect that it would not be competent to show that an absolute promise contained in the note in suit was, and was intended to be, in fact a conditional one. Compare *McFar-*

land v. Sikes, 54 Conn. 250, 7 Atl. 408, where one charged with criminal assault, and urged to settle, gave his note to be held while he should consider the matter, stipulating that if he did not appear on the day fixed it should be held for the settlement, and if he did it should be canceled; and he did not appear. Held, a defense; and judgment on the note reversed.

7. Evidence of condition.

To show that a delivery was conditional, it is not essential to prove that a condition was declared in express terms; but an intent that the delivery should be conditional may be inferred from the acts of the parties and the circumstances of the case.¹ But other courts have held that parol evidence that a deed absolute on its face was delivered on condition is inadmissible.²

¹ Smith v. Lynes, 5 N. Y. 41. See also note to Lee v. Fletcher, 12 L.R.A. 171 and cases cited under § 6 supra.

² Whitney v. Dewey, 10 Idaho, 633, 69 L.R.A. 572, 80 Pac. 1117, and cases cited.

8. Presumption as to date.

a. In general.—The general rule that the date inserted in an instrument is presumptively the date of its delivery¹ applies notwithstanding it was acknowledged² or recorded at a later date.³

This presumption may be rebutted by evidence of retention of possession,⁴ or of actual delivery at a later date;⁵ or by the execution thereafter of another instrument similar in all respects, which is, however, recorded long prior to the first instrument.⁶ It is not rebutted, however, by proof that the consideration was not in fact paid.⁷

¹ Briggs v. Fleming, 112 Ind. 313, 14 N. E. 86 (chattel mortgage); Purdy v. Coar, 109 N. Y. 448, 17 N. E. 352; Scobey v. Walker, 114 Ind. 254, 15 N. E. 674 (deed); Cowing v. Altman, 71 N. Y. 435, 27 Am. Rep. 70, reversing 5 Hun, 556; and overruling, in effect, 1 Thomp. & C. 494 (check); Taylor v. Kinlock, 1 Starkie, 175 (promissory note); Pier v. Finch, 24 Barb. 514 (railroad ticket); Fowler v. Merrill, 11 How. 375, 13 L. ed. 736 (mortgage); Peoria Sav. Loan & T. Co. v. Elder, 165 Ill. 55, 45 N. E. 1083 (note); Windom v. Schuppel, 39 Minn. 35, 38 N. W. 757 (deed); Morgan v. Burrow, — Miss. —, 16 So. 432 (note); Kendrick v. Mutual Ben. L. Ins. Co. 124 N. C. 315, 32 S. E. 728 (insurance policy). See also Abbott, Trial Ev. (3d ed.) p. 1370.

This presumption does not arise as to a deed of a freehold, if there is no proof or acknowledgment, nor subscribing witness. *Harris v. Norton*, 16 Barb. 264; *Genter v. Morrison*, 31 Barb. 155.

² *People v. Snyder*, 41 N. Y. 397, affirming 51 Barb. 589 (so held of a deed, although acknowledgment was dated three years later); *Gordon v. San Diego*, 108 Cal. 264, 41 Pac. 301 (acknowledgment six months later); *Lake Erie & W. R. Co. v. Whitham*, 155 Ill. 514, 28 L.R.A. 612, 40 N. E. 1014; *Biglow v. Biglow*, 39 App. Div. 103, 56 N. Y. Supp. 794.

Where, however, two deeds for the same land were executed on the same day to different grantees, but were acknowledged on different dates, evidence as to the dates of acknowledgment was competent on the issue of date of delivery. *Johnston v. Kramer Bros. & Co.* 203 Fed. 733.

Contra. As to acknowledged instrument. *McIntyre v. Strong*, 16 Jones & S. 127, 63 How. Pr. 43. So where a statute requires acknowledgment as in release of homestead the presumption in absence of proof to contrary is that delivery was on date of acknowledgment and not on date of deed itself. *Calligan v. Calligan*, 259 Ill. 55, 102 N. E. 247. See also note in 8 Ill. L. Rev. 351.

³ *Robinson v. Wheeler*, 25 N. Y. 252; *Nichols v. Sadler*, 99 Iowa, 429, 68 N. W. 709.

⁴ *Wyckoff v. Remsen*, 11 Paige, 564. And see cases reviewed in *Wallace v. Berdell*, 97 N. Y. 13.

⁵ *United States v. LeBaron*, 19 How. 73, 15 L. ed. 525; *Ferguson v. Bond*, 39 W. Va. 561, 20 S. E. 591; *Kraemer v. Adelsberger*, 122 N. Y. 467, 25 N. E. 859.

⁶ *Flynn v. Flynn*, — N. J. Eq. —, 31 Atl. 30.

⁷ *Gerke v. Cameron*, 5 Cal. Unrep. 798, 50 Pac. 434.

b. Undated instrument.—In the case of an undated instrument, the date of an acknowledgment certified thereon,¹ or of the cancelation of a revenue stamp thereon,² is presumptively the date of delivery.

¹ *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528, 585 (at or about the time).

² *Holbrook v. New Jersey Zinc Co.* 57 N. Y. 616.

c. Exception in case of private unauthenticated paper.—The rule that the date of a document is presumptively correct does not apply to a document which is not of a public nature nor formally authenticated, and did not proceed from the party against whom it is offered, when its competency or materiality depends upon its date; but in such case other evidence of its true date must be given, unless it is sanctioned by the rule receiving entries made in the course of duty, etc.¹

¹ See § 8, DATE, and Abbott, Trial Ev. (3d ed.) pp. 158, 407, 780.

DEMAND AND REFUSAL.

1. Oral and written.
2. On servant.
3. Reasons for refusal.

See also LETTERS.

1. Oral and written.

An independent oral demand,¹ though made at the same time with delivery of a written one, is competent; but the conversation had with the mere bearer of a written demand is not competent without producing or accounting for the writing.²

¹ Smith v. Young, 1 Campb. 439.

² Abbott, Trial Ev. 266; Glenn v. Rogers, 3 Md. 312.

2. On servant.

Evidence of a demand on a servant in possession, though he knew its rightfulness, is not sufficient unless it be shown that he was authorized to act, or instructed to refuse, or that his employer had withdrawn so as to prevent demand on himself.¹

¹ Goodwin v. Wertheimer, 99 N. Y. 149, 1 N. E. 404 (demand, to put assignee for benefit of creditors in the wrong).

3. Reasons for refusal.

If one party proves a demand and refusal, the other has a right to prove the reasons which were given by him at the time for the refusal.¹

¹ Bennett v. Burch, 1 Denio, 141.

But this does not let in a narrative of a long series of independent facts.
Walrod v. Ball, 9 Barb. 271.

DENIAL.

1. Form in pleading.
2. General denial.
3. Specific denial.

For evidence in contradiction, or evidence to prove a negative, see CONTRADICTION; CORROBORATION; NEGATIVE; SURPRISE.

1. Form in pleading.

A denial may properly be either positive, or upon information and belief, or of knowledge or information sufficient to form a belief.¹

Merely giving a different and inconsistent version is not sufficient as a denial of the version given in the adversary's pleading.²

¹ *Bennett v. Leeds Mfg. Co.* 110 N. Y. 150, 17 N. E. 669, and note to *Clark v. Dillon*, 15 Abb. N. C. 269; *Ledgerwood Mfg. Co. v. Baird*, 14 Abb. N. C. 319.

An allegation by defendant that he has no knowledge or information sufficient to form a belief as to whether the plaintiff is the owner of certain specified property constitutes a denial. *Pray v. Todd*, 71 App. Div. 391, 75 N. Y. Supp. 947.

² *Wood v. Whiting*, 21 Barb. 190; *Swinburne v. Stockwell*, 58 How. Pr. 312; *Miller v. Winehoffer*, N. Y. Daily Reg. March 30, 1881.

A denial must be general or specific, and cannot be implied from a statement inconsistent with an allegation in the complaint as to a material fact. *Smith v. Coe*, 170 N. Y. 162, 63 N. E. 57, affirming 55 App. Div. 585, 67 N. Y. Supp. 350.

If the facts stated in the complaint are presumptively within defendant's knowledge, his denial of any knowledge sufficient to form a belief is frivolous. *Rochkind v. Perlman*, 123 App. Div. 808, 108 N. Y. Supp. 224, 1151.

2. General denial.

The new procedure has superseded the rule that under the general issue anything may be proved which shows that plaintiff never had a cause of action,¹ and a general denial now only admits evidence going to controvert something that plaintiff

will be obliged to prove under his pleading in order to recover what he seeks.² But a different version may be proved under a denial, although merely alleging a different version is not equivalent to a denial.³ Nor does pleading specially what is competent under the general issue abridge the scope of the proof under the general issue.⁴

Illegality cannot be proved under a general denial;⁵ but the courts have power, on grounds of public policy, to dismiss an action or overrule a defense if illegality appears in the evidence adduced in support of it.⁶

¹ For the common-law rule as to what may be shown under the general issue, and a review of cases, see Gould on Pleading (Hamilton's ed. 1899) 300-323. See also *Shimp v. Siedel*, 6 Houst. (Del.) 421; *Kapischki v. Koch*, 180 Ill. 44, 54 N. E. 179 (to the effect that in actions on the case it is competent under a general denial to give in evidence a former adjudication, satisfaction, or any other matter *ex post facto*, which shows that the cause of action has been discharged); *Forrestell v. Wood*, — Md. —, 23 Atl. 133; *Gregory v. Tomlinson*, 68 Vt. 410, 35 Atl. 350; *Cargill v. Atwood*, 18 R. I. 303, 27 Atl. 214 (to the effect that the general issue puts plaintiff upon proving his whole case, and entitles defendant, without special notice, to give evidence of anything which shows that plaintiff ought not to recover).

Under a general denial the defendant cannot show title in a stranger. *Ten Eyck v. Keller*, 99 App. Div. 106, 91 N. Y. Supp. 169.

In Rhode Island, under the judiciary act, chap. 17, § 3 (Gen. Laws of Rhode Island, Rev. 1909, chap. 286, § 4, p. 1005), the plea of the general issue is to be deemed a part of the record in a case which is certified to the common pleas division on a claim for jury trial, when there was an entry of appearance by defendant in the district court, and hence any evidence properly admissible under such a plea is competent without filing such plea. *Collier v. Jenks*, 19 R. I. 493, 34 Atl. 998.

² Anything which tends to controvert the material allegation of fact in the complaint may be shown under a general denial, but no evidence of new matter can be offered to avoid the legal effect or operation of such facts. *Iselin v. Simon*, 62 Minn. 128, 64 N. W. 143. See also *Eastman v. Gurrey*, 15 Utah, 410, 49 Pac. 310, and cases cited; *Robinson v. Peru Plow & Wheel Co.* 1 Okla. 140, 31 Pac. 988; *Brady v. Hutkoff*, 13 Misc. 515, 34 N. Y. Supp. 947; *Roemer v. Striker*, 142 N. Y. 134, 36 N. E. 808 (where defendant, who was sued for injuries from careless blasting, was allowed to show that the act was not his, but was in fact the act of another); *Tompkins v. Tompkins*, 78 Hun. 220, 28 N. Y. Supp. 903; *Thoburn v. Campbell*, 80 Iowa, 338, 45 N. W. 769; *Jackson v. Kansas City Pkg. Co.* 42 Minn. 382, 44 N. W. 126; *Griffith v. Woolworth*, 28 Neb. 715, 44 N. W. 1137; *Mis-*

souri P. R. Co. v. Wichita Wholesale Grocery Co. 55 Kan. 525, 40 Pac. 899; Beville v. Cox, 109 N. C. 265, 13 S. E. 800; Clark v. Wick, 25 Or. 446, 36 Pac. 165; Bruce v. Foley, 18 Wash. 96, 50 Pac. 935; Anderson v. Rasmussen, 5 Wyo. 44, 36 Pa. 820. See also the cases collected in note to Cary v. Western U. Teleg. Co. 20 Abb. N. C. 342, with application of the rule to various classes of action.

³ See authorities cited under § 1, this title.

⁴ Gregory v. Tomlinson, 68 Vt. 410, 35 Atl. 350.

⁵ Milbank v. Jones, 127 N. Y. 370, 28 N. E. 31; Dillon v. Darst, 48 Neb. 803, 67 N. W. 783; Dodge v. McMahan, 61 Minn. 175, 63 N. W. 407; Barber Asphalt Pav. Co. v. Botsford, 56 Kan. 532, 44 Pac. 3. See also cases reviewed in article on this question by Judge Thompson, 31 Am. L. Rev. 535.

⁶ The authorities on illegality as a defense are collected in a note to May v. Burras, 13 Abb. N. C. 388, and see Cary v. Western U. Teleg. Co. 20 Abb. N. C. 333.

3. Specific denial.

A denial is not good as a specific denial, unless it points to the allegations intended to be denied so specifically as to identify those allegations at once without argument or explanation. Reference merely by folio is bad, because folioing is changed when the record is made up.¹

¹ Note to Clark v. Dillon, 15 Abb. N. C. 269, 276, 282; and see Baylis v. Stimson, 110 N. Y. 621, 17 N. E. 144, affirming 21 Jones & S. 225.

DEPOSIT IN BANK.

Tracing.

In order to trace funds, the making, date, and amount of a deposit in bank, and the medium of paying in, as bills or checks, may be proved against the depositor and those claiming under him, by producing from the possession of the bank the deposit ticket in the handwriting of the depositor, and proving the usual course of making deposits by the testimony of any officer or clerk in the bank familiar with the course of business.¹

¹ Justice Bosworth as referee, in Harrington v. Keteltas, N. Y. 1880 (MSS.) Affirmed in 92 N. Y. 40.

DESERTION.

1. Declarations.
2. Remonstrance.
3. Intention to desert.

See also ABANDONMENT, V.; INTENT; SEPARATION.

1. Declarations.

Declarations by the wife may be shown to prove her nonconsent to the desertion.¹ Statements by the spouse charged with desertion that at some indefinite future time he might consent to a renewal of the marital relations will not defeat the divorce sought by the other party.² Nor will the actual offer to resume marital relations after the lapse of the statutory period suffice.³

¹ Bealor v. Hahn, 117 Pa. 169, 11 Atl. 776.

To disprove wilfulness. Hart v. McGrew, 8 Sadler (Pa.) 505, 11 Atl. 617.

² Ringgold v. Ringgold, 128 Va. 485, 12 A.L.R. 1383, 104 S. E. 836.

³ Wright v. Wright, 81 Fla. 456, 18 A.L.R. 627, 87 So. 156.

2. Remonstrance.

Reasonable remonstrance by one spouse to persuade the other, who is deserting, is all that need be proved, so physical force to prevent departure need not be shown.¹

¹ Nunn v. Nunn, 91 Or. 384, 3 A.L.R. 500, 178 Pac. 986, and note in 3 A.L.R. 503.

3. Intention to desert.

There must be proof of a wrongful intent to desert to constitute ground for divorce.¹ Evidence of the insanity of the deserting spouse intervening before the statutory period has run, will prevent the granting of the divorce.²

¹ Tipton v. Tipton, 169 Iowa, 182, 151 N. W. 90, Ann. Cas. 1916C, 360.

² Wright v. Wright, 125 Va. 526, 4 A.L.R. 1331, 99 S. E. 515, and note in 4 A.L.R. 1333. See also note in L.R.A.1918A, 1186, for cases as to confinement in an insane asylum as desertion.

DICTAGRAPH.

Testimony as to conversations heard over the dictagraph is now quite generally admitted in evidence.¹ There is clearly as much reason for permitting the introduction of this kind of evidence, where the accuracy of the report and the identity of the speakers are properly established, as there is for receiving evidence of conversation over the telephone² or permitting the operation of a phonograph before a jury.³

The dictagraph apparatus may be produced in court, but no scientific explanation of it is necessary.⁴ The weight of such evidence is for the jury.⁵

Nor does a dictagraph covering a room where a telephone conversation is held violate a statute making the tapping of a telephone or telegraph a penal offense.⁶

¹ *Schoborg v. United States*, 264 Fed. 1, petition for *certiorari* denied in 253 U. S. 494, 64 L. ed. 1029; 40 Sup. Ct. Rep. 586; *Com. v. Wakelin*, 230 Mass. 567, 120 N. E. 209; *People v. Eng Hing*, 212 N. Y. 373, 487, 106 N. E. 96, 100; *State v. Minneapolis Milk Co.* 124 Minn. 34, 51 L.R.A.(N.S.) 244, 249, 144 N. W. 417.

State v. Diegle, 11 Ohio N. P. N. S. 593, and the companion case of *State v. Andrews*, 11 Ohio N. P. N. S. 605, affirmed in 14 Ohio C. C. (N.S.) 289. The court, in its charge to the jury in the Diegle case (reported in 9 Ohio Law Reporter, 609), called attention to the fact that this was the first time that the dictagraph had made its appearance in court, but said nothing further as to the admissibility of this class of evidence.

The interest of the public in the dictagraph was aroused by its use in procuring evidence against the McNamara brothers as the instigators of the California dynamiting outrages, and the newspapers of the country gave, at that time, detailed descriptions of the machine and its method of operation.

² As to admissibility of telephone conversations, see post, TELEPHONES, and notes in 17 L.R.A. 440, and 6 L.R.A.(N.S.) 1180.

³ *Boyne City, G. & A. R. Co. v. Anderson*, 146 Mich. 328, 8 L.R.A.(N.S.) 306, 117 Am. St. Rep. 642, 109 N. W. 429, 10 Ann. Cas. 283.

⁴ *Com. v. Wakelin*, 230 Mass. 567, 120 N. E. 209, *supra*.

⁵ *State v. Minneapolis Milk Co.* *supra*.

⁶ *State v. Behringer*, 19 Ariz. 502, 172 Pac. 660.

DOMICIL.

1. Presumptions.
2. *Res gestæ*.
3. Testimony of person as to his intent.
4. Intent of insane person.

See also ABANDONMENT; ABSENCE; RESIDENCE.

1. Presumptions.

The place where a person lives is taken to be his domicile until facts adduced establish the contrary; and a domicile, when acquired, is presumed to continue until it is shown to have been changed.¹

Before one domicile is lost another must be acquired.²

The domicile of the parents is presumed to be the domicile of a minor child.³

¹ *Anderson v. Watt*, 138 U. S. 694, 34 L. ed. 1078, 11 Sup. Ct. Rep. 449, *Price v. Price*, 156 Pa. 617, 27 Atl. 291; *Mowery v. Latham*, 17 R. I. 480, 23 Atl. 13; *Pickering v. Cambridge*, 144 Mass. 244, 10 N. E. 827; *Simmons' Succession*, 109 La. 1095, 34 So. 101.

As to proof of domicile in actions by or against heirs and next of kin, devisees, and legatees, see *Abb. Trial Ev.* (3d ed.) pp. 313 et seq.

As to domicile for purposes of divorce, *Mellen v. Mellen*, 10 Abb. N. C. 333, note; 28 Cent. L. J. 498; note to *Loker v. Gerald*, 16 L.R.A. 407.

As to change of domicile of minor, *Lamar v. Micou*, 112 U. S. 452, 470, 28 L. ed. 751, 5 Sup. Ct. Rep. 221; of insane person, *Talbot v. Chamberlain*, 149 Mass. 57, 32 L.R.A. 254, 20 N. E. 305.

As to change by entering public service, *Ex parte Cunningham*, L. R. 13 Q. B. Div. 418, 53 L. J. Ch. N. S. 1067; *Lauderdale Peerage Case*, 17 Abb. N. C. 439.

² *Reynolds v. Lloyd Cotton Mills*, 177 N. C. 412, 5 A.L.R. 284, 99 S. E. 240; *Boyd v. Com.* 149 Ky. 764, 42 L.R.A. (N.S.) 580, 149 S. W. 1022. Ann. Cas. 1914B, 481. See also cases cited in note 5 A.L.R. 296.

³ *Wirsig v. Scott*, 79 Neb. 322, 112 N. W. 655.

2. *Res gestæ*.

All of a person's acts and conduct fairly indicating his purpose, within a reasonable time before and after he changed his

place of abode, together with his accompanying declarations, are competent on the question whether he intended to change his domicile.¹

¹ *Viles v. Waltham*, 157 Mass. 542, 32 N. E. 901. The declarations cannot, however, be mere narrative of a past occurrence. The acts done must be admissible in evidence, and the declarations must accompany the acts, and be so connected with them as to characterize them, or to indicate the purpose and intention with which the acts were done. *Pickering v. Cambridge*, 144 Mass. 244, 10 N. E. 827. But *Chase v. Chase*, 66 N. H. 588, 29 Atl. 553, holds that evidence of statements made by one whose domicile at his death is in issue as to his intention in going to, returning from, or staying at, a certain place, is competent whether such declarations were *res gestæ* or not, his intention being an independent question.

Warren v. Warren, 73 Fla. 764, L.R.A.1917E, 490, 75 So. 35, where declarations of a man who moved his business from Florida to Cuba were admitted as bearing on the question of whether he intended to remove his domicile to Cuba.

Re Martin, 94 Misc. 81, 157 N. Y. Supp. 474, where declarations of a decedent were held admissible on the issue of whether domicile was in New York or London.

Aspinwall v. Aspinwall, 40 Nev. 55, 160 Pac. 253; *Aspinwall v. Aspinwall*, — Nev. —, 184 Pac. 810.

Wilberding v. Miller, 88 Ohio St. 609, L.R.A.1916A, 718, 106 N. E. 665, holding declarations of testator in will to be strong though not conclusive evidence of domicile.

3. Testimony of person as to his intent.

On an issue as to the character of a person's stay or abode in a certain place, whether it was permanent or temporary, he may testify as to his intent.¹ And on an issue whether a person who has left one place of residence has changed his domicile, he may testify as to his intent in leaving.² No matter how many residences a man may have there is only one domicile,³ and he may testify as to his intent to change his domicile from one residence to another,⁴ although such evidence is held by some courts not to be conclusive.⁵

¹ *Hulett v. Hulett*, 37 Vt. 586; *Kennedy v. Ryall*, 67 N. Y. 379; *Albion v. Maple Lake*, 71 Minn. 503, 74 N. W. 282.

² *Reeder v. Holcomb*, 105 Mass. 94; *Fisk v. Chester*, 8 Gray, 506.

On the general question of right of one to testify as to this intent, see extensive notes in 23 L.R.A.(N.S.) 367, and 34 L.R.A.(N.S.) 323.

³ *Windsor's Estate*, 264 Pa. 552, 107 Atl. 888.

⁴ *Agassiz v. Trefry*, 260 Fed. 226.

⁵ *Agassiz v. Trefry*, *supra*; *Dunn v. Trefry*, 171 C. C. A. 183, 260 Fed. 147.

Contra: *Windsor's Estate*, *supra*; *Re Newcomb*, 192 N. Y. 238, 84 N. E. 950. See also note in 20 *Columbia L. Rev.* 87.

4. Intent of insane person.

It has been held that where a person planned to change his domicile but before doing so became insane, his intention stayed fixed so that when afterward taken there it became his domicile.¹

¹ *Re Robitaille*, 48 N. Y. L. J. 393. But see *contra* note in 26 *Harvard L. Rev.* 268.

DUMMY.

1. Bound by evidence.

2. Effect on rights and liabilities.

For cognate topics, see **AGENCY**; **FICTITIOUS PERSONS**.

1. Bound by evidence.

Evidence which would be competent against the real party in interest is competent against the dummy.¹

¹ *Ballou v. Ballou*, 110 N. Y. 394, 1 L.R.A. 462, 18 N. E. 118 (judgment against husband, competent against wife, in action affecting the property standing in her name).

2. Effect on rights and liabilities.

Transfer of stock to a dummy in view of impending liability not effective to terminate transferrer's liability.¹ Otherwise of a transfer made to preclude possible liability, at a time when there was no present reason to anticipate any.²

¹ *Germania Nat. Bank v. Case*, 99 U. S. 628, 632, 25 L. ed. 448. See also as to liability of pledgee of stock listed in name of dummy holder, note in 19 L.R.A.(N.S.) 252.

² *Anderson v. Philadelphia Warehouse Co.*, 111 U. S. 479, 28 L. ed. 478, 5 Sup. Ct. Rep. 525. But the real owner of the stock will be held liable regardless of whether the stock is registered in his name or not; *Ohio Valley Nat. Bank v. Hulitt*, 204 U. S. 162, 51 L. ed. 423, 27 Sup. Ct. Rep. 179.

DUTY.

1. Direct testimony.
 - a. Scope of duty.
 - b. Performance.
2. Printed rules or instructions.

See also AGENCY; CARE; CAUSE.

1. Direct testimony.

a. Scope of duty.—Where duty depends on the usual course of business, as showing whether a matter was or was not within the scope of one's duty, what are the general duties of a given position is matter of fact to which a witness familiar with the employment may testify.¹

Otherwise where duty depends on the law, or on written instructions, and is directly in question;² but a usage material as qualifying the duty may be proved if not too remote.³

¹ *Missouri P. R. Co. v. Mackey*, 33 Kan. 298, 6 Pac. 291, 295. But the witness, although qualified to speak generally as to the duties of like positions in other businesses of the same character, must show knowledge of the duties of the position in question before he can testify thereto, unless there is evidence that such duties are common to all other like businesses. *McCray v. Galveston, H. & S. A. R. Co.* 89 Tex. 168, 34 S. W. 95.

² *Gratiot v. United States*, 4 How. 80, 112, 11 L. ed. 884, 889; *United States v. Buchanan*, 8 How. 83, 12 L. ed. 997; *People ex rel. Sears v. Tobey*, 153 N. Y. 381, 47 N. E. 800, s. p., *Dunlop v. Munroe*, 7 Cranch, 242, 3 L. ed. 329.

And that printed rules or instructions as to the duties of a given position are the best evidence of those duties, and that oral evidence is incompetent except after proper foundation for it as secondary evidence; see *Georgia P. R. Co. v. Propst*, 90 Ala. 1, 7 So. 635; *St. Louis, A. & T. H. R. Co. v. Bauer*, 156 Ill. 106, 40 N. E. 448; *Price v. Richmond & D. R. Co.* 38 S. C. 199, 17 S. E. 732; *Stoll v. Daly Min. Co.* 19 Utah, 271, 57 Pac. 295; *Galveston, H. & S. A. R. Co. v. Pitts*, — Tex. Civ. App. —, 42 S. W. 255.

³ Compare *Johnston v. Jones*, 1 Black, 209, 17 L. ed. 117, with *Rex v. Cope*, 7 Car. & P. 720.

And that evidence of usage and custom is competent to show duties other than those imposed by the by-laws of a corporation,—especially where those by-laws provide that such other duties and orders of the directors as may be required in the transaction of the business shall be performed, see *State v. Silva*, 130 Mo. 440, 32 S. W. 1007.

b. Performance.—Where the propriety of conduct in the performance of duty depends on experience of facts not within the common knowledge of men of common education and ordinary experience, an expert may be asked what would be the duty of a person under given circumstances;¹ but not what was the duty in the case in hand, for this is the question for the jury.²

¹ See CARE; CAUSE; OPINIONS.

Or where his duties required him to be while performing the particular service. *Helton v. Alabama Midland R. Co.* 97 Ala. 275, 12 So. 276. But he must show himself qualified to speak on the subject. *Farber v. Missouri P. R. Co.* 116 Mo. 81, 20 L.R.A. 350, 22 S. W. 631.

² In *Campbell v. Rickards*, 5 Barn. & Ad. 840, 846, 110 Eng. Reprint, 1001, Lord Denman said: "Witnesses are not receivable to state their views on matters of legal or moral obligation, nor on the manner in which others would probably be influenced, if the parties had acted in one way rather than another." See also Lord Mansfield's opinion in *Carter v. Boehm*, 3 Burr. 1913, 1914, 97 Eng. Reprint, 1166, approved in *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 473, 24 L. ed 256, 258.

2. Printed rules or instructions.

Rules of a railroad company or other common carrier promulgated for the guidance and regulation of its employees are, by the weight of authority, admissible on the question of negligence in an action by a third party against the company.¹ The theory of the courts so deciding is that such rules, while not conclusive, are in the nature of admissions by the party issuing them that reasonable care required the exercise of the precautions therein prescribed.² It has also been suggested that they have probative value as a crystallization of operative experience.³ A substantial minority of jurisdictions hold such rules inadmissible on the ground that the standard of duty, being fixed by law, cannot be enlarged or decreased by private rule of the corporation,⁴ and

that the penalizing of extra precautionary regulations not required by law would discourage their adoption.⁵ Some courts hold that such rules are not competent unless accompanied by proof that the person whose conduct is in question had knowledge of such rules or instructions.⁶

¹ For full discussion of this question and analysis of the cases see notes in L.R.A.1917C, 793, and in 34 Harvard L. Rev. 213.

² *Frizzell v. Omaha Street R. Co.* 59 C. C. A. 382, 124 Fed. 176; *Birmingham R. Light & P. Co. v. Morris*, 163 Ala. 190, 50 So. 198; *Georgia R. Co. v. Williams*, 74 Ga. 723; *Atlanta Consol. Street R. Co. v. Bates*, 103 Ga. 333, 30 S. E. 41, 4 Am. Neg. Rep. 128; *Pennsylvania Co. v. Reidy*, 72 Ill. App. 343; *Lake Shore & M. S. R. Co. v. Ward*, 135 Ill. 511, 26 N. E. 520; *Baltimore & O. R. Co. v. State*, 81 Md. 371, 32 Atl. 201; *Stevens v. Boston Elev. R. Co.* 184 Mass. 476, 69 N. E. 338, 15 Am. Neg. Rep. 338; *Crowley v. Boston Elev. R. Co.* 204 Mass. 241, 90 N. E. 532; *Larson v. Boston Elev. R. Co.* 212 Mass. 262, 98 N. E. 1048; *Illinois C. R. Co. v. Bethea*, 88 Miss. 119, 40 So. 813; *Chicago, B. & Q. R. Co. v. Krayenbuhl*, 65 Neb. 889, 59 L.R.A. 920, 91 N. W. 880, 12 Am. Neg. Rep. 300; *Lyman v. Boston & M. R. Co.* 66 N. H. 200, 11 L.R.A. 364, 20 Atl. 976; *Davis v. Concord & M. R. Co.* 68 N. H. 247, 44 Atl. 388; *Minot v. Boston & M. R. Co.* 73 N. H. 317, 61 Atl. 509; *Hayward v. North Jersey Street R. Co.* 74 N. J. L. 678, 8 L.R.A. (N.S.) 1062, 65 Atl. 737; *Sullivan v. Richmond Light & R. Co.* 128 App. Div. 175, 112 N. Y. Supp. 648; *Cincinnati Street R. Co. v. Altemeier*, 60 Ohio St. 10, 53 N. E. 300, 6 Am. Neg. Rep. 179; *Toledo R. & Light Co. v. Ward*, 25 Ohio C. C. 399, affirmed without opinion in 71 Ohio St. 492, 74 N. E. 1142; *Hecker v. Oregon R. & Nav. Co.* 40 Or. 6, 66 Pac. 270; *Canham v. Rhode Island Co.* 35 R. I. 177, 85 Atl. 1050; *McCormick v. Columbia Electric Street R. Light & P. Co.* 85 S. C. 455, 67 S. E. 562, 21 Ann. Cas. 144; *Texas & P. R. Co. v. Hilgartner*, — Tex. Civ. App. —, 149 S. W. 1091.

³ *Birmingham R. Light & P. Co. v. Morris*, 163 Ala. 190, 50 So. 198, *supra*; *Deister v. Atchison. T. & S. F. R. Co.* 99 Kan. 525, L.R.A.1917C, 784, 162 Pac. 282; *Wigmore*, Ev. § 461.

⁴ *Merchants Transfer & Storage Co. v. Chicago, R. I. & P. R. Co.* 170 Iowa, 378, 150 N. W. 720; *Louisville & N. R. Co. v. Dyer*, 152 Ky. 264, 48 L.R.A.(N.S.) 816, 153 S. W. 194; *Brown v. Detroit United R. Co.* 179 Mich. 404, 146 N. W. 278; *Gillespie v. Great Northern R. Co.* 127 Minn. 234, 149 N. W. 302; *Otto v. Milwaukee N. R. Co.* 148 Wis. 54, 134 N. W. 157; *Virginia R. & Power Co. v. Godsey*, 117 Va. 167, 83 S. E. 1072.

⁵ *Hoffman v. Cedar Rapids & M. C. R. Co.* 157 Iowa, 655, 139 N. W. 165, Ann. Cas. 1915C, 905.

⁶ Mackey v. Baltimore & P. R. Co. 8 Mackey, 282; Louisville, N. A. & C. R. Co. v. Berkey, 136 Ind. 181, 35 N. E. 3; Chicago, K. & W. R. Co. v. Ransom, 56 Kan. 559, 44 Pac. 6; Dougherty v. Philadelphia & R. R. Co. 171 Pa. 457, 33 Atl. 340 (where it appeared that they were not promulgated until after the act in question). *Contra*: Parker v. Georgia P. R. Co. 83 Ga. 539, 10 S. E. 233 (where it is said that whether he had knowledge of them or not was a question not going to their competency in evidence, but to their binding effect upon his conduct). See also Memphis & C. R. Co. v. Askew, 90 Ala. 5, 7 So. 823, where, although knowledge of them was denied, they were nevertheless admitted. And in Dugan v. Chicago, St. P. M. & O. R. Co. 85 Wis. 609, 55 N. W. 894, they were admitted without reference to the question of knowledge.

But they must appertain to the act in question; and it is not proper to give in rules pertaining to the duties as a whole of the person whose conduct is in question, but it should be restricted to the rule showing the particular duty. Memphis & C. R. Co. v. Askew, 90 Ala. 5, 7 So. 823. Thus, rules regulating the speed of trains generally are not competent upon the question whether the speed of a train at a specified place exceeded the limit, where the limit for that place is fixed by a special rule. Laird v. Chicago, R. I. & P. R. Co. 100 Iowa, 336, 69 N. W. 414. Nor are the rules of a railroad company governing the conduct of its employees in the management of trains upon the road competent upon a question of negligent conduct in respect to the management of trains in the freight yard, where they were not intended to apply to trains in the yard. Caron v. Boston & A. R. Co. 167 Mass. 72, 44 N. E. 1085.

As to the sufficiency of showing of knowledge, see note to Nolan v. New York, N. H. & H. R. Co. 43 L.R.A. 305, 356 et seq. See also **KNOWLEDGE**.

DYING DECLARATIONS.

I. IN CIVIL CASES.

II. IN CRIMINAL CASES.

1. In general.
2. In favor of defendant.
3. Whose declarations admissible.
4. Subject of declarations.
5. Mental and physical conditions.
 - a. In general.
 - b. Belief in after-accountability.
6. Time elapsing between declaration and death.
7. Form and completeness of declaration; oral or written.
8. When there is other evidence of the same facts.
9. Questions for court or jury.
10. Right to impeach or contradict and to sustain declarant.
11. Weight to which entitled.

I. IN CIVIL CASES.

Dying declarations are almost universally in civil cases held to be mere hearsay, and not admissible in evidence,¹ even in justification of defamation by charge of crime.² There has, however, been vigorous criticism of the soundness of excluding such declarations³ and at least one state, Kansas, has held that the dying declaration may be used in any civil case to prove any fact to which declarant might testify if living.⁴

¹ *Waldele v. New York C. & H. R. R. Co.* 61 How. Pr. 350; *Brown v. L. C. & L. R. Co.* 7 Ky. L. Rep. 96; *East Tennessee, V. & G. R. Co. v. Maloy*, 77 Ga. 237, 2 S. E. 941; *Marshall v. Chicago & G. E. R. Co.* 48 Ill. 475, 95 Am. Dec. 561; *Daily v. New York & N. H. R. Co.* 32 Conn. 356, 87 Am. Dec. 176; *Friedman v. Railroad Co.* 7 Phila. 203; *Bionto v. Illinois C. R. Co.* 125 La. 147, 27 L.R.A.(N.S.) 1030, 51 So. 98 (actions for personal injuries); *Thayer v. Lombard*, 165 Mass. 174, 52 Am. St. Rep. 507, 42 N. E. 563 (action on contract); *Wooten v. Wilkins*, 39 Ga. 223, 99 Am. Dec. 456 (action for seduction of daughter who subsequently died). *Ross v. Cooper*, 38 N. D. 173, 164 N. W. 679.

² *Barfield v. Britt*, 47 N. C. (2 Jones, L.) 41, 62 Am. Dec. 190, note.

³ Wigmore, Ev. §§ 1430, 1436.

- ⁴ *Thurston v. Fritz*, 91 Kan. 468, 50 L.R.A. (N.S.) 1167, 138 Pac. 625.
See also dissenting opinion in *Ross v. Cooper*, *supra*.

II. IN CRIMINAL CASES.

1. In general.

The admission of dying declarations in evidence, even in criminal cases, is confined at common law to cases of homicide, where the death of the deceased is the subject of the charge.¹ The admission of such declarations is an exception to the doctrine that hearsay testimony will not be received, and is most justly grounded upon necessity.²

- ¹ *United States v. McDurk*, 1 Cranch, C. C. 71, Fed. Cas. No. 15,680; *Oliver v. State*, 17 Ala. 587; *People v. Hall*, 94 Cal. 595, 30 Pac. 7; *McBride v. People*, 5 Colq. App. 91, 37 Pac. 953; *Parks v. State*, 105 Ga. 242, 31 S. E. 580; *North v. People*, 139 Ill. 81, 28 N. E. 966; *Binns v. State*, 46 Ind. 311; *Walston v. Com.* 16 B. Mon. 15; *McDaniel v. State*, 8 Smedes & M. 401, 47 Am. Dec. 93; *State v. Jefferson*, 77 Mo. 136; *People v. Davis*, 56 N. Y. 95; *State v. Harper*, 35 Ohio St. 78, 35 Am. Rep. 596; *Railing v. Com.* 110 Pa. 100, 1 Atl. 314, 6 Am. Crim. Rep. 7; *State v. Faile*, 43 S. C. 52, 20 S. E. 798; *Wright v. State*, 41 Tex. 246; *Crookham v. State*, 5 W. Va. 510; *Miller v. State*, 25 Wis. 384; *Rex v. Hutchinson*, 2 Barn. & C. 608, note, 107 Eng. Reprint, 510, note.

Thus, upon an indictment for unlawfully using an instrument upon the person of a woman, with the intent to destroy a vitalized embryo, in consequence of which she died, her dying declarations are inadmissible. *State v. Harper*, 35 Ohio St. 78, 35 Am. Rep. 596; *Reg. v. Hind*, 8 Cox, C. C. 300, Bell, C. C. 253, 29 L. J. Mag. Cas. N. S. 147, 6 Jur. N. S. 514, 2 L. T. N. S. 253, 8 Week. Rep. 421. So on a charge of rape, where the victim subsequently killed herself. *Reg. v. Newton*, 1 Fost. & F. 641.

- ² *Mose v. State*, 35 Ala. 421; *Newberry v. State*, 68 Ark. 355, 58 S. W. 351; *People v. Glenn*, 10 Cal. 32; *Graves v. People*, 18 Colo. 170, 32 Pac. 63; *Leiber v. Com.* 9 Bush. 11, 1 Am. Crim. Rep. 309; *Peoples v. Com.* 87 Ky. 487, 9 S. W. 509, 810; *State v. Wagner*, 61 Me. 178; *People v. Lonsdale*, 122 Mich. 388, 81 N. W. 277, 12 Am. Crim. Rep. 256; *Brown v. State*, 32 Miss. 433; *State v. Wensell*, 98 Mo. 137, 11 S. W. 614; *Fitzgerald v. State*, 11 Neb. 577, 10 N. W. 495; *Hackett v. People*, 54 Barb. 370; *Barfield v. Britt*, 47 N. C. (2 Jones, L.) 41, 62 Am. Dec. 190; *State v. Garrand*, 5 Or. 216; *Com. v. Sullivan*, 13 Phila. 410; *Nelson v. State*, 7 Humph. 542; *Warren v. State*, 9 Tex. App. 619, 35 Am. Rep. 745.

2. In favor of defendant.

The rule is that dying declarations of the deceased may be given in evidence, as well to acquit as to convict the accused; and they are not limited as evidence in favor of the state alone.¹

¹ Moore v. State, 12 Ala. 764, 46 Am. Dec. 276; Mattox v. United States, 146 U. S. 140, 36 L. ed. 917, 13 Sup. Ct. Rep. 50; People v. Knapp, 26 Mich. 112; Brock v. Com. 92 Ky. 183, 17 S. W. 337; People v. Southern, 120 Cal. 645, 53 Pac. 214; Rex v. Scaife, 1 Moody & R. 551, 2 Lewin, C. C. 150; Coatney v. State, 61 Fla. 19, 55 So. 285; People v. Hotz, 261 Ill. 239, 103 N. E. 1007; Dumas v. State, 159 Ala. 42, 133 Am. St. Rep. 17, 49 So. 224; State v. Uzzo, 6 Penn. (Del.) 212, 65 Atl. 775; Green v. State, 89 Miss. 331, 42 So. 797.

For other cases and full discussion see note in 52 L.R.A.(N.S.) 910.

3. Whose declarations admissible.

The accused being on trial for the murder of one person, it is not competent to admit dying declarations of another person who was killed in the same affray, such declarations being admissible only when coming from the person for whose murder the prisoner is indicted.¹ The dying declarations of a wife are admissible against her husband on trial for murdering her,² and the declarations of a husband are admissible against his wife when she is accused of killing him.³ But a declaration in *articulo mortis*, made by a child only four years old, is not admissible on the trial of an indictment for the murder of such child, because of the child's incompetency to make such a declaration.⁴

¹ State v. Fitzhugh, 2 Or. 227; State v. Westfall, 49 Iowa, 328, 3 Am. Crim. Rep. 343; State v. Bohan, 15 Kan. 407, 2 Am. Crim. Rep. 278; Brown v. Com. 73 Pa. 321, 18 Am. Rep. 740; Krebs v. State, 3 Tex. App. 348; State v. Terrell, 46 S. C. L. (12 Rich.) 321.

So the dying declarations of a witness to a homicide are not admissible. Poteete v. State, 9 Baxt. 261, 40 Am. Rep. 90.

² People v. Green, 1 Denio, 615; State v. Belcher, 13 S. C. 459; Com. v. Stoops. Addison (Pa.) 381.

³ Moore v. State, 12 Ala. 764, 46 Am. Dec. 276.

⁴ Rex v. Pike, 3 Car. & P. 598.

4. Subject of declarations.

Dying declarations are only admissible as to actual facts

which point distinctly to the cause of death, and to the circumstances producing and attending it.¹ They are not admissible where they relate to matters antecedent or subsequent to the transaction which are the cause of the death.² And the general rule is that matters of opinion, and conclusions and conjecture, stated by the person whose dying declarations are sought to be admitted, are inadmissible, since such declarations must speak to facts only.³ There are authorities, however, holding that such opinions are admissible,⁴ on the ground that in the case of dying declarations it is impossible to put the jury in possession of all the facts.⁵

¹ *Oliver v. State*, 17 Ala. 587; *Allen v. State*, 70 Ark. 337, 68 S. W. 28; *People v. Taylor*, 59 Cal. 640; *Savage v. State*, 18 Fla. 909; *Parks v. State*, 105 Ga. 242, 31 S. E. 580; *North v. People*, 139 Ill. 81, 28 N. E. 966; *Montgomery v. State*, 80 Ind. 338, 41 Am. Rep. 815; *State v. Baldwin*, 79 Iowa, 714, 45 N. W. 297, 8 Am. Crim. Rep. 566; *State v. O'Shea*, 60 Kan. 772, 57 Pac. 970; *Pace v. Com.* 89 Ky. 204, 12 S. W. 271; *State v. Black*, 42 La. Ann. 861, 8 So. 594; *People v. Olmstead*, 30 Mich. 431, 1 Am. Crim. Rep. 301; *Merrill v. State*, 58 Miss. 65; *State v. Draper*, 65 Mo. 335, 27 Am. Rep. 287; *People v. Davis*, 56 N. Y. 95; *State v. Harper*, 35 Ohio St. 78, 35 Am. Rep. 596; *Com. v. Murray*, 2 Ashm. (Pa.) 41; *State v. Banister*, 35 S. C. 290, 14 S. E. 678; *Nelson v. State*, 7 Humph. 542; *State v. Dickinson*, 41 Wis. 299, 2 Am. Crim. Rep. 1; *Rex v. Hutchinson*, 2 Barn. & C. 608, note, 107 Eng. Reprint, 510, note.

² *Perry v. State*, 102 Ga. 365, 30 S. E. 903; *Binns v. State*, 46 Ind. 311; *State v. Perigo*, 80 Iowa, 37, 45 N. W. 399; *State v. O'Shea*, 60 Kan. 772, 57 Pac. 970; *Peoples v. Com.* 87 Ky. 487, 9 S. W. 509, 810; *Lipscomb v. State*, 75 Miss. 559, 23 So. 210, 230; *State v. Draper*, 65 Mo. 335, 27 Am. Rep. 287; *Medina v. State*, 43 Tex. Crim. Rep. 52, 63 S. W. 331, 12 Am. Crim. Rep. 246; *State v. Moody*, 18 Wash. 165, 51 Pac. 356; *Smith v. State*, 16 Ala. App. 47, 75 So. 192; *Moore v. State*, 125 Ark. 177, 188 S. W. 3; *Malone v. State*, 72 Fla. 28, 72 So. 415; *Lucas v. Com.* 153 Ky. 424, 155 S. W. 721; *People v. Alexander*, 161 Mich. 645, 126 N. W. 837, 21 Ann. Cas. 150; *State v. Kelleher*, 224 Mo. 145, 123 S. W. 551, 19 Ann. Cas. 1270; *State v. Doris*, 51 Or. 136, 16 L.R.A.(N.S.) 660, 94 Pac. 44; *State v. Johnson*, 41 R. I. 253, 14 A.L.R. 754, 103 Atl. 741; *Still v. State*, 125 Tenn. 80, 140 S. W. 298; *Hill v. State*, 88 Tex. Crim. Rep. 179, 225 S. W. 521; *Patterson v. Com.* 114 Va. 807, 75 S. E. 737; *State v. Swartz*, 108 Wash. 21, 182 Pac. 953. For additional cases and full discussion see note in 14 A.L.R. 757.

- ³ *United States v. Veitch*, 1 Cranch, C. C. 115, Fed. Cas. No. 16,614; *People v. Taylor*, 59 Cal. 640; *McBride v. People*, 5 Colo. App. 91, 37 Pac. 953; *Darby v. State*, 79 Ga. 63, 3 S. E. 663; *Barnett v. People*, 54 Ill. 325; *Morgan v. State*, 31 Ind. 193; *State v. Donnelly*, 69 Iowa, 705, 58 Am. Rep. 234, 27 N. W. 369; *Luby v. Com.* 12 Bush, 1; *State v. Black*, 42 La. Ann. 861, 8 So. 594; *Payne v. State*, 61 Miss. 161, 4 Am. Crim. Rep. 155; *State v. Chambers*, 87 Mo. 406; *State v. Patrick*, 48 N. C. (3 Jones, L.) 443; *Medina v. State*, 43 Tex. Crim. Rep. 52, 63 S. W. 331, 12 Am. Crim. Rep. 246; *McNeal v. State*, 115 Miss. 678, 76 So. 625; *State v. Klute*, 160 Iowa, 170, 140 N. W. 864, where, however, the statement "He just deliberately shot me" was admitted.
- ⁴ *Pippin v. Com.* 117 Va. 919, 86 S. E. 152; *Ex parte Key*, 5 Ala. App. 274, 59 So. 331.
- ⁵ *Wigmore*, Ev. § 1447; notes in 29 Harvard L. Rev. 224 and 16 Mich. L. Rev. 267.

5. Mental and physical conditions.

a. In general.—Dying declarations, to be admissible as such, must be made *in extremis*, when the declarant is at the very point of death,¹ and they must be made under a consciousness on the part of the declarant of impending death.² And, according to the weight of authority, this sense of impending death must consist of an apprehension of imminent, or almost immediate, dissolution,³ though this proposition is by no means sustained by all the decisions.⁴ With but few exceptions the authorities also hold that there must have been a complete abandonment on the part of the declarant of all hope of recovery.⁵ And, of course, the declarant must have been in possession of his mental faculties at the time of making the declaration.⁶ The existence of these mental conditions may be evidenced by statements of the declarant alone,⁷ such statements combined with surrounding circumstances,⁸ by the circumstances in the absence of a statement by declarant,⁹ by sending for a priest,¹⁰ by arranging business affairs,¹¹ or by expression of physician's opinion.¹²

- ¹ *Pulliam v. State*, 88 Ala. 1, 6 So. 839; *Graves v. People*, 18 Colo. 170, 32 Pac. 63; *Campbell v. State*, 11 Ga. 355; *Morgan v. State*, 31 Ind. 193; *Com. v. Matthews*, 89 Ky. 287, 12 S. W. 333; *McLean v. State*, — Miss. —, 12 So. 905; *Kastner v. State*, 58 Neb. 767, 79 N. W. 713; *Montgomery v. State*, 11 Ohio, 424; *State v. Johnson*, 26 S. C. 152, 1 S. E. 510, 7 Am. Crim. Rep. 366; *Curtis v. State*, 14 Lea, 502; *Gibson*

v. Com. 2 Va. Cas. 111; State v. Cameron. 2 Chand. (Wis.) 172, 2 Pinney (Wis.) 490; Reg. v. Perkins, 9 Car. & P. 395, 2 Moody, C. C. 135.

² Mattox v. United States, 146 U. S. 140, 36 L. ed. 917, 13 Sup. Ct. Rep. 50; Faire v. State, 58 Ala. 74; Allen v. State, 70 Ark. 387, 68 S. W. 28; People v. Ramirez, 73 Cal. 403, 15 Pac. 33; State v. Smith, 49 Conn. 376; Nesbit v. State, 43 Ga. 238; Scott v. People, 63 Ill. 508; State v. Gillick, 7 Iowa, 287; Starr v. Com. 97 Ky. 193, 30 S. W. 397; Com. v. Brewer, 164 Mass. 577, 42 N. E. 92; People v. Simpson, 48 Mich. 474, 12 N. W. 662; Lambeth v. State, 23 Miss. 322; State v. Crabtree, 111 Mo. 136, 20 S. W. 7; Binfield v. State, 15 Neb. 484, 19 N. W. 607; People v. Sweeney, 41 Hun, 332; State v. Poll, 8 N. C. (1 Hawk) 442, 9 Am. Dec. 655; Robbins v. State, 8 Ohio St. 131; State v. Shaffer, 23 Or. 555, 32 Pac. 545; Kane v. Com. 109 Pa. 541; State v. Sullivan, 20 R. I. 114, 37 Atl. 673; State v. Nance, 25 S. C. 168; King v. State, 91 Tenn. 617, 20 S. W. 169; O'Boyle v. Com. 100 Va. 785, 40 S. E. 121; State v. Cameron, 2 Chand. (Wis.) 172, 2 Pinney (Wis.) 490; Reg. v. Smith, 10 Cox, C. C. 82, Leigh & C. C. C. 607, 34 L. J. Mag. Cas. N. S. 153, 11 Jur. N. S. 695, 12 L. T. N. S. 609, 13 Week. Rep. 816.

³ Curtis v. State, 14 Lea, 502; Westbrook v. People, 126 Ill. 81, 18 N. E. 304; Maine v. People, 9 Hun, 113; Hussey v. State, 87 Ala. 121, 6 So. 420; Simons v. People, 150 Ill. 66, 36 N. E. 1019; Watson v. Com. 16 B. Mon. 15; State v. Spencer, 30 La. Ann. 362; Reg. v. Osman, 15 Cox, C. C. 1, 31 Moak, Eng. Rep. 739; North v. People, 139 Ill. 81, 28 N. E. 966; Lambeth v. State, 23 Miss. 322; State v. Furney, 41 Kan. 115, 13 Am. St. Rep. 262, 21 Pac. 213, 8 Am. Crim. Rep. 131; State v. Quick, 49 S. C. L. (15 Rich.) 342; Sullivan v. Com. 93 Pa. 284, affirming 13 Phila. 410; State v. Wilson, 121 Mo. 434, 26 S. W. 357; State v. Jagers, 58 S. C. 41, 36 S. E. 434, 12 Am. Crim. Rep. 228; Smith v. State, 9 Humph. 9; Rex v. Van Butchell, 3 Car. & P. 629.

But it is not necessary that apprehensions of immediate death by one *in articulo mortis* should be embodied in language by the dying person to a bystander, it being sufficient if the danger was so imminent and immediate as to satisfy the judge that the deceased must of necessity have been laboring under an impression of almost immediate dissolution. Smith v. State, 9 Humph. 9; Stewart v. State, 2 Lea, 598.

⁴ Rex v. Woodstock, 1 Leach, C. L. 500, 1 East, P. C. 354; Evans v. State 58 Ark. 47, 22 S. W. 1026; State v. Sullivan, 20 R. I. 114, 37 Atl. 673; Krebs v. State, 3 Tex. App. 348; State v. Nash, 7 Iowa, 347; State v. Newhouse, 39 La. Ann. 862, 2 So. 799; Com. v. Stoops, Addison (Pa.) 381.

⁵ *Carver v. United States*, 160 U. S. 553, 40 L. ed. 532, 16 Sup. Ct. Rep. 388; *Johnson v. State*, 17 Ala. 618; *Evans v. State*, 58 Ark. 47, 22 S. W. 1026; *People v. Gray*, 61 Cal. 164, 44 Am. Rep. 549; *Green v. State*, 43 Fla. 552, 30 So. 798; *Thompson v. State*, 24 Ga. 297; *Westbrook v. People*, 126 Ill. 81, 18 N. E. 304; *Archibald v. State*, 122 Ind. 122, 23 N. E. 758; *State v. Gillick*, 7 Iowa, 298; *State v. Furney*, 41 Kan. 115, 13 Am. St. Rep. 262, 21 Pac. 213, 8 Am. Crim. Rep. 131; *Peoples v. Com.* 87 Ky. 487, 9 S. W. 509, 810; *Com. v. Roberts*, 108 Mass. 296; *Bell v. State*, 72 Miss. 507, 17 So. 232, 10 Am. Crim. Rep. 276; *State v. Mathes*, 90 Mo. 571, 2 S. W. 800; *Kastner v. State*, 58 Neb. 767, 79 N. W. 713; *Maine v. People*, 9 Hun, 113; *People v. Chase*, 79 Hun, 296, 29 N. Y. Supp. 376; *Robbins v. State*, 8 Ohio St. 131; *State v. Quick*, 49 S. C. L. (15 Rich.) 342; *Benavides v. State*, 31 Tex. 579; *Reg. v. Peel*, 2 Fost. & F. 21.

In *Worthington v. State*, 92 Md. 222, 56 L.R.A. 353, 84 Am. St. Rep. 506, 48 Atl. 355, dying declarations of a woman whom defendant was charged with killing by means of an abortion were held admissible, where they were accompanied by constant affirmation of expectancy of death, and begging the doctor to save her, as she was dying, although he held out hope of recovery.

⁶ *Ex parte Fatheree*, 34 Tex. Crim. Rep. 594, 31 S. W. 403; *Owens v. Com.* 22 Ky. L. Rep. 514, 58 S. W. 422, 14 Am. Crim. Rep. 26; *People v. Olmstead*, 30 Mich. 431, 1 Am. Crim. Rep. 301.

But such declarations are not rendered inadmissible by the fact that declarant was, at the time, partially under the influence of opiates, and had to be aroused from time to time to continue his statement, the statement being intelligent, continuous, and logical, and not made in answer to questions calculated to induce it. *Taylor v. State*, 38 Tex. Crim. Rep. 552, 43 S. W. 1019.

And the court will not presume that a deceased person whose statements are offered in evidence as dying declarations had become insane, in the absence of any evidence of that fact, where the evidence goes no further than to show that the deceased, at the time of making such declarations, had considerable fever and had taken an opiate, but it does not appear that either had affected his mind. *State v. Garrand*, 5 Or. 216.

And in *State v. Reed*, 137 Mo. 125, 38 S. W. 574, the court said that they were unwilling to say that before dying declarations could be received in evidence it must be shown as a condition precedent that the declarant was in the possession of his mental faculties at the time he made them, although, should it appear from the evidence that at the time the declarations were made the declarant was not in the possession of his mental faculties, a different rule would prevail.

⁷ *Jordan v. State*, 81 Ala. 20, 1 So. 577, 82 Ala. 1, 2 So. 460; *Shell v. State*, 88 Ala. 14, 7 So. 40; *Clemons v. State*, 43 Fla. 200, 30 So.

- 699; *Barnett v. People*, 54 Ill. 325; *Terrell v. Com.* 13 Bush, 246; *Dillard v. State*, 58 Miss. 368; *Hunnicutt v. State*, 18 Tex. App. 498, 51 Am. Rep. 330.
- ⁸ *Krebs v. State*, 3 Tex. App. 348; *Mattox v. United States*, 146 U. S. 140, 36 L. ed. 917, 13 Sup. Ct. Rep. 50; *People v. Samario*, 84 Cal. 484, 24 Pac. 283; *Scott v. People*, 63 Ill. 508; *State v. Murdy*, 81 Iowa, 603, 47 N. W. 867; *State v. Young*, 104 Iowa, 730, 74 N. W. 693; *State v. Sullivan*, 20 R. I. 114, 37 Atl. 673; *State v. Nocton*, 121 Mo. 537, 26 S. W. 551; *Donnelly v. State*, 26 N. J. L. 463; *Kilpatrick v. Com.* 31 Pa. 198.
- ⁹ *Clark v. State*, 105 Ala. 91, 17 So. 37; *People v. Taylor*, 59 Cal. 640; *Lester v. State*, 37 Fla. 382, 20 So. 232; *Campbell v. State*, 11 Ga. 355; *Com. v. Matthews*, 89 Ky. 287, 12 S. W. 333; *State v. Wilson*, 23 La. Ann. 558; *People v. Simpson*, 48 Mich. 474, 12 N. W. 662; *Rakes v. People*, 2 Neb. 157; *Com. v. Birriolo*, 197 Pa. 371, 47 Atl. 355; *State v. Bradley*, 34 S. C. 136, 13 S. E. 315; *Nelson v. State*, 7 Humph. 542; *Burrell v. State*, 18 Tex. 713.
- ¹⁰ *Carver v. United States*, 164 U. S. 694, 41 L. ed. 602, 17 Sup. Ct. Rep. 228; *United States v. Taylor*, 4 Cranch, C. C. 338, Fed. Cas. No. 16,436; *Hammil v. State*, 90 Ala. 577, 8 So. 380; *People v. Lee*, 17 Cal. 76; *State v. Swift*, 57 Conn. 496, 18 Atl. 664; *State v. Nash*, 7 Iowa, 347.
- ¹¹ *Reg. v. Thomas*, 1 Cox, C. C. 52; *People v. Gray*, 61 Cal. 164, 44 Am. Rep. 549; *State v. Nash*, 7 Iowa, 347; *State v. Trivas*, 32 La. Ann. 1086, 36 Am. Rep. 293; *Curtis v. State*, 14 Lea, 502; *Temple v. State*, 15 Tex. App. 304, 49 Am. Rep. 200.
- ¹² *Hagenow v. People*, 188 Ill. 545, 59 N. E. 242; *State v. Leeper*, 70 Iowa, 748, 30 N. W. 501; *State v. Somnier*, 33 La. Ann. 237; *People v. Lonsdale*, 122 Mich. 388, 81 N. W. 277, 12 Am. Crim. Rep. 256; *Oliver v. State*, 17 Ala. 587; *People v. Lem Deo*, 132 Cal. 199, 64 Pac. 265; *State v. Draper*, 65 Mo. 335, 27 Am. Rep. 287; *Brotherton v. People*, 75 N. Y. 159, 3 Am. Crim. Rep. 218, affirming 14 Hun, 486.
- For other authorities as to how sense of impending death is to be evidenced, see notes in 56 L.R.A. 406, and 30 L.R.A.(N.S.) 391.

b. Belief in after-accountability.—As to whether a belief by the declarant in God, in future accountability, and a future state of reward and punishment, is essential to the admission of his statements otherwise admissible, is a question in regard to which the decisions appear to be divided, some holding that the lack of such belief is sufficient to exclude them altogether,¹ while others hold that, notwithstanding the want of it, the declaration is admissible, and that the absence of such belief goes to the credibility or weight of the evidence.² There seems to

be an agreement, however, that the same rule applies as would admit or exclude the testimony of a living witness. In some jurisdictions it is provided by statute that a witness is not rendered incompetent by reason of his religious belief or the want of it, and in such undoubtedly the fact would only go to the weight of the declaration.

¹ *Donnelly v. State*, 26 N. J. L. 463, affirmed in 26 N. J. L. 601; *Goodall v. State*, 1 Or. 333, 80 Am. Dec. 396; *Brown v. State*, 78 Miss. 637, 84 Am. St. Rep. 641, 29 So. 519; *Lambeth v. State*, 23 Miss. 322.

² *State v. Elliott*, 45 Iowa, 486, 2 Am. Crim. Rep. 322; *Nesbit v. State*, 43 Ga. 238.

6. Time elapsing between declaration and death.

While the time elapsing between the declaration and death is an element to be considered, the general rule, almost unanimously followed by the decisions, is that it is the impression of almost immediate dissolution, and not the rapid succession of death in point of fact, that renders the testimony admissible.¹

¹ *Greenl. Ev.* § 158; *State v. Reed*, 53 Kan. 767, 42 Am. St. Rep. 322, 37 Pac. 174; *People v. Weaver*, 108 Mich. 649, 66 N. W. 567; *Rakes v. People*, 2 Neb. 157; *People v. Simpson*, 48 Mich. 474, 12 N. W. 662; *Fitzgerald v. State*, 11 Neb. 577, 10 N. W. 495; *State v. Sadler*, 51 La. Ann. 1397, 26 So. 390; *Reynolds v. State*, 68 Ala. 502, 4 Am. Crim. Rep. 153; *State v. Nash*, 7 Iowa, 347; *Com. v. Birriolo*, 197 Pa. 371, 47 Atl. 355; *State v. Nocton*, 121 Mo. 537, 26 S. W. 551, *People v. Chase*, 79 Hun, 296, 29 N. Y. Supp. 376; *Jones v. State*, 71 Ind. 66; *State v. Banister*, 35 S. C. 290, 14 S. E. 678; *Com. v. Haney*, 127 Mass. 455; *Rex v. Mosley*, 1 Moody, C. C. 97, 1 Lewin, C. C. 79; *Baxter v. State*, 15 Lea, 657.

7. Form and completeness of declaration; oral or written.

The weight of authority seems to be in favor of the doctrine that where the dying declaration has been reduced to writing, and the writing signed by, or affirmed by, the declarant after its contents have been fully made known to him, the writing is the best evidence of what the declaration was, and that parol or secondary evidence is not admissible until the nonproduction of the writing is accounted for,¹ and it is generally considered that when the writing is not produced, and its absence is properly accounted for, as where the writing has been lost or destroyed,² and oral testimony admitted in its stead, it is not

proof of the contents of the writing that is admissible, but proof of what deceased said.

What must be given in evidencing dying declarations is the substance of what the declarant said, and it is not absolutely necessary to give his exact words.³ Neither is it absolutely essential that the communication of the deceased should be in words, a communication by signs being admissible.⁴ And the fact that the statement of a dying person is drawn from him by questions, and even leading questions, is no objection to its admission as a dying declaration.⁵

¹ Krebs v. State, 8 Tex. App. 1; Trowter's Case, 12 Vin. Abr. 119; Rex v. Gay, 7 Car. & P. 230; Boulden v. State, 102 Ala. 78, 15 So. 341; Hines v. Com. 90 Ky. 64, 13 S. W. 445; Collier v. State, 20 Ark. 36; Drake v. State, 25 Tex. App. 293, 7 S. W. 868; Dunn v. People, 172 Ill. 582, 50 N. E. 137, 11 Am. Crim. Rep. 447; Turner v. State, 89 Tenn. 547, 15 S. W. 838.

² Tyree v. Com. 160 Ky. 706, 170 S. W. 33; State v. Clark, 142 Iowa, 305, 2 A.L.R. 1709, 76 So. 722; Rodrigues v. State, 79 Tex. Crim. Rep. 631, 186 S. W. 335; State v. Patterson, 45 Vt. 308, 12 Am. Rep. 200. For additional cases and full discussion see note in 2 A.L.R. 1711.

³ Krebs v. State, 8 Tex. App. 1; Roberts v. State, 5 Tex. App. 141; Montgomery v. State, 11 Ohio, 424; Ward v. State, 8 Blackf. 101.

⁴ Com. v. Casey, 11 Cush. 417, 59 Am. Dec. 150; Warren v. State, 9 Tex. App. 619, 35 Am. Rep. 745; Jones v. State, 71 Ind. 66; State v. Morrison, 64 Kan. 669, 68 Pac. 48, 13 Am. Crim. Rep. 347; McHugh v. State, 31 Ala. 317.

⁵ Rex v. Fagent, 7 Car. & P. 238; Reg. v. Smith, 10 Cox, C. C. 82, Leigh & C. C. C. 607, 34 L. J. Mag. Cas. N. S. 153, 11 Jur. N. S. 695, 12 L. T. N. S. 609, 13 Week. Rep. 816; Com. v. Haney, 127 Mass. 455; Richard v. State, 42 Fla. 528, 29 So. 413; State v. Trivas, 32 La. Ann. 1086, 36 Am. Rep. 293; Maine v. People, 9 Hun, 113; Vass v. Com. 3 Leigh, 786, 24 Am. Dec. 695; Anderson v. State, 79 Ala. 5.

8. When there is other evidence of the same facts.

While the original and true reason for excepting dying declarations from the rule prohibiting hearsay evidence was undoubtedly necessary, it was not the necessity of any individual case, but the general necessity, in cases of homicide, of admitting what in many, if not most, cases of that nature was the best and only obtainable evidence of the circumstances of the death of the person killed, and therefore, when the objection has

been raised that in a particular case the dying declarations should not be admitted because in that case it was unnecessary, there being other evidence on the same subject or to the same effect as that contained in the declaration, the courts have almost uniformly decided that the necessity or lack of it in the individual cases was not to be taken into consideration, but that the declaration, being in all other essentials admissible, would not be rejected for the reason that there was other evidence of the same character.¹

¹ *State v. Saunders*, 14 Or. 300, 12 Pac. 441; *Parks v. State*, 105 Ga. 242, 31 S. E. 580; *Com. v. Roddy*, 184 Pa. 274, 39 Atl. 211; *State v. Yee Wee*, 7 Idaho, 188, 61 Pac. 588; *Luker v. Com.* 9 Ky. L. Rep. 385, 5 S. W. 354; *Reynolds v. State*, 68 Ala. 502, 4 Am. Crim. Rep. 153; *State v. Wilson*, 24 Kan. 189, 36 Am. Rep. 257; *Payne v. State*, 61 Miss. 161, 4 Am. Crim. Rep. 155; *Darby v. State*, 79 Ga. 63, 3 S. E. 663; *People v. Knickerbocker*, 1 Park. Crim. Rep. 302; *People v. Beverly*, 108 Mich. 509, 66 N. W. 379.

9. Questions for court or jury.

It is generally conceded that the preliminary question as to whether the party offering in evidence the statements of deceased in a trial for homicide has laid a proper foundation for their admission is, primarily, for the court, and in England and nearly all of the states it is held that the decision of the court on this subject is final and conclusive, and that with it the jury have nothing to do.¹ A different rule, however, prevails in Georgia, where it is held that, while the question is primarily one for the court, yet, after the evidence has been admitted, it is not only the right, but the duty, of the jury to find whether a proper foundation has been laid.² It would seem, also, that the same rule that obtains in Georgia prevails in Massachusetts,³ California,⁴ Iowa,⁵ and Oregon.⁶

¹ *Rex v. Hucks*, 1 Starkie, 523, 1 Leach, C. L. 503, note; *Rex v. Van Butchell*, 3 Car. & P. 629; *Reg. v. Smith*, 10 Cox, C. C. 82, Leigh & C. C. C. 607, 34 L. J. Mag. Cas. N. S. 153, 11 Jur. N. S. 695, 12 L. T. N. S. 609, 13 Week. Rep. 816; *Rex v. John*, 1 East, P. C. 357; *Lambeth v. State*, 23 Miss. 322; *State v. Burns*, 33 Mo. 483; *Justice v. State*, 99 Ala. 180, 13 So. 658; *Roten v. State*, 31 Fla. 514, 12 So. 910; *Smith v. State*, 9 Humph. 9; *State v. Center*, 35 Vt. 378; *People v. Kraft*, 148 N. Y. 631, 43 N. E. 80, affirming 91 Hun, 474, **ABB. FACTS—33.**

36 N. Y. Supp. 1034; Donnelly v. State, 26 N. J. L. 463; State v. Bennett, 14 La. Ann. 661.

² Campbell v. State, 11 Ga. 355; Dumas v. State, 62 Ga. 58; Mitchell v. State, 71 Ga. 128; Varnedoc v. State, 75 Ga. 181, 58 Am. Rep. 465.

³ Com. v. Brewer, 164 Mass. 577, 42 N. E. 92.

⁴ People v. Thomson, 145 Cal. 717, 79 Pac. 435.

⁵ State v. Phillips, 118 Iowa, 660, 92 N. W. 876.

⁶ State v. Doris, 51 Or. 136, 16 L.R.A.(N.S.) 660, 94 Pac. 44.

10. Right to impeach or contradict and to sustain declarant.

While there is some conflict of authority as to the right of accused to contradict and impeach dying declarations introduced in evidence against him, a few cases holding that such contradictory statements, to be admissible, must have been made when deceased was *in extremis*, while others hold that they cannot be admitted under any circumstances, by far the greater number of cases hold that proof of statements made by the declarant which tend to contradict, qualify, or in any manner impeach his dying declaration, may be admitted without regard to whether or not they were made *in extremis*, and that in such case the rule requiring a foundation by calling the attention of the party sought to be contradicted to the matter does not apply.¹ It has also been held that dying declarations may be impeached by showing that declarant was of bad reputation, either generally or for truth and veracity.² And where accused has given evidence tending to contradict the declarant the prosecution has the right to introduce other declarations of the declarant as rebutting testimony, although such other declarations were not made while declarant was *in extremis*.³

¹ Morelock v. State, 90 Tenn. 528, 18 S. W. 258; Dunn v. People, 172 Ill. 582, 50 N. E. 137, 11 Am. Crim. Rep. 447; Green v. State, 154 Ind. 655, 57 N. E. 637; Carver v. United States, 164 U. S. 694, 41 L. ed. 602, 17 Sup. Ct. Rep. 228; State v. Lodge, 9 Houst. (Del.) 542, 33 Atl. 312; Morrison v. State, 42 Fla. 149, 28 So. 97; Battle v. State, 74 Ga. 101; Com. v. Cooper, 5 Allen, 495, 81 Am. Dec. 762; People v. Lawrence, 21 Cal. 368; Felder v. State, 23 Tex. App. 477, 59 Am. Rep. 777, 5 S. W. 145; Nelms v. State, 13 Smedes & M. 500, 53 Am. Dec. 94; Shell v. State, 88 Ala. 14, 7 So. 40.

² Lester v. State, 37 Fla. 382, 20 So. 232; Redd v. State, 99 Ga. 210, 25 S. E. 268.

³ State v. Blackburn, 80 N. C. 474; Bostick v. State, 3 Humph. 344; State v. Thomason, 46 N. C. (1 Jones, L.) 274.

11. Weight to which entitled.

The weight and credibility of dying declarations when admitted in evidence is always and entirely for the jury.¹ But as to the weight of dying declarations as compared with the testimony of living witnesses sworn and testifying in open court and subjected to the sifting process of cross-examination, the decisions vary, some holding that they are to be received with the same degree of credit as the testimony of the deceased would receive if examined under oath as a witness,² while others—and these are perhaps the best considered cases—hold that such declarations are, under no circumstances, to be considered on the same plane or of equal weight and value with the testimony of a sworn witness giving evidence in the presence of the court and jury and subject to cross-examination.³

¹ *Moore v. State*, 12 Ala. 764, 46 Am. Dec. 276; *Campbell v. State*, 38 Ark. 498; *People v. Abbott*, — Cal. —, 4 Pac. 769; *Perry v. State*, 102 Ga. 365, 30 S. E. 905; *Starkey v. People*, 17 Ill. 17; *Doles v. State*, 97 Ind. 555; *Walston v. Com.* 16 B. Mon. 15; *People v. Beverly*, 108 Mich. 509, 66 N. W. 379; *Lambeth v. State*, 23 Miss. 322; *State v. Stephens*, 96 Mo. 637, 10 S. W. 172; *Donnelly v. State*, 26 N. J. L. 463; *People v. Green*, 1 Park. Crim. Rep. 11; *Com. v. Lenox*, 3 Brewst. (Pa.) 249; *State v. Sullivan*, 20 R. L. 114, 37 Atl. 673; *State v. Quick*, 15 Rich. L. 342.

² *Hill v. State*, 41 Ga. 484; *Green v. State*, 13 Mo. 382; *State v. Schmidt*, 73 Iowa, 469, 35 N. W. 590; *State v. Whitson*, 111 N. C. 695, 16 S. E. 332; *Baxter v. State*, 15 Lea, 657.

³ *Ashton's Case*, 2 Lewin, C. C. 147; *People v. Kraft*, 148 N. Y. 631, 43 N. E. 80, affirming 91 Hun, 474, 36 N. Y. Supp. 1034; *State v. Vansant*, 80 Mo. 67; *State v. Eddon*, 8 Wash. 292, 36 Pac. 139; *Walker v. State*, 37 Tex. 366.

For a full review of all the authorities on the question of dying declarations, see elaborate note in 56 L.R.A. 353.

EFFECT OF INJURY OR OPERATION.

1. Testimony of person injured.
2. Expert witness.
3. Nonexpert witness.

See also CARE; CAUSE; OPINION.

1. Testimony of person injured.

A person injured may testify to the effects of an injury or operation upon him, and what is the resulting condition,¹ provided that, unless he be an expert, his answer states only facts of knowledge and consciousness, and not opinions, requiring professional skill to form justly.²

¹ Creed v. Hartman, 8 Bosw. 123, affirmed on other points in 29 N. Y. 591; North Chicago Street R. Co. v. Gillow, 166 Ill. 444, 46 N. E. 1082, s. p., Reeve v. Dennett, 145 Mass. 23, 11 N. E. 938 (teeth filled without pain); Beckwith v. New York C. R. Co. 64 Barb. 299 (proper to ask, "Did the state of your health cause you to give up your business?" for it calls for a fact, not an opinion).

And in Alabama, G. S. R. Co. v. Frazier, 93 Ala. 45, 9 So. 303, a plaintiff, though not an expert, was held competent to testify as to the permanent character of the injuries for which he was suing, where the lapse of time between the injury and the trial had been such that any abnormal conditions remaining were necessarily permanent.

² Stevens v. Rodger, 25 Hun, 54 (holding that one, not an expert, cannot testify that the effect of a blow on his ear was to produce deafness); Pfau v. Alteria, 23 Misc. 693, 52 N. Y. Supp. 88 (holding that one, not an expert, cannot testify that his head will never be the same as it was).

2. Expert witness.

An expert may testify to probable future effects,¹ but so far only as relevant to the cause of action;² or as the question does not call for consequences too remote and speculative, or for mere conjecture.³ On the other hand, he cannot be asked whether the person's condition is the direct result.⁴

It is immaterial, however, that the question is not confined to the reasonable certainty of such effects.⁵

¹ *Goodrich v. People*, 19 N. Y. 574, 577 (unwholesomeness of meat consequent on disease of animal. Supreme court, 3 Park. Crim. Rep. 622, Affirmed by court of appeals without questioning this point); *Matteson v. New York C. R. Co.* 35 N. Y. 487, 91 Am. Dec. 67 (curability); *Buel v. New York C. R. Co.* 31 N. Y. 314, 88 Am. Dec. 271; *Cunningham v. New York C. & H. R. R. Co.* 49 Fed. Rep. 439; *Denver Tramway Co. v. Reid*, 4 Colo. App. 53, 35 Pac. 269; *Erickson v. Barber Bros.* 83 Iowa, 367, 49 N. W. 838; *Langworthy v. Green Twp.* 88 Mich. 207, 50 N. W. 130; *Chicago, R. I. & P. R. Co. v. Archer*, 46 Neb. 907, 65 N. W. 1043; *Poffenbarger v. Smith*, 27 Neb. 788, 43 N. W. 1150; *Alberti v. New York, L. E. & W. R. Co.* 118 N. Y. 77, 6 L.R.A. 765, 23 N. E. 35; *Ayres v. Delaware, L. & W. R. Co.* 158 N. Y. 254, 53 N. E. 22; *Stever v. New York C. & H. R. R. Co.* 7 App. Div. 392, 39 N. Y. Supp. 944; *O'Flaherty v. Nassau Electric R. Co.* 34 App. Div. 74, 53 N. Y. Supp. 1069; *Mitchell v. Tacoma R. & Motor Co.* 13 Wash. 560, 43 Pac. 528. So held although his opinion is in part based upon statements made by the injured person relating to his past or present symptoms. *Consolidated Traction Co. v. Lambertson*, 59 N. J. L. 297, 36 Atl. 100.

Nor is the competency of the opinion affected by the fact that the examination on which it is based was made long prior to the trial. *Missouri P. R. Co. v. Callahan*, — Tex. —, 12 S. W. 833 (two years); *Abbot v. Dwinnell*, 74 Wis. 514, 43 N. W. 496 (more than one year). That fact merely goes to its weight. *Ibid.*

A medical expert asked the probable future course of plaintiff's disease may, in stating that in his opinion plaintiff will never recover, qualify it by adding "so far as to be capable of any persistent occupation;" and such qualification is not objectionable as being a second speculative opinion based upon the first opinion. *Lehigh & H. R. R. Co. v. Marchant*, 28 C. C. A. 544, 55 U. S. App. 427, 84 Fed. 870.

² *Cumming v. Brooklyn City R. Co.* 21 Abb. N. C. 1, 109 N. Y. 95, 16 N. E. 65 (holding that in parent's action evidence of future probable necessity of expensive surgical operation is not competent, for such damages can be recovered only by the child).

³ *Yaeger v. Southern California R. Co.* 5 Cal. —, 51 Pac. 190. And for cases affirming this rule, but holding the questions not objectionable as speculative, see *Stever v. New York C. & H. R. R. Co.* 7 App. Div. 392, 39 N. Y. Supp. 944; *Maher v. New York C. & H. R. R. Co.* 20 App. Div. 161, 46 N. Y. Supp. 847.

⁴ *Chicago, R. I. & P. R. Co. v. Sheldon*, 6 Kan. App. 347, 51 Pac. 808.

⁵ Every expert opinion as to the future, founded upon present conditions, is, and must necessarily be, uncertain; but the fact that it is so uncertain does not prevent the opinion of an expert being given as

² *Equitable Co-operative Foundry Co. v. Hersee*, 103 N. Y. 25, 9 N. E. 487. S. P., ACQUIESCENCE. And see RATIFICATION.

EMBEZZLEMENT.

1. Circumstantial evidence.
2. Evidence of intent generally.
3. Evidence of other crimes.

See more fully on this question, CRIMINAL TRIAL BRIEF.

1. Circumstantial evidence.

Circumstantial evidence, though short of showing the actual appropriation of specific money, is competent, and may be sufficient to show embezzlement.¹

¹ *Hackett v. King*, 8 Allen, 144, 85 Am. Dec. 695; *Boston & W. R. Corp. v. Dana*, 1 Gray, 83; *New York & B. Ferry Co. v. Moore*, 102 N. Y. 667, s. c. with note, 18 Abb. N. C. 106, reversing 32 Hun, 29 (misappropriation of ferry tolls through a long period shown by unexplained acquisition of money during that time).

2. Evidence of intent generally.

Proof of a felonious intent is essential to a conviction for embezzlement and any evidence legitimately showing the existence¹ or absence² of such intent is competent.

¹ *State v. Sage*, 22 Idaho, 489, 126 Pac. 403, Ann. Cas. 1914B, 251; *Territory v. Hale*, 13 N. M. 181, 81 Pac. 583, 13 Ann. Cas. 551; *Eggleston v. State*, 129 Ala. 80, 87 Am. St. Rep. 17, 30 So. 582.

² *Lindgren v. United States*, 171 C. C. A. 500, 260 Fed. 772; *State v. Coyle*, 41 Utah, 320, 126 Pac. 305. See also note in 18 Mich. L. Rev. 427.

3. Evidence of other crimes.

In trials for embezzlement, evidence of other acts of a similar character is competent for the purpose of showing a guilty intent, or the existence of a common scheme, plan, or system.¹

¹ *United States v. Russell*, 19 Fed. 591; *United States v. Snyder*, 4 McCrary, 618, 14 Fed. 554; *People v. Gray*, 66 Cal. 271, 5 Pac. 240; *People v. Bidleman*, 104 Cal. 608, 38 Pac. 502; *People v. Neyce*, 86 Cal. 393, 24 Pac. 1091; *Reeves v. State*, 95 Ala. 31, 11 So. 158; *Thalheim v. State*, 38 Fla. 169, 20 So. 938; *Jackson v. State*, 76 Ga. 551; *Com. v. Tuckerman*, 10 Gray, 173; *People v. Hawkins*, 106 Mich. 479, 64 N. W. 736; *Miller v. State*, 88 Tex. Crim. Rep. 69, 12 A.L.R. 597, 225 S. W. 379; *Gallardo v. State*, — Tex. Crim. Rep. —, 40 S. W. 974; *Goodwyn v. State*, — Tex. Crim. Rep. —, 64 S. W. 251; *People*

v. Lyon, 1 N. Y. Crim. Rep. 400; *Reg. v. Richardson*, 2 Fost. & F. 343, 8 Cox, C. C. 448; *Collins v. State*, — Ind. —, 131 N. E. 390.

For elaborate note on the general question of evidence of other crimes in criminal cases, see 62 L.R.A. 193 and 43 L.R.A.(N.S.) 774.

EMPLOYMENT.

1. Appearance of being in service.
2. Presumption of employment.
 - a. From control of property.
 - b. From services rendered.
 - c. Of continuance of relation.

For cognate topics, see ABILITY; AGE; AGENCY; CHARACTER; DUTY.

1. Appearance of being in service.

Evidence that a person was actually engaged in performing labors such as were a part of the ordinary business of an employer is sufficient to go to the jury as evidence that he was acting as a servant of the latter.¹

For this purpose it is not necessary to identify the person.²

- ¹ *Svenson v. Atlantic Mail S. S. Co.* 57 N. Y. 108 (man engaged in unloading defendant's steamer); *McCoun v. New York C. & H. R. R. Co.* 66 Barb. 338 (man alleged to be defendant's agent was on its engine with his coat off, apparently engaged in work there); *Hughes v. New York & N. H. R. Co.* 4 Jones & S. 222 (man in charge of defendant's freight car wearing a breakman's cap and jacket); *Lampkins v. Vicksburg, S. & P. R. Co.* 42 La. Ann. 997, 8 So. 530 (man alleged to be defendant's conductor wore a cap and had a lantern and conductor's clippers); *Martin v. Richards*, 155 Mass. 381, 29 N. E. 591. See other cases under AGENCY, §§ 8, 9.

But the testimony that a person receiving baggage, witness "supposed to be the baggage master" of defendant, is not enough. *Butler v. Hudson River R. Co.* 3 E. D. Smith, 571.

- ² *Wagner v. New York, L. E. & W. R. Co.* 20 N. Y. Week. Dig. 277 (flagman).

2. Presumption of employment.

a. *From control of property.*—Evidence that a person was in charge of property of another, apparently performing usual duties of an employee or servant, raises a presumption in favor of third persons that he stood in that relation.¹

- ¹ *Norris v. Kohler*, 41 N. Y. 42, reversing 1 Sweeney, 39 (runaway team); *Doherty v. Ford*, 8 Misc. 227, 28 N. Y. Supp. 720.

A person wearing on his hat a plate with the words "Electrical vehicle," with a number, and operating one of defendant's cabs at a cabstand,

is presumed to have been in defendant's employ. *Curley v. Electric Vehicle Co.* 68 App. Div. 18, 74 N. Y. Supp. 35.

A person who operates the machinery of a carrier, without any explanation of the circumstances, is presumed to be the carrier's servant. *Wilson v. Alexander*, 115 Tenn. 125, 88 S. W. 935.

b. From services rendered.—Whenever services are rendered by one person for another, which are accepted, a contract of employment will be presumed,¹ unless the parties are near relatives or members of the same family in which case no such presumption exists.²

¹ *Kerr v. Cusenbary*, 60 Mo. App. 558; *Hay v. Peterson*, 6 Wyo. 419, 34 L.R.A. 581, 45 Pac. 1073; 2 *Parsons, Contracts*, p. 46.

² *Davies v. Davies*, 9 Car. & P. 87; *Saunders v. Saunders*, 90 Me. 284, 38 Atl. 172; *Enger v. Lofland*, 100 Iowa, 303, 69 N. W. 526; *Livingston v. Hammond*, 162 Mass. 375, 38 N. E. 968; *Andrus v. Foster*, 17 Vt. 556; *Williams v. Hutchinson*, 3 N. Y. 312, 53 Am. Dec. 301; *Houck v. Houck*, 99 Pa. 552; *Reeves v. Moore*, 4 Ind. App. 492, 31 N. E. 44; *Heffron v. Brown*, 155 Ill. 322, 40 N. E. 583; *Ex parte Aycock*, 34 S. C. 257, 13 S. E. 450; *Hodge v. Hodge*, 47 Wash. 196, 11 L.R.A. (N.S.) 763, 91 Pac. 764; *Addison, Contr.* 14th ed. p. 849, and cases cited in 2 *Wharton, Ev.* §§ 1226–1237; *Best, Ev.* §§ 303–326.

And this implication from relationship avails in favor of creditors of the recipient of the services. Thus, it has been held in several cases that a conveyance of property in consideration of services rendered by a person who is a relative of the recipient or a member of his family is invalid as against the creditors of such recipient, unless the services were performed in pursuance of an antecedent contract. *Zerbe v. Miller*, 16 Pa. 488; *Hack v. Stewart*, 8 Pa. 213; *Stoneburner v. Motley*, 95 Va. 784, 30 S. E. 364; *Beale v. Hall*, 97 Va. 383, 34 S. E. 53.

Even where the person who rendered, and the person who received, the services, were not related by either blood or marriage, the implication of a promise to pay compensation will, as a general rule, be negatived if it appears that at the time when the services were rendered there existed between them a domestic relationship the incidents of which were essentially similar to those which are ordinarily associated with such a relationship when it exists between kinsfolk. *Graham v. Stanton*, 177 Mass. 321, 58 N. E. 1023; *Wyley v. Bull*, 41 Kan. 206, 20 Pac. 855; *Cousty's Estate*, 12 Phila. 98; *Walker v. Taylor*, 28 Colo. 233, 64 Pac. 192; *Deppen v. Personette*, 93 Ill. App. 513; *Smith v. Johnson*, 45 Iowa, 308; *Sword v. Keith*, 31 Mich. 247; *Schrimpf v. Settegast*, 36 Tex. 296; *Hogg v. Laster*, 56 Ark. 382, 19 S. W. 975; *Lunay v. Vantyne*, 40 Vt. 501.

The presumption, however, is strong or weak in proportion to the nearness of the relationship. *Quigly v. Harold*, 22 Ill. App. 269; *Hill v. Hill*, 121 Ind. 255, 23 N. E. 87; *Shane v. Smith*, 37 Kan. 55, 14 Pac. 477; *Smith v. Myers*, 19 Mo. 433; *Thornton v. Grange*, 66 Barb. 507; *Gorrell v. Taylor*, 107 Tenn. 568, 64 S. W. 888; *Kessler's Estate*, 87 Wis. 660, 41 Am. St. Rep. 74, 59 N. W. 129.

As between parent and child it is strong, because of the moral and legal obligations imposed upon them in reference to each other; but as to other relatives it grows weaker as the parent tree is receded from, and each degree of retrogression therefrom lessens its force, until that point in relationship is reached where all moral and legal obligations are assimilated, and stand upon the same basis as to the rest of society. *Phillips v. Sanchez*, 35 Fla. 187, 17 So. 363. Thus, the rule does not apply to services rendered by one to his wife's aunt's husband who lived in another town. *Clark v. Cordry*, 69 Mo. App. 6.

In some jurisdictions it is held that the presumption of gratuitousness in case of services performed by a relative or member of the household can be overcome only by proof of an express agreement that the services should be remunerated. *Borum v. Bell*, 132 Ala. 86, 31 So. 454; *Walker v. Taylor*, 28 Colo. 233, 64 Pac. 192; *Wright v. Senn*, 85 Mich. 191, 48 N. W. 545; *Hinkle v. Sage*, 67 Ohio St. 256, 65 N. E. 999; *Perkins v. Hasbrouck*, 155 Pa. 494, 26 Atl. 695; *Leidig v. Coover*, 47 Pa. 534; *Wall's Appeal*, 111 Pa. 460, 56 Am. Rep. 288, 5 Atl. 220; *Murphy v. Murphy*, 1 S. D. 316, 9 L.R.A. 820, 47 N. W. 142; *Andrus v. Foster*, 17 Vt. 556; *Lunay v. Vantyne*, 40 Vt. 501 (But see *Putnam v. Town*, 34 Vt. 429; *Sawyer v. Hebard*, 58 Vt. 375, 3 Atl. 529); *Pellage v. Pellage*, 32 Wis. 136; *Ellis v. Cary*, 74 Wis. 176, 4 L.R.A. 55, 17 Am. St. Rep. 125, 42 N. W. 252.

But the doctrine adopted by the majority of the American courts is that the presumption of gratuitousness may be overcome by proving the existence of either an express or an implied agreement to pay compensation. *Heffron v. Brown*, 155 Ill. 322, 40 N. E. 583; *Cowell v. Roberts*, 79 Mo. 218; *Wessinger v. Roberts*, 67 S. C. 240, 45 S. E. 169; *Cowan v. Musgrave*, 73 Iowa, 384, 35 N. W. 496; *Stansbury v. Stansbury*, 20 W. Va. 23; *Lockwood v. Robbins*, 125 Ind. 398, 25 N. E. 455; *Turner v. Turner*, 18 Ky. L. Rep. 822, 38 S. W. 506; *Bixler v. Sellman*, 77 Md. 494, 27 Atl. 137; *Davis v. Gallagher*, 55 Hun, 593, 9 N. Y. Supp. 11; *Green v. Roberts*, 47 Barb. 521; *Hogg v. Laster*, 56 Ark. 382, 19 S. W. 975; *Mills v. Joiner*, 20 Fla. 479; *Saunders v. Saunders*, 90 Me. 284, 38 Atl. 172; *Seavey v. Seavey*, 37 N. H. 125; *Hudson v. Lutz*, 50 N. C. (5 Jones, L.) 217; *Murrell v. Studstill*, 104 Ga. 604, 30 S. E. 750; *Donahue v. Donahue*, 53 Minn. 460, 55 N. W. 602.

For a full review of the authorities on this question, see note in 11 L.R.A. (N.S.) 873.

c. Of continuance of relation.—The relation of employer and employee having been once established under a contract admitted to have been entered into, and the term of employment not appearing to have expired by limitation, the relation must be presumed to continue until the contrary appears.¹

And when one serves another under a contract for a year's service, and holds over, continuing in the service after the expiration of the year, there is a presumption that the contract of service continues through another year.²

¹ *Berg v. Carroll*, 30 N. Y. S. R. 675, 9 N. Y. Supp. 509; *Mendelson v. Bronner*, 124 App. Div. 396, 108 N. Y. Supp. 807; *Appleton Waterworks Co. v. Appleton*, 132 Wis. 563, 113 N. W. 44. And in *St. Kevin Min. Co. v. Isaacs*, 18 Colo. 400, 32 Pac. 822, proof of a continuous employment for upwards of two years was held to impose upon defendant the burden of showing a termination of such employment. See also *Lyman v. Schwartz*, 13 Colo. App. 318, 57 Pac. 735, holding that the burden of showing termination of a contract of employment for an indefinite time by another and different one is upon defendant in an action upon such contract.

The presumption of the continuance of an agency arises from proof of a prior appointment as an agent without anything to show its revocation. *Hall v. Union Cent. L. Ins. Co.* 23 Wash. 610, 51 L.R.A. 288, 83 Am. St. Rep. 844, 63 Pac. 505.

² *Kellogg v. Citizens' Ins. Co.* 94 Wis. 554, 69 N. W. 362, and cases cited; *Dickinson v. Norwegian Plow Co.* 101 Wis. 157, 76 N. W. 1108; *Mears v. O'Donoghue*, 58 Ill. App. 345 (holding, however, that in this case the presumption was overcome by sufficient evidence). But *Mason v. Secor*, 76 Hun, 178, 27 N. Y. Supp. 570, holds that the continuance of one who has been in the service of his employer for several years at a fixed salary, in the same employment after the formation of a partnership between his employer and others, raises no presumption that he continues in the service of the partnership on the same terms.

If an employee continues in service after the expiration of a contract for ten months, there is no presumption that the contract has been renewed for a year. *Caldwell v. Caldwell Co.* 88 N. Y. Supp. 970.

An indefinite continuation of service under a five-year contract was held to be a renewal from year to year, and not for another term of five years. *Brightson v. H. B. Clafin Co.* 84 App. Div. 557, 82 N. Y. Supp. 667.

ESTOPPEL.

1. Burden of proof.
2. Equitable estoppel.
3. Silence.
4. Estoppel by admission in action.
5. By taking position before the court.
6. By forbearing to sue.

For cognate topics, see **ACQUIESCENCE; AGENCY; CONSENT; ELECTION OF REMEDIES; RATIFICATION.**

1. Burden of proof.

The burden of establishing an estoppel is upon him who invokes it.¹

¹ *Sawyer v. Nelson*, 160 Ill. 629, 43 N. E. 728; *Hill v. Meinhard*, 39 Fla. 111, 21 So. 805; *Gage v. Nichols*, 135 Ill. 128, 25 N. E. 672; *Stevens v. King*, 16 App. Div. 377, 44 N. Y. Supp. 893; *Draper v. Medlock*, 122 Ga. 234, 69 L.R.A. 483, 50 S. E. 113, 2 Ann. Cas. 650; *Lewis v. Apperson*, 103 Va. 624, 68 L.R.A. 867, 106 Am. St. Rep. 903, 49 S. E. 978; *Beaufort County Lumber Co. v. Price*, 144 N. C. 50, 56 S. E. 684. And when relied upon it must be clearly and satisfactorily proved. *Ball v. Riggs*, 19 Ky. L. Rep. 829, 42 S. W. 97.

2. Equitable estoppel.

To establish an equitable estoppel¹ it is not necessary to show design to mislead;² nor, in case of design, is it necessary to show design to mislead the particular person.³

But it must appear that the party claiming the estoppel was influenced⁴ by the act or omission, and would be prejudiced by holding the other not estopped.⁵

¹ For cases defining equitable estoppel, and applying the doctrine, see notes to *Stevens v. Ludlum*, 13 L.R.A. 270, and *Brookhaven v. Smith*, 7 L.R.A. 755.

² *Blair v. Wait*, 69 N. Y. 113, 116.

³ No privity is needed other than that which flows from the wrongful act and consequent injury. *Bank of Batavia v. New York, L. E. & W. R. Co.* 106 N. Y. 195, 200, 60 Am. Rep. 440, 12 N. E. 433. See also *Anglo-American Sav. & L. Asso. v. Campbell*, 13 App. D. C. 581, 43 L.R.A. 622.

⁴ It is enough, if, in reliance, the party has been led to omit what he otherwise would, and might effectively, have done to protect himself. *Voorhis v. Olmstead*, 66 N. Y. 113; *Manhattan Beach Co. v. Harned*,

27 Fed. 484; *Leather Mfrs.' Nat. Bank v. Morgan*, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 697. See also cases in note to *Stevens v. Ludlum*, 13 L.R.A. 271.

Otherwise of declarations to the attorney of the party, not shown to have been communicated to the party, nor to have influenced the conduct of the attorney. *Masten v. Olcott*, 101 N. Y. 152, 4 N. E. 274.

And of declarations of one who was a stranger when they were made, but afterward became agent for the party claiming the estoppel. *Maguire v. Selden*, 103 N. Y. 642, 8 N. E. 517.

⁵ It is not necessary that the representation should have been made in immediate connection with the act in reliance upon it. *Ahern v. Goodspeed*, 72 N. Y. 108, 113.

But the conduct in reliance must have been without such delay as to give him an intervening advantage by not relying on it meanwhile. *Andrews v. Aetna L. Ins. Co.* 85 N. Y. 334.

Purchasers of trust bonds are presumed to rely on a trust mortgage, and a person with whose consent certain lands had been included in a mortgage was held to be estopped from claiming the property against successors to bondholders. *Stubbs v. Franklin & M. R. Co.* 101 Me. 355, 64 Atl. 625.

3. Silence.

To sustain an estoppel because of omission to speak, there must be both the specific opportunity and the apparent duty to speak; the party maintaining silence must have known that someone was relying thereon, and was either acting or about to act as he would not have done had the truth been told.¹

¹ *Viele v. Judson*, 82 N. Y. 32. See also cases cited in notes to *Tarkington v. Purvis*, 9 L.R.A. 609, and *Reichert v. St. Louis & S. F. R. Co.* 5 L.R.A. 183.

4. Estoppel by admission in action.

An admission of a fact material to plaintiff's cause of action, made by defendant to plaintiff at or before the commencement of the action, on the faith of which he elected his remedy and proceeded with the action, is conclusive on defendant in the action.¹

¹ *First Presbyterian Congregation v. Williams*, 9 Wend. 148 (declaration by defendant in ejectment for nonpayment of rent, and in default of property whereon to distrain, that the property on the premises did not belong to him). s. p., *Chapman v. Searle*, 3 Pick. 38 (where earlier

cases are reviewed); *Dezell v. Odell*, 3 Hill, 215, 38 Am. Dec. 628 (leading case. Receiptor to constable, held estopped as to ownership). But a statement communicated as one of the elements in the foundation of the claim is not necessarily conclusive against correction if there be no surprise; although the rules of variance and surprise may prevent it being corrected first at the trial. *Connecticut Mut. L. Ins. Co. v. Schwenk*, 94 U. S. 593, 24 L. ed. 294.

5. By taking position before the court.

One may, by taking a position before the court, be estopped, without having misled his adversary.¹

¹ Note in *Re Soule*, 22 Abb. N. C. 268, and cases cited on both sides of the question; *Hughes v. Dundee Mortg. & Trust Invest. Co.* 28 Fed. 40. (So held of one who, having carried a judgment up in error, attempts pending that proceeding, to plead the judgment in bar of a new action.) But an estoppel by taking position in a litigation may be waived. *Andrews v. Aetna L. Ins. Co.* 85 N. Y. 334.

As to estoppel of party who has invoked jurisdiction to deny it, after obtaining benefit of the courts' taking jurisdiction, see note to *Robertson v. Smith*, 15 L.R.A. 273.

6. By forbearing to sue.

One is not estopped from claiming a right by not bringing a suit or special proceeding to enforce it.¹

¹ *Viele v. Judson*, 82 N. Y. 32; *Thomas. Mortg.* 2d ed. 245.

EXCUSE.

For other cognate topics, see **EXPLANATION**; **PERFORMANCE**; **WAIVER**.

Must be alleged.

Excuse for nonperformance is, in general, inadmissible under an allegation of performance.¹ Otherwise of excuse for not tendering where tender is not part of the contract.²

¹ *Oakley v. Morton*, 11 N. Y. 25, 62 Am. Dec. 49; *Elting v. Dayton*, 43 N. Y. S. R. 363, 17 N. Y. Supp. 849, affirmed without opinion, 144 N. Y. 644, 39 N. E. 493; *La Chicotte v. Richmond R. & Electric Co.* 15 App. Div. 380, 44 N. Y. Supp. 75, and cases cited; *Lajos v. Eden Musee American Co.* 10 Misc. 148, 30 N. Y. Supp. 916; *Monahan v. Fitzgerald*, 62 Ill. App. 192; *Gerald v. Tunstall*, 109 Ala. 567, 20 So. 43; *Scraggs v. Hill*, 37 W. Va. 706, 17 S. E. 185. Compare *Bogardus v. New York L. Ins. Co.* 101 N. Y. 328, 4 N. E. 522; *Smith v. Wetmore*, 24 Misc. 225, 52 N. Y. Supp. 513; *Murphy v. North British & Mercantile Ins. Co.* 70 Mo. App. 78; *Pierce City Water Co. v. Pierce City*, 61 Mo. App. 471. And *Standard Gaslight Co. v. Wood*, 9 C. C. A. 362, 26 U. S. App. 15, 61 Fed. 74, holds that under a declaration in general assumpsit for the reasonable value of work which defendant had accepted, evidence excusing nonperformance of the agreement to complete such work by a definite time is admissible notwithstanding an averment of performance.

² *Holmes v. Holmes*, 9 N. Y. 525; *Carman v. Pultz*, 21 N. Y. 547.

Otherwise, also, of a statutory excuse if the court may take judicial notice of it. *Baxter v. Brooklyn L. Ins. Co.* 44 Hun, 184.

EXPLANATION.

1. Explanation of denial.
2. Explanation on redirect.
3. Fact stated not thereby proved.
4. Explaining nonproduction of evidence.
5. Explaining impeaching evidence.
6. Explaining admission.

For cognate topics, see **CORROBORATION**; **EXCUSE**; **REBUTTAL**.

1. Explanation of denial.

On the question whether a party made a contract or representation reputed to him it is competent to show, not merely that he did not do so, but what he actually did or said in the transaction referred to, although that be irrelevant except as an explanation or corroboration of his denial.¹

¹ This is a general principle, and applicable alike to the main question in issue and to matters incidentally involved. *Marsh v. Dodge*, 66 N. Y. 533 (under general denial of making specific contract, evidence that the contract of that date was substantially different is admissible); *Judge v. Judge*, 14 N. Y. Civ. Proc. Rep. 138 (under denial of slander defendant's version of the alleged conversation is competent, and it is error to limit the testimony to a denial of what was alleged); *Pioneer Mfg. Co. v. Phoenix Assur. Co.* 106 N. C. 28, 10 S. E. 1057; *Griffin v. Carr*, 21 App. Div. 51, 47 N. Y. Supp. 323 (holding evidence by one sued as a partner, that it was not his purpose to become a partner, is competent only to explain some particular transaction which is inconsistent with his unqualified denial of any interest in the business, and not in support of such denial).

2. Explanation on redirect.

A witness may be allowed on redirect, to explain a statement called out on his cross-examination, although it involves testimony to a declaration by the party calling him, which is not otherwise admissible.¹

¹ *Simmons v. Havens*, 101 N. Y. 427, 5 N. E. 73; *Edgell v. Francis*, 86 Mich. 232, 48 N. W. 1095. See fully on this question *Civil Trial Brief* (4th ed.) pp. 256 *et seq.*

3. Fact stated not thereby proved.

A party who avails himself of his right to prove that at the time of his act he stated his reason therefor does not, by proving the statement to have been made, prove its truth, nor throw the burden of disproving its truth on the other party.¹

¹ *Citizens' Nat. Bank v. Importers' & Traders' Nat. Bank*, 44 Hun, 386.

4. Explaining nonproduction of evidence.

Where a party's good faith in refraining from testifying in his own behalf, or calling as a witness a person shown to be acquainted with the facts, is questioned, he has a right to give evidence explaining his course.¹

And it is not error to allow counsel, whose course in the nonproduction of evidence promised in his opening has been commented upon by adverse counsel, to explain his reasons for that course.²

¹ *Woodruff v. Hurson*, 32 Barb. 557; *Brown v. Barse*, 10 App. Div. 444, 42 N. Y. Supp. 306.

² *Blake v. People*, 73 N. Y. 586.

5. Explaining impeaching evidence.

Where a foundation for the impeachment of a witness by proof of inconsistent statements or acts has been laid, he has a right to explain such statements or acts.¹

¹ *Ayers v. Watson*, 132 U. S. 394, 33 L. ed. 378, 10 Sup. Ct. Rep. 116; *Hunter v. Gibbs*, 79 Wis. 70, 48 N. W. 257. See fully on this question, *Civil Trial Brief* (4th ed.) pp. 262 et seq.

6. Explaining admission.

A party may usually be permitted to explain words and phrases used in an alleged admission by him.¹

¹ *Eddy v. Church*, 64 Misc. 7, 118 N. Y. Supp. 795.

FEELINGS.

1. Direct testimony.
 - a. By the person affected:
 - b. By observer.
2. Natural manifestations of present feeling.
3. Declarations describing feeling.
4. Feigning.
5. Experiment.

For cognate topics, see ABILITY; CARE; CAUSE; CHARACTER; CONDITION; HEALTH; INTENT; MALICE; OPINION.

1. Direct testimony.

a. By the person affected.—A person may testify to his own feelings.¹

¹ *Huggans v. Fryer*, 1 Lans. 276 (fear; deeming one's self unsafe as to chattel-mortgage security); *Simmons v. State*, 61 Miss. 243 (error not to allow accused to state his mental condition when he made a confession); *Armstrong v. Ackley*, 71 Iowa, 76, 32 N. W. 180 (health, and pain suffered); *Rea v. Harrington*, 58 Vt. 181, 56 Am. Rep. 561, 2 Atl. 475 (mental suffering; sleeplessness, inability to work, etc., caused by slander); *Spurrier v. Front Street Cable R. Co.* 3 Wash. 659, 29 Pac. 346 (personal injury, pain, and suffering); *North Chicago Street R. Co. v. Cook*, 145 Ill. 551, 33 N. E. 958 (personal injury, pain and suffering); *Brown v. Third Ave. R. Co.* 19 Misc. 504, 43 N. Y. Supp. 1094 (feelings since injury); *Spaulding v. Bliss*, 83 Miss. 311, 47 N. W. 210 (malpractice; feelings as to location and source of pain).

b. By observer.—A witness, who had adequate opportunity¹ of observing the demeanor of a person, may testify directly to the state of feeling apparently manifested by that demeanor.²

¹ *Tompkins v. Wadley*, 3 Thomp. & C. 424 (holding it not error to exclude testimony as to plaintiff's respect for defendant, when there was nothing to show that the witness had been in a situation to observe the general deportment).

In *State v. Baldwin*, 36 Kan. 1, 12 Pac. 318, the court lay stress upon the length of acquaintance and frequency of observation; but this concerns rather the weight, than the competency, of the evidence.

Compare *Messner v. People*, 45 N. Y. 1, excluding testimony to the significance or expression of an outcry.

An extensive discussion on the right to testify to the mental state of another appears in the note in L.R.A.1918A, 721.

² Abbott, Tr. Ev. (3d ed.) p. 1852; McKee v. Nelson, 4 Cow. 355 (leading case, holding, in action for breach of promise, that on the question of affection a witness may testify whether or not one of the parties was sincerely attached to the other); Leary v. Leary, 18 Ga. 696 (divorce); State v. Baldwin, 36 Kan. 1, 12 Pac. 318 (allowing question whether there was anything in the appearance which made witness believe the person was in grief or dissatisfied; and testimony to his being in good spirits and seeming happy. Also that one was nervous and showed fear); State v. Shelton, 64 Iowa, 333, 20 N. W. 459 (competent to ask whether a person manifested anger); St. Louis & S. F. R. Co. v. Murray, 55 Ark. 248, 16 L.R.A. 787, 18 S. W. 50 (testimony of witness who assisted the injured person to pull off and put on his coat after the injury, that he complained of being hurt in shoulder, though not competent as *res gestæ*, competent to show existence of present pain and injury); Sherrill v. Western U. Teleg. Co. 117 N. C. 352, 23 S. E. 277. Compare Bagley v. Mason, 69 Vt. 175, 37 Atl. 287, holding incompetent evidence as to belief of witness from the appearance of the plaintiff in an action for assault and battery, as to whether or not he was in pain.

For notice of the distinction between this class of evidence and declarations, see Gardner v. Klutts, 53 N. C. (8 Jones, L.) 375, 80 Am. Dec. 381.

An ordinary witness may testify that a horse appeared to be frightened. Com. v. Sturtivant, 117 Mass. 122, 19 Am. Rep. 401 (*dictum*); Followed in Yahn v. Ottumwa, 60 Iowa, 429, 15 N. W. 257; abstr. s. c. in 28 Alb. L. J. 334 (holding that witness might testify that horses were frightened by water being thrown upon them).

In prosecution for "disturbing" a meeting, a witness cannot testify directly that the meeting was disturbed; for this is the question for the jury. Morris v. State, 84 Ala. 457, 4 So. 628.

One who has nursed and rubbed an injured person may testify to numbness of her limbs which he noticed while so doing. Will v. Mendon, 108 Mich. 251, 66 N. W. 58. And one who was present much of the time assisting in the care of another during his illness as a result of personal injuries may describe his appearance, and state of what, if anything, he complained relative to the pain which he suffered. Atchison v. Acheson, 9 Kan. App. 33, 57 Pac. 248.

In an action for breach of promise of marriage, it is competent, for the purpose of showing how plaintiff was affected by defendant's marriage to another woman, to ask witness how it affected or seemed to affect her; and an answer that she did not talk about the matter, but was downhearted, is admissible. Robinson v. Carver, 88 Iowa, 381, 55 N. W. 492. And a question to plaintiff as to how it affected her when she heard that defendant was married, and her answer that she "hated it awful bad," are competent as relating to facts touching her condition, mentally and physically, resulting from defendant's marriage.

2. Natural manifestations of present feeling.

The apparently spontaneous manifestations of present feeling, by demeanor, gesture, outcry, moan, tears, and the like,—as distinguished from declarations describing feelings,—are original evidence.¹

¹ *Hagenlocher v. Coney Island & B. R. Co.* 99 N. Y. 136, 1 N. E. 536; *St. Louis & S. F. R. Co. v. Murray*, 55 Ark. 248, 16 L.R.A. 787, 29 Am. St. Rep. 32, 18 S. W. 50; *Hoadley v. M. Seward & Son Co.* 71 Conn. 640, 42 Atl. 997; *Broyles v. Prisock*, 97 Ga. 643, 25 S. E. 389; *West Chicago Street R. Co. v. Kennelly*, 170 Ill. 508, 48 N. E. 996; *Huntington v. Burke*, 21 Ind. App. 655, 52 N. E. 415; *Hughes v. Nolte*, 7 Ind. App. 526, 34 N. E. 745; *Kelly v. Cohoes Knitting Co.* 8 App. Div. 156, 40 N. Y. Supp. 477; *Jackson v. Wells*, 13 Tex. Civ. App. 275, 35 S. W. 528; *Bagley v. Mason*, 69 Vt. 175, 37 Atl. 287; *Bothell v. Seattle*, 17 Wash. 263, 49 Pac. 491; *Duffey v. Consolidated Block Coal Co.* 147 Iowa, 225, 30 L.R.A.(N.S.) 1067, 124 N. W. 609; *Bennett v. Northern P. R. Co.* 2 N. D. 112, 13 L.R.A. 465, 49 N. W. 408; *Williams v. Great Northern R. Co.* 68 Minn. 55, 37 L.R.A. 199, 70 N. W. 860; *Rideout v. Winnebago Traction Co.* 123 Wis. 297, 69 L.R.A. 601, 101 N. W. 672.

But testimony as to exclamations of pain, made by the injured person during the examination, cannot be given by a physician who has been employed to examine a person who contemplates suing for injuries received through another's negligence, for the express purpose of making him a witness in such suit. *Jones v. Portland*, 88 Mich. 598, 16 L.R.A. 437, 50 N. W. 731.

3. Declarations describing feeling.

Declarations descriptive of present feeling, made as part of the *res gestæ* of a fact properly in evidence, are competent original evidence.¹

Whether other declarations descriptive of feeling, past or present, are competent, is disputed.²

¹ *Frink v. Coe*, 4 G. Greene, 555, 61 Am. Dec. 141, with note; *McMurrin v. Rigby*, 80 Iowa, 322, 45 N. W. 877; *Missouri, K. & T. R. Co. v. Sanders*, 12 Tex. Civ. App. 5, 33 S. W. 245 (holding that evidence of the attending physician that on the day of the occurrence the injured person complained to him of pain in certain parts of his body, and of a witness that the person complained to him after the train had gone about 35 yards as to the nature of his injuries, and that he could go no further, is competent as part of the *res gestæ*); *International & G. N. R. Co. v. Kuehn*, 2 Tex. Civ. App. 210, 21 S. W.

58 (holding that complaints of existing suffering and exclamations of present pain by an injured person, made before suit brought for the injuries, are admissible as *res gestæ*, but not when made after suit brought or after the litigation is in view).

For the principles and contrasted authorities as to what the rule of *res gestæ* lets in, see Criminal Trial Brief.

For the strongest cases, see Travellers' Ins. Co. v. Mosley, 8 Wall. 397, 19 L. ed. 437, favoring a free admission of subsequent declarations as part of the *res gestæ*. *Contra*: Reg. v. Bedingfield, 14 Cox, C. C. 341.

* *Affirmative*: Atchison, T. & S. F. R. Co. v. Johns, 36 Kan. 769, 59 Am. Rep. 609, 14 Pac. 237; abstr. 36 Alb. L. J. 118; Cleveland, C. C. & I. R. Co. v. Newell, 104 Ind. 264, 54 Am. Rep. 312, 3 N. E. 839, and cases cited; Hancock County Comrs. v. Leggett, 115 Ind. 544, 18 N. E. 53 (holding that declarations indicative of existing pain or suffering, and expressive of it, are competent, and quoting with approval from State v. Davidson, 30 Vt. 377, 73 Am. Dec. 312, to the effect that such declarations are received to show the extent of latent injuries upon the person upon the general ground that such injuries are incapable of being shown in any other mode except by such declarations as to their effect, but they are not admitted as part of the *res gestæ* [Per Redfield, Ch. J.]); Strudgeon v. Sand Beach, 107 Mich. 496, 65 N. W. 616 (holding declarations of present suffering competent, and not objectionable as hearsay, so long as they do not amount to narrations of past conditions); Will v. Mendon, 108 Mich. 251, 66 N. W. 58 (holding that the fact that they are made in the absence of the other party makes no difference); Williams v. Great Northern R. Co. 68 Minn. 55, 37 L.R.A. 199, 70 N. W. 860. See also, on this question, Hawkes v. Chester, 70 Vt. 271, 40 Atl. 727; City R. Co. v. Wiggins, — Tex. Civ. App. —, 52 S. W. 577; Texas & P. R. Co. v. Barron, 78 Tex. 421, 14 S. W. 698; Lange v. Schoettler, 115 Cal. 388, 47 Pac. 139; Kansas City, Ft. S. & M. R. Co. v. Stoner, 2 C. C. A. 437, 10 U. S. App. 209, 51 Fed. 649; Bennett v. Northern P. R. Co. 2 N. D. 112, 13 L.R.A. 465, 49 N. W. 408; Keyes v. Cedar Falls, 107 Iowa, 509, 78 N. W. 227; Northern P. R. Co. v. Urlin, 158 U. S. 271, and note to same case, 39 L. ed. 977, 15 Sup. Ct. Rep. 840; State v. Gedicke, 43 N. J. L. 86 (abortion; holding that the declarations by the female to the physician who was examining her, of bodily feelings and symptoms of pregnancy, are admissible in evidence as part of the facts on which his opinion is formed. This is an exception to the rule as to hearsay evidence, and seems to be founded on the strong inducement she had to speak the truth, the examination being to care for health. New trial on other ground. Citing Barber v. Merriam, 11 Allen, 322; Bacon v. Charlton, 7 Cush. 581; 1 Greenl. Ev. 102; Wharton, Crim. Ev. 2711). But it is firmly established that physicians or others, called to examine or confer with the injured party with reference to the trial of a pending case, are not permitted to testify to the declara-

tions or exclamations made at the time, so far as they are voluntary. *McKormick v. West Bay City*, 110 Mich. 265, 68 N. W. 148, and cases cited.

Negative: *Roche v. Brooklyn City & N. R. Co.* 105 N. Y. 294, 59 Am. Rep. 506, 11 N. E. 630 (negligence case; statements descriptive of present feelings made long before the injury, not competent). Approved in part in 22 Cent. L. J. 509, where the conflicting cases are well reviewed.

Compare *Reed v. New York C. R. Co.* 45 N. Y. 574; overruling 56 Barb. 493 (declarations of pain as caused by efforts at labor long before the injury, not admissible); *Kennedy v. Rochester City & B. R. Co.* 130 N. Y. 654, 29 N. E. 141 (holding that declarations of pain and suffering, made a few hours after the accident to one not a physician in attendance professionally, are incompetent).

It was not long ago the general practice to receive such declarations; and much may be said in favor of that rule because, if pain, for instance, though long after the injury, is a relevant fact, as to show damages, a material manifestation of pain, such as limping or rubbing the injured member, may be proved; and then the ordinary application of the rule of the *res gestæ* would let in what was said in the act as characterizing it, except that this would not bring in also a narrative of a past event. For that rule is not confined to the act which forms the main issue, but extends to all relevant facts. But apparent abuses resulting from receiving descriptive declarations of pain in negligence cases had led to a reconsideration of the rule; and the better opinion now is, that a party seeking to recover damages on account of his own suffering cannot give in evidence, in his own behalf, his own descriptive declarations of suffering, as distinguished from apparently spontaneous manifestations of the distress.

Leading cases under general rule; *Caldwell v. Murphy*, 11 N. Y. 416; *Werely v. Persons*, 28 N. Y. 344, 84 Am. Dec. 346.

Exclamations of pain, etc., are competent in criminal prosecution for assault. *Com. v. Jardine*, 143 Mass. 567, 10 N. E. 250.

Subsequent declarations as to previous mental state are not competent. See Criminal Trial Brief.

4. Feigning.

An expert who testifies to his means of knowledge may testify as to whether a person whom he examined was feigning pain.¹

¹ *Chicago, B. & Q. R. Co. v. Martin*, 112 Ill. 16, abstr. 32 Alb. L. J. 358.

But see *Cole v. Lake Shore & M. S. R. Co.* 95 Mich. 77, 54 N. W. 638 (to the effect that an expert cannot give his opinion that plaintiff in an action for personal injuries is shamming before the jury).

5. Experiment.

It is not error to allow a physician to thrust a pin into **the** flesh of a party, to demonstrate loss of sensation, though **both** were unsworn.¹

¹ Osborne v. Detroit, 32 Fed. 36.

FICTITIOUS PERSONS.

1. Bank account.
2. Declarations.
3. Inquiries.
 - a. In general.
 - b. Weight of evidence.
4. Explanation.
5. Effect of use.
6. Fictitious grantee.

For cognate topics, see **ABSENCE; DUMMY; NAMES; NEGATIVE.**

1. Bank account.

A bank pass book purporting to show an account with a specified person is inadmissible to show that such person is not a fictitious person.¹

¹ A bank account can be kept in a fictitious name, as well as anything else can be done under such a name. *Hirsch v. Jones*, — Tex. Civ. App. —, 42 S. W. 604.

2. Declarations.

Declarations of a person active in the preparation of an instrument, and made in connection with the transaction, are

admissible to show that one named as a party was a fictitious person.¹

¹ *Taylor v. Crowninshield*, 5 N. Y. Legal Obs. 209 (Robertson, Asst. V. C.).

3. Inquiries.

a. In general.—To prove that there was no such person as had been supposed or pretended to be indicated by a name, it is competent for a witness to testify to his search and inquiries made for the purpose of finding such a person among persons most likely to know him if there were such an one; and to the result.¹

The witness may testify that he examined appropriate public records,—such as examining assessment rolls for the name of a person represented to be a farmer,—and found no such name there; and it is not necessary to produce the record itself.²

¹ *People v. Jones*, 106 N. Y. 523, 13 N. E. 93, affirming 25 N. Y. Week. Dig. 541 (holding it proper to allow the witness to be asked what he did, and to state that he had conversations and could get no information; if he was not allowed to repeat the conversations); *People v. Sanders*, 114 Cal. 216, 46 Pac. 153, s. p., *People v. Sharp*, 53 Mich. 523, 19 N. W. 168. (holding that the extent of search, etc., affects the weight, not the competency, of the evidence).

But it is held error to allow the answers given to his questions to be repeated by the witness. *Wiggins v. People*, 4 Hun, 540.

² *People v. Jones*, 106 N. Y. 523, 13 N. E. 93, affirming 25 N. Y. Week. Dig. 541.

b. Weight of evidence.—Testimony to such unsuccessful inquiries is sufficient to throw upon the adverse party the burden of showing the existence of such a person.¹

¹ *Taylor v. Crowninshield*, 5 N. Y. Legal Obs. 209.

But even nonappearance on a muster roll of the name of one seeking to collect back pay is not conclusive. *Thompson v. Fargo*, 63 N. Y. 479, affirming 48 How. Pr. 93.

4. Explanation.

Evidence of misspelling is competent by way of explanation.¹

¹ *Turnbull v. Bowyer*, 40 N. Y. 456, 100 Am. Dec. 523, affirming 2 Robt. 406.

5. Effect of use.

One who makes an instrument in a fictitious name is bound thereby.¹ He may be chargeable with forgery, in case of criminal intent.² And a person who makes a contract in a fictitious name may be sued thereon in that name.³

¹ *David v. Williamsburgh City F. Ins. Co.* 83 N. Y. 365, 38 Am. Rep. 418, reversing 7 Abb. N. C. 47, and cases cited (holding that plaintiff deriving title under a conveyance from his grantor to a fictitious name, followed by a conveyance executed by the same grantor in the fictitious name to plaintiff, had an insurable interest).

Compare *McDuffie v. Clark*, 39 Hun, 166.

The question of use of fictitious name as affecting the validity of an instrument is the subject of a note in 39 L.R.A. 423.

And the question when is a negotiable instrument deemed payable to the order of a fictitious person, within the rule which regards such an instrument as payable to bearer, is treated in a note in 22 L.R.A. (N.S.) 499.

² *Ex parte Hibbs*, 26 Fed. 421 (postal money order procured in such name, and letter asking bank to collect it).

³ *Dictum* in *Snook's Petition*, 2 Hilt. 566, and cases cited.

6. Fictitious grantee.

A grant made to a fictitious person is not a genuine instrument having a legal existence, within the rule that a third person claiming thereunder can claim to be a bona fide purchaser.¹

¹ *Moffat v. United States*, 122 U. S. 24, 28 L. ed. 623, 5 Sup. Ct. Rep. 10 (so held of a government grant). Compare *David v. Williamsburgh City F. Ins. Co.* 83 N. Y. 265, 38 Am. Rep. 418, reversing 7 Abb. N. C. 47.

Otherwise of a grant to real persons in fictitious or assumed names.

Colorado Coal & I. Co. v. United States, 123 U. S. 307, 31 L. ed. 182, 8 Sup. Ct. Rep. 131.

But the want of proof that such persons existed does not raise a presumption that they were fictitious. *Atty. Gen. v. Ruggles*, 59 Mich. 123, 26 N. W. 419.

Where it was claimed that a guardian for the purpose of defrauding his ward made a conveyance of his property to a fictitious person, and the guardian testified that the grantee lived in a certain place, person residing at that place were permitted to testify that no such person had ever lived there. *Phelps v. Nazworthy*, 226 Ill. 254, 80 N. E. 756.

FILING.

Mode of proving.**Mode of proving filing and nonfiling.¹**

¹ 1 Abbott, New Pr. & F. 90; Peterson v. Taylor, 15 Ga. 483, 60 Am. Dec. 705, with note; People v. Hurlbutt, 44 Barb. 126; Sampson v. Buffalo, N. Y. & P. R. Co. 4 Thomp. & C. 600, 2 Hun, 512; Jennings v. Newman, 52 How. Pr. 282; Sunderlin v. Wyman, 10 Hun, 493; Briggs v. Waldron, 83 N. Y. 582, affirming 9 N. Y. Week. Dig. 219.

An indorsement of the filing, on a petition for a lien, made by the clerk, is prima facie evidence that the petition was filed in his office on the day stated in the indorsement. Minton v. Underwood Lumber Co. 79 Wis. 646, 48 N. W. 857. See also Howell v. Slauson, 83 Cal. 539, 23 Pac. 692, holding that an indorsement on a transcript of the original list of lands selected by the state as indemnity for the loss of school lands, as "received and filed December 5, 1871," accompanied by testimony of the register of the local land office that the transcript was received from the General Land Office and was deposited as part of the records, is sufficient evidence, although lacking a file mark, that it was filed in the local land office.

Primary and secondary evidence: Parol evidence that a copy of a chattel mortgage was left with the clerk and the latter's fees paid is inadmissible to prove the filing, unless the copy is produced with the filing upon it, or some showing made why it cannot be produced. Curtis v. Wilcox, 91 Mich. 229, 51 N. W. 992.

Although the statute makes the indorsement of the clerk evidence of the filing of a notice of intention to enforce a mechanics' lien, yet if he neglects to make the proper indorsement, proof of the filing may be made by other evidence. Building & Planing Mill Co. v. Huber, 42 Mo. App. 432.

The true date of the presentation for record of an instrument may be shown by oral testimony, although the county recorder is required by statute to enter upon each instrument the date and precise time of day of its presentation. Kalb v. Wise, 5 Ohio N. P. 5.

Evidence that a certificate of nomination was handed to the secretary of state out of the office and out of office hours was held insufficient to show proper filing which must have been made by depositing the certificate in the office with some person in charge thereof during office hours. Cowie v. Means, 39 Colo. 1, 88 Pac. 485.

There is no presumption that a complaint was filed prior to the entry of judgment. Leitch v. Wells, 48 N. Y. 585.

FINGER PRINTS, PALM PRINTS, AND FOOT PRINTS.

1. Finger prints.
 - a. In general.
 - b. Photographs.
 - c. Experiments in court.
 - d. Compulsory taking of finger prints.
2. Palm prints.
 - a. In general.
 - b. Photographs.
3. Foot prints.

See also **INTENT; OPINIONS; PRIVILEGE.**

1. Finger prints.

a. In general.—Evidence as to the correspondence of finger prints to prove identity has been held admissible by all courts that have considered the question,¹ although it has been claimed by one expert that finger prints may be forged.² The weight of such evidence is always for the jury to determine.³ It is usually required that such evidence be presented and authenticated by expert witnesses.⁴ On redirect examination of an expert where there has been an effort on cross-examination to impeach him, he may relate his experience in other cases.⁵

¹ *People v. Jennings*, 252 Ill. 534, 43 L.R.A.(N.S.) 1206, 96 N. E. 1077 (for photographs of the finger prints in the Jennings Case see a volume called "Personal Identification" by Harris H. Wilder and Bert Wentworth, published by the Gorham Press 1918, at pages 284, 285); *State v. Cerciello*, 86 N. J. L. 309, 52 L.R.A.(N.S.) 1010, 90 Atl. 1112; *State v. Connors*, 87 N. J. L. 419, 94 Atl. 812; *People v. Roach*, 215 N. Y. 592, 109 N. E. 618, Ann. Cas. 1917A, 410.

See also for additional cases notes in 3 A.L.R. 1706 and Ann. Cas. 1917A, 417. For additional cases of finger print identification and photographs thereof see also the volume entitled *Personal Identification* referred to supra.

The cases and text books relating to finger prints are exhaustively reviewed in *State v. Kuhl*, 42 Nev. 185, 3 A.L.R. 1694, 175 Pac. 190, and the same rule applied to palm prints.

² Article by Milton Carlson, Examiner and Photographer of Questioned Documents, Los Angeles, California, entitled "Finger Prints Can be Forged," 5 Va. L. Reg. N. S. page 765, in which the author recites how he himself forged a finger print.

³ People v. Roach, 215 N. Y. 592, 109 N. E. 618, Ann. Cas. 1917A, 410; Moon v. State, — Ariz. —, 16 A.L.R. 362, 198 Pac. 288.

⁴ Lamble v. State, — N. J. L. —, 114 Atl. 346; Moon v. State, and People v. Roach, *supra*.

⁵ Moon v. State, *supra*.

b. Photographs.—Photographs of the original finger print impressions are admissible without the original being produced, whether such original is capable of convenient production in court ¹ or not.²

¹ Lamble v. State, — N. J. L. —, 114 Atl. 346.

² State v. Connors, 87 N. J. L. 419, 94 Atl. 812.

c. Experiments in court.—A demonstration or test with finger prints of the jurymen by a finger print expert has been held proper.¹

¹ Moon v. State, — Ariz. —, 16 A.L.R. 362, 198 Pac. 288.

d. Compulsory taking of finger prints.—An impression of a person's finger prints taken by compulsion is not a violation of the constitutional privilege against self incrimination.¹

¹ People v. Sallow, 100 Misc. 447, 165 N. Y. Supp. 915; McGarry v. State, 82 Tex. Crim. Rep. 597, 200 S. W. 527. See also note in 17 Columbia L. Rev. 633, and cases cited under title, PRIVILEGE, *infra*, § 1, notes 8 and 9.

2. Palm prints.

a. In general.—Evidence of experts as to comparison of palm prints has also been held admissible for the purpose of establishing identity.¹

¹ State v. Kuhl, 42 Nev. 185, 3 A.L.R. 1694, 175 Pac. 190; State v. Miller, 71 N. J. L. 527, 60 Atl. 202; Powell v. State, 50 Tex. Crim. Rep. 592, 99 S. W. 1005; Brown v. State, 76 Tex. Crim. Rep. 316, 174 S. W. 360.

b. Photographs.—So enlarged photographs of palm prints may be introduced in evidence and presented to the jury by the use of a projectoscope.¹

¹ *State v. Kuhl*, 42 Nev. 185, 3 A.L.R. 1694, 175 Pac. 190.

3. Foot prints.

Under the theory that any evidence is competent which tends to prove a material fact, footprints have been held admissible.¹ And where a prisoner's shoes are taken to compare with footprints it is not an encroachment on the constitutional privilege against self incrimination.²

¹ *People v. Storrs*, 207 N. Y. 147, 153, 45 L.R.A.(N.S.) 860, 100 N. E. 730, Ann. Cas. 1914C, 196, cited with approval in *People v. Roach*, 215 N. Y. 592, 109 N. E. 618, Ann. Cas. 1917A, 410; *Young v. State*, 68 Ala. 569, 574; *Jones v. State*, 63 Ga. 395, 398.

See also cases cited under topic, INTENT, *infra*, § 6, note 1, subheading TRACKS, and § 10, b. For opinion evidence as to a knee print, see *State v. Pruett*, 22 N. M. 223, L.R.A.1918A, 656, 160 Pac. 362.

² *People v. Breen*, 192 Mich. 39, 158 N. W. 142.

FIXTURES.

See also INTENT.

Evidence of intent.

The question of whether a particular article is a fixture or not being now largely a question of intent in the annexation,¹ circumstantial evidence is competent to show the intent;² and evidence of an express agreement is not necessary.³

But the party who annexed the chattel cannot in his own favor testify directly as to whether the thing could be removed without injury to the realty.⁴

¹ *Potter v. Cromwell*, 40 N. Y. 287; *Worhees v. McGinnis*, 48 N. Y. 278, 282; *McRea v. Central Nat. Bank*, 66 N. Y. 489, affirming 50 How. Pr. 51; *Muehling v. Muehling*, 181 Pa. 483, 37 Atl. 527; *Ames v.*

Trenton Brewing Co. 56 N. J. Eq. 309, 38 Atl. 858; Wentworth v. S. A. Woods Mach. Co. 163 Mass. 28, 39 N. E. 414; Hewitt v. General Electric Co. 164 Ill. 420, 45 N. E. 725; Baringer v. Evenson, 127 Wis. 36, 106 N. W. 801; Patterson v. Chaney, 24 N. M. 156, 6 A.L.R. 90, 173 Pac. 859.

See also cases and discussion in notes in 69 L.R.A. 692, and 15 L.R.A. (N.S.) 727.

2 **Causey v. Empire Plaid Mills**, 119 N. C. 180, 25 S. E. 863. In **Washington Nat. Bank v. Smith**, 15 Wash. 160, 45 Pac. 736, it is held that the intention that a chattel shall become a part of the realty cannot be shown by evidence of the actual state of mind of the owner, but must be gathered from the circumstances surrounding the transaction. **Owings v. Estes**, 256 Ill. 553, 43 L.R.A.(N.S.) 675, 100 N. E. 205, where harness cases, racks, and hangers attached by owner for use in harness shop were held to be a part of the realty.

3 **Batcheller v. Commercial Union Assur. Co.** 143 Mass. 495, 10 N. E. 321, and cases cited (holding that it is enough to show that the parties contemplated the ownership contended for).

4 **Phoenix Mills v. Miller**, 4 N. Y. S. R. 787, 792, reversing for error in receiving such testimony. Landon, J., dissented. Compare **INTENT**.

FOREIGN LAW.

1. Judicial notice.
2. Presumptions.
3. Oral evidence.
 - a. What law is.
 - b. As to construction.
4. Usage in territories acquired by United States.
5. Statute books and Codes.
6. Copy of statute; omissions and alterations.
7. Impeaching.
8. Judicial decisions.
9. Foreign law a question of fact.

1. Judicial notice.¹

¹ As to judicial notice of foreign laws, see the title **JUDICIAL NOTICE**, I. 2.

2. Presumptions.

As to the presumptions that may be indulged when a foreign law involved in a case is not proved or conceded, some courts lay down the rule that it will be presumed that the common law on the subject prevails in the foreign jurisdiction,¹ while other courts declare that the presumption will be indulged that the law of the foreign jurisdiction is the same as that of the forum.² It is apparent that the practical results of the two presumptions are the same when the law of the forum is the common law, but a conflict between the two rules arises when the law of the forum on the subject is statutory and opposed to the common-law rule. This distinction, however, is rarely, if ever, brought out in the opinions, and it is often impossible to determine from the report of the cases whether the law on the subject at the forum was common law or statutory law.³

In some cases it has been expressly held that the court will not presume that the law of any other state or jurisdiction is the same on any point as its own statutory law.⁴

And it is obvious that the presumption that the common law prevails on any subject cannot be indulged with respect to any jurisdiction not inheriting the common law.⁵

¹ *Goodman v. Griffin*, 3 Stew. (Ala.) 160; *Dunn v. Adams*, 1 Ala. 527, 35 Am. Dec. 42; *McDougald v. Carey*, 38 Ala. 320; *Wolf v. Burke*, 18 Colo. 264, 19 L.R.A. 792, 32 Pac. 427; *Eubanks v. Banks*, 34 Ga. 407; *Crouch v. Hall*, 15 Ill. 263; *Tinkler v. Cox*, 68 Ill. 119; *Trimble v. Trimble*, 2 Ind. 76; *Baltimore & O. S. W. R. Co. v. Reed*, 158 Ind. 25, 56 L.R.A. 468, 92 Am. St. Rep. 293, 62 N. E. 488; *Johnson v. Bank of United States*, 2 B. Mon. 310; *Moss v. Rowland*, 3 Bush, 506; *State use of Allen v. Pittsburgh & C. R. Co.* 45 Md. 41; *Wood v. Corl*, 4 Met. 203; *Com. v. Graham*, 157 Mass. 73, 16 L.R.A. 578, 34 Am. St. Rep. 255, 31 N. E. 706; *Engstrand v. Kleffman*, 86 Minn. 403, 91 Am. St. Rep. 359, 90 N. W. 1054; *Reiff v. Bakken*, 36 Minn. 333, 31 N. W. 348; *Roll v. St. Louis & C. Smelting & Min. Co.* 52 Mo. App. 60; *Houghtaling v. Ball*, 19 Mo. 84, 59 Am. Dec. 331; *Reed v. Wilson*, 41 N. J. L. 29; *Waln v. Waln*, 53 N. J. L. 429, 22 Atl. 203; *Ruse v. Mutual Ben. L. Ins. Co.* 23 N. Y. 516; *Vanderpoel v. Gorman*, 140 N. Y. 563, 24 L.R.A. 548, 37 Am. St. Rep. 601, 34 N. E. 932; *First Nat. Bank v. National Broadway Bank*, 156 N. Y. 459, 42 L.R.A. 139, 51 N. E. 398; *Benbow v. Moore*, 114 N. C. 263, 19 S. E. 156; *Gooch v. Faucett*, 122 N. C. 270, 39 L.R.A. 835, 29 S. E.

362; *Rosemand v. Southern R. Co.* 66 S. C. 91, 44 S. E. 574; *State v. Shattuck*, 69 Vt. 403, 40 L.R.A. 428, 60 Am. St. Rep. 936, 38 Atl. 81. See also other cases in notes in 21 L.R.A. 467, 67 L.R.A. 33, 34 L.R.A.(N.S.) 261, and 38 L.R.A.(N.S.) 40. *Kelley v. Kelley*, 161 Mass. 111, 25 L.R.A. 806, 42 Am. St. Rep. 389, 36 N. E. 837; *Miller v. Wilson*, 146 Ill. 523, 37 Am. St. Rep. 186, 34 N. E. 1111. See also note in 33 Harvard L. Rev. 315.

And in the absence of averment or proof the presumption is that in a state or nation where the common law prevails the common-law rules are the same as those of the forum. *People ex rel. Lawrence v. Brady*, 56 N. Y. 182; *First Nat. Bank v. Fourth Nat. Bank*, 77 N. Y. 320, 33 Am. Rep. 618, reversing 16 Hun, 332; *Peet v. Hatcher*, 112 Ala. 514, 21 So. 711; *Howard v. Chesapeake & O. R. Co.* 11 App. D. C. 300; *Pattillo v. Alexander*, 96 Ga. 60, 29 L.R.A. 616, 22 S. E. 646; *Shannon v. Wolf*, 173 Ill. 253, 50 N. E. 682; *Jackson v. Pittsburgh, C. C. & St. L. R. Co.* 140 Ind. 241, 39 N. E. 663; *Hudson v. Northern P. R. Co.* 92 Iowa, 231, 60 N. W. 608; *Weisberg v. Hunt*, 239 Mass. 190, 131 N. E. 471; *Knapp v. Knapp*, 95 Mich. 474, 55 N. W. 353; *Burdiet v. Missouri P. R. Co.* 123 Mo. 221, 26 L.R.A. 384, 27 S. W. 453; *Juilliard v. May*, 130 Ill. 87, 22 N. E. 477; *Thomas v. Pendleton*, 1 S. D. 150, 46 N. W. 180; *Stewart v. Union Mut. L. Ins. Co.* 155 N. Y. 257, 42 L.R.A. 147, 49 N. E. 876; *Deyo v. Morss*, 30 App. Div. 56, 51 N. Y. Supp. 785; *Gooch v. Faucett*, 122 N. C. 270, 39 L.R.A. 835, 29 S. E. 362. See also note to *Brown v. Wright*, 58 Ark. 20, 21 L.R.A. 467, 22 S. W. 1022.

² *Hickman v. Alpaugh*, 21 Cal. 225; *Pierce v. Southern P. Co.* 120 Cal. 156, 40 L.R.A. 350, 47 Pac. 874, 52 Pac. 302; *Bemis v. McKenzie*, 13 Fla. 553; *Crafts v. Clark*, 31 Iowa, 77; *Goodwin v. Provident Sav. Life Assur. Asso.* 97 Iowa, 226, 32 L.R.A. 473, 59 Am. St. Rep. 411, 66 N. W. 157; *Kansas P. R. Co. v. Cutter*, 16 Kan. 568; *Patterson v. Garrison*, 16 La. 557; *McKenzie v. Wardwell*, 61 Me. 136; *Scroggin v. McClelland*, 37 Neb. 644, 22 L.R.A. 110, 40 Am. St. Rep. 520, 56 N. W. 208; *Musser v. Stauffer*, 178 Pa. 99, 35 Atl. 709; *Evans v. Cleary*, 125 Pa. 204, 11 Am. St. Rep. 886, 17 Atl. 440; *Thomas v. Pendleton*, 1 S. D. 150, 36 Am. St. Rep. 726, 46 N. W. 180; *Loud v. Hamilton*, — Tenn. —, 45 L.R.A. 400, 51 S. W. 140; *Pennsylvania R. Co. v. Naive*, 112 Tenn. 239, 64 L.R.A. 443, 79 S. W. 124; *Stevenson v. Pullman Palace Car Co.* — Tex. Civ. App. —, 26 S. W. 112; *Pauska v. Daus*, 31 Tex. 67; *Slaughter v. Bernards*, 88 Wis. 111, 59 N. W. 576; *Freyman v. Day*, 108 Wash. 71, 182 Pac. 940.

³ For review of all the authorities on presumption as to law of other state or country see notes in 21 L.R.A. 471, and 67 L.R.A. 33.

For similar reviews as to the law of foreign country see notes in 34 L.R.A. (N.S.) 261, and 38 L.R.A.(N.S.) 40.

⁴ *Leonard v. Columbia Steam Nav. Co.* 84 N. Y. 48, 36 Am. Rep. 491 (statute giving action for causing death); *Kelley v. Kelley*, 161 Mass. ABB. FACTS—35.

111, 25 L.R.A. 806, 36 N. E. 837; *Myers v. Chicago, St. P. M. & O. R. Co.* 69 Minn. 476, 72 N. W. 694; *First Nat. Bank v. National Broadway Bank*, 156 N. Y. 459, 42 L.R.A. 139, 51 N. E. 398; *Casola v. Kugelman*, 33 App. Div. 428, 54 N. Y. Supp. 89; *Yeaton v. Eagle Oil & Ref. Co.* 4 Wash. 183, 29 Pac. 1051. See also cases in note to *Brown v. Wright*, 21 L.R.A. 467.

⁵ *Re Hall*, 61 App. Div. 266, 70 N. Y. Supp. 406 (so holding as to France); *Banco De Sonora v. Bankers' Mut. Casualty Co.* 124 Iowa, 576, 104 Am. St. Rep. 367, 100 N. W. 532 (as to Mexico); *Hurley v. Missouri P. R. Co.* 57 Mo. App. 675; *Garner v. Wright*, 52 Ark. 385, 6 L.R.A. 715, 12 S. W. 785 (as to Texas); *Clark v. Barnes*, 58 Mo. App. 667 (as to Arkansas). See also cases in notes in 21 L.R.A. 467, and 67 L.R.A. 40.

The presumption that the common law is in force in another state applies only to states carved out of English territory. *Mathieson v. St. Louis & S. F. R. Co.* 219 Mo. 542, 118 S. W. 9.

Florida does not recognize the common law as the source of its jurisprudence; therefore in an action in Alabama, where the common law prevails, it could not be presumed that the law of Florida was the same as that of Alabama. Proof must be given of the Florida law. *Watford v. Alabama-Florida Lumber Co.* 152 Ala. 178, 44 So. 567.

The presumption that the common law is in force is only indulged in by our courts with reference to England and those states which have taken the common law from England. It does not apply in Brazil. *Crashley v. Press Pub. Co.* 179 N. Y. 27, 71 N. E. 258, 1 Ann. Cas. 196, affirming 74 App. Div. 118, 77 N. Y. Supp. 711.

3. Oral evidence.

a. What law is.—In the absence of a statute as to mode of proof, oral evidence is competent to prove the law of another state or nation, if it be not shown to have been written law;¹ but is not competent to prove the contents of written law, which must be proved by a copy of the law, properly authenticated.²

¹ *Livingston v. Maryland Ins. Co.* 6 Cranch, 274, 3 L. ed. 222; *Re Roberts*, 8 Paige, 446; *Lincoln v. Battelle*, 6 Wend. 475; *Dyer v. Smith*, 12 Conn. 384; *State v. Behrman*, 114 N. C. 797, 25 L.R.A. 449, 19 S. E. 220; *McNeill v. Arnold*, 17 Ark. 154; *Baltimore & O. R. Co. v. Glenn*, 28 Md. 287, 92 Am. Dec. 668; *Hammond v. Woodman*, 41 Me. 177, 66 Am. Dec. 234; *Rieck v. Griffin*, 74 Neb. 102, 103 N. W. 1061, and cases in note in 25 L.R.A. 449.

The unwritten law of another state, when involved in the determination of an action, is a proper subject of expert testimony. *Barber v. Hildebrand*, 42 Neb. 400, 60 N. W. 594; *Title Guarantee & T. Co. v. Tren-*

ton Potteries Co. 56 N. J. Eq. 441, 38 Atl. 422; Chattanooga, R. & C. R. Co. v. Jackson, 89 Ga. 676, 13 S. E. 109; Jackson v. Jackson, 82 Md. 17, 34 L.R.A. 773, 33 Atl. 317; State v. Behrman, 114 N. C. 797, 19 S. E. 220, and cases in note to same case, 25 L.R.A. 449.

A lawyer acquainted with the construction of the common law and statutes of a particular jurisdiction, may testify in relation thereto. Dimpfel v. Wilson, 107 Md. 329, 13 L.R.A.(N.S.) 1180, 68 Atl. 561, 15 Ann. Cas. 753.

² Pierce v. Indseth, 106 U. S. 546, 27 L. ed. 254, 1 Sup. Ct. Rep. 418; People v. Lambert, 5 Mich. 349, 72 Am. Dec. 49; Phillips v. Gregg, 10 Watts, 158, 36 Am. Dec. 158; Webster v. Reese, 23 Iowa, 269; Emery v. Berry, 28 N. H. 473, 61 Am. Dec. 622 (*dictum*, as to statute); People v. Nyee, 34 Hun, 298 (Constitution); Bryant v. Kelton, 1 Tex. 434.

As to mode of authentication of copy, see 2 Abbott, New Pr. & F. 727, etc. For a full and comprehensive review of the cases on the question of oral proof of foreign laws, see notes to State v. Behrman, 25 L.R.A. 449, and Ennis v. Smith, 14 L. ed. U. S. 472.

b. As to construction.—Oral evidence as to what would, in the opinion of the witness, be the construction adopted by the courts of the foreign jurisdiction, is not competent.¹

But the interpretation and adjudication, which might never have been evidenced by books or writings, may be properly shown by the testimony or opinions of competent witnesses instructed in the law of the state, such expositions and interpretations being well understood as the rules of law deduced by the court.²

¹ Molson's Bank v. Boardman, 47 Hun, 135; s. p. Hennessey v. Farrelly, 13 Daly, 468.

² Walker v. Forbes, 31 Ala. 9; Dyer v. Smith, 12 Conn. 384.

4. Usage in territories acquired by United States.

Usage and custom are competent evidence as to the law in force on this continent prior to the organization of the states or annexation to the states; and if a custom so prevailing and notorious is shown as to justify an inference that the authorities tacitly assented, it may be deemed that a prior law was repealed.¹

¹ Adams v. Norris, 23 How. 353, 16 L. ed. 539. And see USAGE.

5. Statute books and Codes.

The public statute law of another state may be proved by a book purporting to be such statute or Code of that state, and to be published by its authority, without further authentication.¹

¹ *Main v. Aukam*, 12 App. D. C. 375; *Cochran v. Ward*, 5 Ind. App. 89, 29 N. E. 795, 31 N. E. 581; *Hecla Powder Co. v. Sigua Iron Co.* 157 N. Y. 437, 52 N. E. 650 (N. Y. Code Civ. Proc. § 942); *Congregational Unitarian Soc. v. Hale*, 29 App. Div. 396, 51 N. Y. Supp. 704; *Copeland v. Collins*, 122 N. C. 619, 30 S. E. 315 (N. C. Code, § 1338); *Falls v. United States Sav. Loan & Bldg. Co.* 97 Ala. 417, 24 L.R.A. 174, 13 So. 25; *Manhattan L. Ins. Co. v. Fields*, — Tex. Civ. App. —, 26 S. W. 280.

In Missouri a statute provides that such books shall be admitted as prima facie evidence of the statutes of the other state. (Rev. Stats. Mo. 1919, chap. 34, § 5340, p. 1717.) And it is not necessary that it purport to be printed by authority of the state. *Williams v. Williams*, 53 Mo. App. 617; *Glenn v. Hunt*, 120 Mo. 330, 25 S. W. 181 (holding, also, that it is not incompetent because not certified to by the secretary of state as required by another statute providing that copies of any act contained in any printed statute book of a sister state shall be received in the courts as prima facie evidence of the act, when certified by the secretary of state of such state or of Missouri, as the section refers only to a certified copy of a law, and not to the book from which the law may be copied).

Some of the courts, however, not only require that the statute book be published by authority of the state, but also require that there be proof that the book is commonly admitted and read as evidence in the courts of that state. For example, see *Rogero v. Zippel*, 33 Fla. 625, 15 So. 326; *Rudolph Hardware Co. v. Price*, 164 Iowa, 353, 145 N. W. 910, Ann. Cas. 1916D, 850, and note 853; *Goodwin v. Provident Sav. Life Assur. Asso.* 97 Iowa. 226, 32 L.R.A. 473, 66 N. W. 157; *Bride v. Clark*, 161 Mass. 130, 36 N. E. 745, so holding of the Revised Statutes of New York, and also that the certificate of the New York secretary of state, that so much of the matter contained therein as purports to be a copy of the Revised Statutes is a correct transcript thereof as originally published, is not enough. See also *Dawson v. Peterson*, 110 Mich. 431, 68 N. W. 246; *People v. McQuaid*, 85 Mich. 123, 48 N. W. 161 (holding, however, that the showing made was sufficient to admit the books).

6. Copy of statute; omissions and alterations.

A duly authenticated copy of a statute of another state or

nation is not inadmissible merely because it appears to omit some sections,¹ or bears interlineations or erasures.²

¹ *Patterson v. State*, 17 Tex. App. 102 (holding that, in the absence of evidence to the contrary, the court may presume that all the sections touching the subject are included). See U. S. Comp. Stats. 1916, § 1519, vol. 3, p. 2431.

² *United States v. Amedy*, 11 Wheat. 392, 6 L. ed. 502 (holding that alterations are not presumed to have been made after authentication).

7. Impeaching.

A statute of another state duly proved cannot be impeached except in the same method as a statute of the former.¹

¹ *People v. Nyce*, 34 Hun, 298 (holding, therefore, that a statute of another state cannot be proved unconstitutional by a judicial decision of that state without producing the Constitution).

8. Judicial decisions.

Judicial decisions of another state are not conclusive evidence on a question of the constitutionality of one of its statutes.¹

¹ *People v. Nyce*, 34 Hun, 298 (error to hold license under which defendant justified void merely because the law under which it was granted had been held unconstitutional in the state where it was passed).

9. Foreign law a question of fact.

The foreign law is ordinarily held to be a question of fact for the trial court.¹ Even where the decisions are conflicting as to what the foreign law is, the weight of authority is that the question is one solely for the court,² although some courts hold that such a question is for the jury to determine.³ Where the evidence of foreign law includes conflicting expert testimony it is generally held that the question must be submitted to the jury,⁴ although more accurate results would probably obtain, if even in such cases the decision were left entirely to the court as has been held to be the rule by some courts.⁵

¹ *Bradley v. Bentley*, 85 Vt. 412, 82 Atl. 669; *Hanna v. Lichtenhein*, 225 N. Y. 579, 122 N. E. 625; *Bank of China v. Morse*, 168 N. Y. 458, 56 L.R.A. 139, 85 Am. St. Rep. 676, 61 N. E. 774.

- ² *Christiansen v. William Graver Tank Works*, 223 Ill. 142, 79 N. E. 97, 7 Ann. Cas. 69; *Collins v. Norfolk & W. R. Co.* 152 Ky. 755, 154 S. W. 37; *Frasier v. Charleston & W. C. R. Co.* 73 S. C. 140, 52 S. E. 964.
- ³ *Hancock Nat. Bank v. Ellis*, 172 Mass. 39, 42 L.R.A. 396, 70 Am. St. Rep. 232, 51 N. E. 207; *Hanna v. Lichtenhein*, 225 N. Y. 579, 122 N. E. 625, *supra*.
- ⁴ *Electric Welding Co. v. Prince*, 200 Mass. 386, 128 Am. St. Rep. 434, 86 N. E. 947; *Harrison v. Atlantic Coast Line R. Co.* 168 N. C. 382, 84 S. E. 519.
- ⁵ *Hansen v. Grand Trunk R. Co.* 78 N. H. 518, 102 Atl. 625; *Connecticut Valley Lumber Co. v. Maine C. R. Co.* 78 N. H. 553, 103 Atl. 263, 19 N. C. C. A. 1009; note in 31 Harvard L. Rev. 896.

FORGOTTEN FACT.

1. Aiding memory by otherwise irrelevant inquiry.
2. Routine or habit.
3. Memoranda refreshing memory.
 - a. In general.
 - b. Writing not an original.
 - c. Voluminous writings.
 - d. Inspection and cross-examination.
 - e. Witness unable to read or write.
4. Mention to third person.

For cognate topics, see ACCOUNT; CONTRADICTION; CORROBORATION; NAMES; NEGATIVE; QUANTITY; TIME.

1. Aiding memory by otherwise irrelevant inquiry.

A party may aid the memory of his own witness by inquiring as to any circumstance tending to enable him to recollect more clearly or more certainly the fact sought to be proved.¹

- ¹ *O'Hagan v. Dillon*, 76 N. Y. 170; *Louisville, E. & St. L. R. Co. v. Hart*, 3 Ind. App. 130, 28 N. E. 218. Thus, a witness not saying positively whether there was a light on the engine, and giving indefinite answers to questions leading up to her recollection, may be asked if she observed any change in the appearance of the engine after the accident. Such evidence is proper to ascertain her exact recollection, although the fact asked for be itself unimportant. *Tozer v. New York C. & H. R. R. Co.* 17 N. Y. Week. Dig. 370.

2. Routine or habit.

A witness having no recollection of the details of a fact claimed to have occurred in the course of the routine of his official business may testify to the uniform routine, and that the details of this transaction must have been in accordance with that routine or habit.¹

¹ *People ex rel. Phelps v. New York County Court of Oyer & Terminer*, 83 N. Y. 436, 447, 451, affirming *People v. Genet*, 19 Hun, 91 (mayor's testimony to what must have induced him to countersign warrant); *Leonard v. Nixon*, 96 Ga. 239, 23 S. E. 80, citing first edition of this work, *s. p. Morrow v. Ostrander*, 13 Hun, 219. For other illustrations, see Abbott, *Tr. Ev.* (3d ed.) p. 769 (inference of mailing from ordinary course of business).

3. Memoranda refreshing memory.

a. In general.—A witness may refresh and assist his memory by the use of a memorandum made at or near the time to which it relates,¹ and may even be required to do so.² It does not seem to be necessary that the writing should be made by the witness himself, providing that after inspecting it he can speak to the facts from his own recollection,³ or because of his confidence in the correctness of the writing.⁴ But it cannot be so used where the witness neither recollects the facts nor remembers to have recognized the writing as true, since his testimony, so far as founded upon such a writing, is but hearsay.⁵

But a memorandum made by the witness, or under his eye,⁶ at the time of⁷ an act or event of which he had knowledge, is competent in connection with his testimony that he made the memorandum, or saw it at the time it was made, and then knew it to be true, although he has now no recollection of the facts stated in the entry.⁸ The memorandum need not have been made in the usual course of business.⁹

¹ *Woodruff v. State*, 61 Ark. 157, 32 S. W. 102; *Brown v. Galesburg Pressed Brick & Tile Co.* 132 Ill. 648, 24 N. E. 522; *Sanders v. Wakefield*, 41 Kan. 11, 20 Pac. 518; *Wise v. Phoenix F. Ins. Co.* 101 N. Y. 637, 4 N. E. 634. See also Abbott, *Tr. Ev.* (3d ed.) p. 833; *Civil Trial Brief* (4th ed.) p. 231.

It is no objection that the writing is in characters which the witness alone can read. *State v. Cardoza*, 11 S. C. 195, 238.

- But a written memorandum may not be used to aid the recollection of a witness, unless its correctness when made is first established. *Territory v. Harwood*, 15 N. M. 424, 29 L.R.A.(N.S.) 504, 110 Pac. 556.
- In California, by a Code provision the witness may refresh his recollection by anything written under his direction at the time when the fact occurred, or at any other time when the fact was fresh in his memory and he knew that the writing correctly stated the fact. *McGowan v. McDonald*, 111 Cal. 57, 43 Pac. 418. See Code of Civil Procedure of California (Dearing 1915) § 2047, p. 938.
- But it must appear that the witness's memory needs the aid of the writing to refresh it. *State v. Baldwin*, 36 Kan. 1, 12 Pac. 318; *Young v. Catlett*, 6 Duer, 437.
- As to reading copy of lost instrument, see *Scott v. Slingerland*, 44 Hun, 254; *Singer Mfg. Co. v. Riley*, 80 Ala. 314.
- As to unauthenticated document, see *Barber v. Bennett*, 58 Vt. 476, 4 Atl. 231.
- As to contemporaneousness of memorandum, see *Maxwell v. Wilkinson*, (*Parsons v. Wilkinson*) 113 U. S. 656, 28 L. ed. 1037, 5 Sup. Ct. Rep 691; *Palmer v. People*, 19 Hun, 372.
- That memorandum to refresh memory may be used as matter of right without giving evidence to identify it, see *Carter v. Bowe*, 41 Hun, 516.
- ²*Chapin v. Lapham*, 20 Pick. 467; *State v. Staton*, 114 N. C. 813, 19 S. E. 96.
- ³*State v. Lull*, 37 Me. 246; *Huckins v. People's Mut. F. Ins. Co.* 31 N. H. 238; *Huff v. Bennett*, 6 N. Y. 337; *Aldrich v. Griffith*, 66 Vt. 390, 29 Atl. 376; *Hill v. State*, 17 Wis. 675, 86 Am. Dec. 736; *The J. S. Warden*, 135 C. C. A. 267, 219 Fed. 517, and numerous authorities there cited.
- ⁴*Bowden v. Spellman*, 59 Ark. 251, 27 S. W. 602; *Card v. Foot*, 56 Conn. 369, 15 Atl. 371; *Billingslea v. Smith*, 77 Md. 504, 26 Atl. 1077; *Coffin v. Vincent*, 12 Cush. 98; *Third Nat. Bank v. Owen*, 101 Mo. 558, 14 S. E. 632.
- ⁵*Chamberlain v. Sands*, 27 Me. 458; *Green v. Caulk*, 16 Md. 556; *Douglas v. Leighton*, 57 Minn. 81, 58 N. W. 827.
- ⁶That it is indispensable to entitle the witness's memorandum to be read that he should verify the handwriting as his own, see *Gilchrist v. Brooklyn Grocers' Mfg. Asso.* 59 N. Y. 495, affirming 66 Barb. 390.
- But by the present practice contemporaneous memoranda verified as positively correct to the knowledge of the witness at the time the fact occurred and the entry was made are admitted though made by a third person. *Bateman v. New York C. & H. R. R. Co.* 47 Hun, 429. Memoranda of survey or measurement were made and entered by another, but observed by the witness to have been correctly made and

entered. Held, that he might look at the paper and state the figures as there entered. *Flint v. Kennedy*, 33 Fed. 821.

But if the memorandum sought to be used is only a copy of the one originally known to be correct, the original must be produced or accounted for. *Fisher v. Verplanck*, 23 Hun, 286 (error to receive bill made out by a third person from almanac marked by witness, neither the third person nor the almanac being produced).

And a written memorandum made by an officer at the time of attaching goods, partly from his own inspection and tickets thereon showing the purchase price, and partly from information given him at the time by persons assisting him, is inadmissible in evidence for any purpose where he cannot say, as to any particular item therein, whether he had written it from his own examination of the article or from information furnished by one of his assistants. *Norwalk ex rel. Fawcett v. Ireland*, 68 Conn. 1, 35 Atl. 804.

7 *Maxwell v. Wilkinson* (*Parsons v. Wilkinson*) 112 U. S. 656, 28 L. ed. 1037, 5 Sup. Ct. Rep. 691 (memorandum made long after the event, excluded); *H. L. Judd & Co. v. Cushing*, 50 Hun, 181, 22 Abb. N. C. 358, 2 N. Y. Supp. 836 (memorandum made by party as to past transactions after suit brought, incompetent); *Bates v. Preble*, 151 U. S. 149, 38 L. ed. 106, 14 Sup. Ct. Rep. 277. In *Nelms v. Steiner Bros.* 113 Ala. 502, 22 So. 435, it is held that memorandum prepared by a party for the purposes or in the course of a trial should not be admitted in evidence,—at least without careful instructions that it is not in itself evidence, and must not be looked to for any other purpose than reference to the items and the comparison of them with the evidence having a tendency to support them.

8 *Ætna Ins. Co. v. Weide*, 9 Wall. 677, 681, 19 L. ed. 810 (memorandum on leaf of ledger); *Guy v. Mead*, 22 N. Y. 462, 465; *Owens v. State*, 67 Md. 307, 10 Atl. 210, 302; *Curtis v. Bradley*, 65 Conn. 99, 28 L.R.A. 143, 31 Atl. 591; *Skeels v. Starrett*, 57 Mich. 350, 24 N. W. 98; *Imhoff v. Richards*, 48 Neb. 590, 67 N. W. 483; *Pinkham v. Benton*, 62 N. H. 687; *People v. McLaughlin*, 150 N. Y. 365, 44 N. E. 1017; *Holden v. Prudential Ins. Co.* 191 Mass. 153, 77 N. E. 309. See also notes in 15 Columbia L. Rev. 468, and 11 Mich. L. Rev. 527.

Shorthand notes made by the witness may be used to refresh recollection. *Burson v. Vogel*, 29 App. D. C. 388.

Memoranda made by a street car conductor at the time of an accident may be used for this purpose. *Lucas v. Metropolitan Street R. Co.* 56 App. Div. 405, 67 N. Y. Supp. 833.

The memorandum cannot be received as evidence if, after referring to it, the witness had a distinct recollection of the material facts. In that case he must be confined to using it to refresh his memory. *Vicksburg & M. R. Co. v. O'Brien*, 119 U. S. 103, 30 L. ed. 299, 7 Sup. Ct. Rep. 118; *People v. McLaughlin*, 150 N. Y. 365, 44 N. Y. 1017.

Contra: Owens v. State, 67 Md. 307, 10 Atl. 210, 302; Taplin v. Clark, 89 Vt. 226, 95 Atl. 491. See also note in 14 Mich. L. Rev 332.

The rule allowing an original written memorandum of a fact to be used as evidence of such fact, in the absence of recollection by the person who made the memorandum, relates only to memoranda of facts, and not to memoranda of inferences of conclusions. People v. McLaughlin, 13 Misc. 287, 35 N. Y. Supp. 73.

But a memorandum is admissible in evidence without the testimony of the person who made it, where he is without the jurisdiction of the court, and his handwriting is proved. Labaree v. Klosterman, 33 Neb. 150, 49 N. W. 1102.

⁹ Etna Ins. Co. v. Weide, 9 Wall. 677, 19 L. ed. 810; Morrow v. Ostrander, 13 Hun, 219. And see Reg. v. Langton, 20 Moak, Eng. Rep. 360, L. R. 2 Q. B. Div. 296.

b. Writing not an original.—The writing need not be an original where the witness, after his memory has been refreshed thereby, can testify from his own recollection of the original facts,¹ and can state that the original was a correct statement of the facts, and that the writing used is a true copy.² Whether in such case the original must first be accounted for is not free from doubt,³ but that the writing used is inadmissible in evidence is no objection to its use to refresh the memory.⁴ Nor need the witness have an independent recollection of the facts, where he can state that at the time the writing was made he knew its contents, and knew them to be correct.⁵

¹ Bonnet v. Glattfeldt, 120 Ill. 166, 11 N. E. 250; Bullock v. Hunter, 44 Md. 416; Robinson v. Mulder, 81 Mich. 75, 45 N. W. 505; George v. Joy, 19 N. H. 544; Flato v. Brod, 37 Tex. 735; Harrison v. Middleton, 11 Gratt. 527; Folsom v. Apple River Log-Driving Co. 41 Wis. 602.

² Calloway v. Varner, 77 Ala. 541, 54 Am. Rep. 78; People v. Munroe, 4 Cal. Unrep. 66, 33 Pac. 776; Chicago & A. R. Co. v. Adler, 56 Ill. 344; Houston & T. C. R. Co. v. Burke, 55 Tex. 323, 40 Am. Rep. 808.

³ To the effect that the original need not be produced or accounted for, see Denver & R. G. Co. v. Wilson, 4 Colo. App. 355, 36 Pac. 67; Erie Preserving Co. v. Miller, 52 Conn. 446, 52 Am. Rep. 607; Com. v. Ford, 130 Mass. 64, 39 Am. Rep. 426; Harrison v. Middleton, 11 Gratt. 527.

But refusal to produce the original may be considered by the jury in weighing the testimony. Chicago & A. R. Co. v. Adler, 56 Ill. 344; Davie v. Jones, 68 Me. 393.

That the absence of the original must be accounted for, see *Jones v. Jones*, 94 N. C. 114; *Byrnes v. Pacific Exp. Co.* 4 Tex. App. Civ. Cas. (Willson) 285, 15 S. W. 46.

⁴ *Morris v. Everly*, 19 Colo. 539, 36 Pac. 150; *Cameron v. Blackman*, 39 Mich. 108; *Mead v. White*, 6 Sadler (Pa.) 38, 8 Atl. 913.

⁵ *Acklen v. Hickman*, 63 Ala. 494, 35 Am. Rep. 54; *Burbank v. Dennis*, 101 Cal. 90, 35 Pac. 444; *O'Brien v. Stambach*, 101 Iowa, 40, 69 N. W. 1133; *Wright v. Wright*, 58 Kan. 525, 50 Pac. 444; *Evans v. Murphy*, 87 Md. 498, 40 Atl. 109; *Costello v. Crowell*, 133 Mass. 352; *Stahl v. Duluth*, 71 Minn. 341, 74 N. W. 143; *Bateman v. New York C. & H. R. R. Co.* 47 Hun, 429; *State v. Colwell*, 3 R. I. 132; *Davis v. Field*, 56 Vt. 426; *Schettler v. Jones*, 20 Wis. 412. *Contra*: *Clark v. State*, 4 Ind. 156; *Redden v. Sprauance*, 4 Harr. (Del.) 217; *Owings v. Shannon*, 1 A. K. Marsh, 188.

c. Voluminous writings.—The manner in which such memorandum may be used must be left to some extent to the discretion of the court, and where they are voluminous the witness may be permitted to refer to them whenever necessary, and will not be required to examine them all before testifying.¹

¹ *Johnson v. Coles*, 21 Minn. 108; *Bullock v. Hunter*, 44 Md. 417.

d. Inspection and cross-examination.—Anything used in court to refresh the memory of a witness, adverse counsel may see and cross-examine upon;¹ but memoranda which were consulted out of court need not be produced for inspection,² unless the witness testifies upon the faith of the papers which he has inspected, and not from his own memory refreshed or confirmed by the examination.³

¹ *Peck v. Lake*, 3 Lans. 136; *Atchinson, T. & S. F. R. Co. v. Hays*, 8 Kan. App. 545, 54 Pac. 322; *Cortland Mfg. Co. v. Platt*, 83 Mich. 419, 47 N. W. 330; *McKivitt v. Cone*, 30 Iowa, 455.

But he is not bound to introduce it in evidence. *Little v. Lichkoff*, 98 Ala. 321, 12 So. 429. And he may waive the right of inspection. *Adae v. Zangs*, 41 Iowa, 536; *Wernwag v. Chicago & A. R. Co.* 20 Mo. App. 473.

² *State v. Collins*, 15 S. C. 379, 40 Am. Rep. 697; *State v. Cheek*, 35 N. C. (13 Ired. L.) 114; *Wabash & E. Canal Co. v. Bledsoe*, 5 Ind. 133.

So held, even under a statute providing that where a witness is allowed to refresh his memory the writing must be produced, and may be inspected by the adverse party, who may read it to the jury. *State v. Magers*, 36 Or. 38, 58 Pac. 892.

³ *Hall v. Ray*, 18 N. H. 126.

e. Witness unable to read or write.—When the witness can neither read nor write, a writing signed by his mark cannot be read to him in the presence of the jury, but he must withdraw for that purpose.¹

¹ *Com. v. Fox*, 7 Gray, 585. In this case the witness was directed to withdraw with one counsel on each side, and have the paper read to her without comment.

4. Mention to third person.

If a witness has forgotten details of a fact he may testify that he once mentioned them to another person; and such other person may then be called to prove what was so mentioned to him.¹

A material ultimate fact may be proved by showing by a witness that he knew the facts in relation to the matter which is the subject of investigation, and communicated them to another person at the time, but has forgotten them; and then by the testimony of such other person to the effect that he entered at the time the facts communicated, and by the production of the book or memorandum in which the entries were made.²

¹ *Shear v. Van Dyke*, 10 Hun, 528 (amount was thus proved).

So, if a conversation between two persons is proper evidence in an action against others, it may be proved by either or both of the parties between whom it took place, as, when A communicated to B a statement made to him by C, and on his examination could not recollect its substance, C, was held to be a competent witness to prove it. *Green v. Cawthorn*, 15 N. C. (4 Dev. L.) 409, 410 (civil case); *Wharton*, Crim. Ev. § 360.

² *New York v. Second Ave. R. Co.* 102 N. Y. 572, 7 N. E. 905; *Payne v. Hodge*, 7 Hun, 612, affirmed in 71 N. Y. 598, without opinion; *Adams v. People*, 3 Hun, 654, affirmed in 63 N. Y. 621, without discussing this point; *Curtis v. Bradley*, 65 Conn. 99, 28 L.R.A. 143, 31 Atl. 591.

For the general rule as to proving entries, see *Abbott, Tr. Ev.* (3d ed.) pp. 833 et seq., and *Bridgewater v. Roxbury*, 54 Conn. 213, 6 Atl. 415.

For a strong authority as to the necessity of personal knowledge on the part of those making the entries, see *Chaffee v. United States*, 18 Wall. 516, 21 L. ed. 908.

GENUINENESS.

1. Proof of genuineness of letter other than by proof of handwriting or typewriting.
 - a. Original letters.
 - b. Reply letters.
2. Of bank notes.
3. Of stock.
4. Several signatures.
5. Of acknowledged instrument.

See also ACKNOWLEDGMENT; AGE; HANDWRITING; SEAL.

1. Proof of genuineness of letter other than by proof of handwriting or typewriting.

a. *Original letters*.—The authorities generally concede that under proper facts and circumstances the authenticity or genuineness of a letter may be established by indirect or circumstantial evidence, without resort to proof of handwriting or typewriting.¹

¹ *Union Cent. L. Ins. Co. v. Washburn*, 158 Ala. 169, 48 So. 475; *Re Kennedy*, 4 Cal. Unrep. 671, 36 Pac. 1030; *Deep River Nat. Bank's Appeal*, 73 Conn. 341, 47 Atl. 675; *Nickles v. State*, 48 Fla. 46, 37 So. 312; *Walls v. Atlanta Newspaper Union*, 141 Ga. 594, 81 S. E. 866; *Abbott v. McAloon*, 70 Me. 98; *People v. Adams*, 162 Mich. 371, 127 N. W. 354; *Glauber Mfg. Co. v. Voter*, 70 N. H. 332, 47 Atl. 612; *Williamson v. Davis*, — Okla. —, 177 Pac. 567; *Com. v. Drum*, 42 Pa. Super. Ct. 156; *Spellman v. Richmond & D. R. Co.* 35 S. C. 475, 28 Am. St. Rep. 858, 14 S. E. 947; *James v. State*, 72 Tex. Crim. Rep. 155, 161 S. W. 472; *Ashlock v. Com.* 108 Va. 877, 61 S. E. 752; *Maynard v. Bailey*, 85 W. Va. 679, 9 A. L. R. 981, 102 S. E. 480.

b. Reply letters.—The universally accepted rule is to the effect that a *prima facie* case of authenticity is made by showing that the offered letter purports to be from the addressee of a prior letter and to be in reply thereto, and that it was received through the mail in due course, there being indulged in such a case a presumption of fact of the genuineness of the signature to the reply letter sufficient in itself to render it admissible in evidence without further authentication.¹

¹ Consolidated Grocery Co. v. Hammond, 99 C. C. A. 195, 175 Fed. 641; White Trunk & Bag Co. v. Brantley, 16 Ala. App. 37, 75 So. 182; Barham v. Bank of Delight, 94 Ark. 158, 27 L.R.A.(N.S.) 439, 126 S. W. 394; Fielding v. Iler, 39 Cal. App. 559, 179 Pac. 519; Chicago, B. & Q. R. Co. v. Roberts, 10 Colo. App. 87, 49 Pac. 428, 3 Am. Neg. Rep. 331; Jones v. Cooke, 25 App. D. C. 524; Boykin v. State, 40 Fla. 484, 24 So. 141; Ragan v. Smith, 103 Ga. 556, 29 S. E. 759; Grayville Waterworks v. Burdick, 109 Ill. App. 520; Fisher v. Carter, 178 Iowa, 636, 160 N. W. 15; Huber Mfg. Co. v. Claudel, 71 Kan. 441, 80 Pac. 960; Louisville & N. R. Co. v. E. J. O'Brien & Co. 168 Ky. 403, 182 S. W. 227, Ann. Cas. 1917D, 922; Lancaster v. Ames, 103 Me. 87, 17 L.R.A.(N.S.) 229, 125 Am. St. Rep. 286, 68 Atl. 533; American Bonding Co. v. Ensey, 105 Md. 211, 65 Atl. 921; Connecticut v. Bradish, 14 Mass. 296; Hoxsie v. Empire Lumber Co. 41 Minn. 548, 43 N. W. 476; Citizens State Bank v. Ferson, — Mo. App. —, 208 S. W. 136; Helwig v. Aulabaugh, 83 Neb. 542, 120 N. W. 162; Todd Protectograph Co. v. Wells, F. & Co. Exp. 111 Misc. 282, 181 N. Y. Supp. 128; State ex rel. Echerd v. Viele, 164 N. C. 122, 80 S. E. 408; Kvale v. Keane, 39 N. D. 560, 9 A. L. R. 972, 168 N. W. 74; Williamson v. Davis, — Okla. —, 177 Pac. 567; Comerer v. Patrons' Mut. F. Ins. Co. 53 Pa. Super. Ct. 516; Leesville Mfg. Co. v. Morgan Wood & Iron Works, 75 S. C. 342, 55 S. E. 768; Tilden v. Smith, 24 S. D. 576, 124 N. W. 841; Messner v. State, 78 Tex. Crim. Rep. 632, 182 S. W. 329; Ramsey v. Reid, 83 W. Va. 197, 98 S. E. 155.

For additional cases and full discussion see note in 9 A. L. R. 984.

2. Of bank notes.

The genuineness of bank notes may be proved by witnesses acquainted with paper of that description, without proving the handwriting of the signatures, where the production of the paper is impracticable.¹

¹ Johnson v. People, 4 Denio, 364; United States v. Keen, 1 McLean, 429,

Fed. Cas. No. 15,510. That handwriting on bank notes does not qualify witness to speak to genuineness of signature, see *State v. Allen*, 8 N. C. (1 Hawks) 6, 9 Am. Dec. 616. See also *Keating v. People*, 160 Ill. 480, 43 N. E. 724, and cases cited (to the effect that a banker may testify to the genuineness of bank bills).

3. Of stock.

To test the genuineness of stock certificates, the stock book, although fraudulently kept, is competent in connection with testimony tracing the various certificates.¹

¹ *Perin v. Cincinnati, N. O. & T. P. R. Co.* 18 Ohio L. J. 383.

4. Several signatures.

Proof that some of the signatures on a statutory petition are not genuine makes a prima facie case of fraud, and throws on the other party the burden of proving the genuineness of the others.¹

¹ *State ex rel. Edwards v. Sumter County*, 22 Fla. 364 (petition for license).

5. Of acknowledged instrument.

An instrument properly acknowledged is supposed to be genuine.¹

¹ *Metropolitan Lumber Co. v. McColeman*, 140 Mich. 333, 103 N. W. 809.

GIFT.

1. Direct testimony.
2. Declarations of donor.
3. Presumptions and burden of proof.
 - a. Validity of gift.
 - b. Acceptance of gift.
4. Sufficiency of proof of.

For cognate topics, see **ASSENT; CONSIDERATION; DELIVERY; INTENT.**

1. Direct testimony.

To meet the rule that there must be delivery and intent, the

alleged donor may testify as to whether at the time of delivery he intended to part with the title and give it to the donee.¹

¹ Pritchard v. Hirt, 39 Hun, 378, and cases cited. See also INTENT.

As to the necessity of proving delivery or its equivalent, see Martin v. Funk, 75 N. Y. 134, 31 Am. Rep. 446, where the earlier cases are collected; Gano v. Fisk, 43 Ohio St. 462, 54 Am. Rep. 819, 3 N. E. 533, with note; Poullain v. Poullain (Ga.) abstract 37 Alb. L. J. 161; Johnson v. Spies, 5 Hun, 471; article in 28 Cent. L. J. 400; article in 21 Am. L. Rev. N. S. 145.

2. Declarations of donor.

On the question of a gift of personal property, declarations and acts of the donor, made either before or after or at the time of the alleged gift, are admissible to show intention and the character of the acts done in relation to the alleged gift.¹ Otherwise of subsequent declarations inconsistent with, or in effect denying or avoiding the gift.²

¹ Miller v. Clark, 40 Fed. 15; Riggs v. Powell, 142 Ill. 453, 32 N. E. 482; Gunn v. Thruston, 130 Mo. 339, 32 S. W. 654; Re Hall, 154 Cal. 527, 98 Pac. 269; McElveen v. King, 88 S. C. 346, 70 S. E. 801; Garrison v. Union Trust Co. 164 Mich. 345, 32 L.R.A. (N.S.) 219, 129 N. W. 691.

Both a gift of an insurance policy, and delivery to render it effective, may be proved by declarations of the donor. Lord v. New York L. Ins. Co. 95 Tex. 216, 56 L.R.A. 596, 93 Am. St. Rep. 827, 66 S. W. 290. Declarations of a man free from debt at the time they are made are admissible in evidence to prove a gift to his wife as against the claims of subsequent creditors. First Nat. Bank v. Holland, 99 Va. 495, 55 L.R.A. 155, 86 Am. St. Rep. 898, 39 S. E. 126.

² Brock v. Brock, 92 Va. 173, 23 S. E. 224; Bennett v. Cook, 28 S. C. 353, 6 S. E. 28. Note in 1 A.L.R. 1240.

3. Presumptions and burden of proof.

a. Validity of gift.—The rule with respect to the presumption of validity and the burden of proof in case of wills and testaments does not apply to gifts *inter vivos*.¹ Where a gift is questioned, the donee, or the person alleging the gift, generally has the burden of proof.² And if the relation between the donor and donee is confidential, a gift is presumptively

fraudulent, and special circumstances are necessary to sustain it.³ Thus, while the relation of parent and child ordinarily raises no presumption of undue influence in a gift from the parent to the child, and the burden is on the person attacking such a gift to show its invalidity,⁴ yet where between the parent and the child there is a relation of trust and confidence in business affairs, the courts are substantially agreed that such relation raises a presumption against the validity of the gift,⁵ though there are some cases in which the courts have doubted or failed to admit the existence of such a presumption.⁶ On the other hand, some courts consider that the confidential relation necessary to raise the presumption exists when the parent is old and feeble, and leans or depends upon the child, or is largely under the latter's care and protection, even though there is no relation of business trust and confidence.⁷ One of the matters which is frequently considered in the cases is whether the grantor or donor had the benefit of independent advice, and in New Jersey this has drifted from a fact in the case to a legal principle.⁸

There is also a presumption of undue influence in case of a gift from a man to his mistress,⁹ or by a woman to a man with whom she has had illicit relations.¹⁰

¹ Smith v. Smith, 84 Kan. 242, 35 L.R.A.(N.S.) 944, 114 Pac. 245.

² Davis v. Davis, 104 N. Y. Supp. 824; Jones v. Falls, 101 Mo. App. 536, 73 S. W. 903; Thomas v. Tilley, 147 Ala. 189, 41 So. 854; Nogga v. Savings Bank, 79 Conn. 425, 65 Atl. 129; Merchants' Loan & T. Co v. Egan, 222 Ill. 494, 78 N. E. 800.

³ Nobles v. Hutton, 7 Cal. App. 14, 93 Pac. 289; Hutcheson v. Bibb, 142 Ala. 586, 38 So. 754.

A gift to a spiritual adviser by one *in extremis* cannot be sustained without proof of the good faith of the transaction. McPherson v. Byrone, 155 Mich. 338, 118 N. W. 985.

⁴ Bain v. Bain, 150 Ala. 453, 43 So. 562; Rogers v. Rogers, 6 Penn. (Del.) 267, 66 Atl. 374; Turner v. Gumbert, 19 Idaho, 339, 114 Pac. 33; Hudson v. Hudson, 237 Ill. 9, 86 N. E. 661; Curtis v. Burns, 27 Ind. App. 74, 60 N. E. 963; Mallow v. Walker, 115 Iowa, 238, 91 Am. St. Rep. 158, 88 N. W. 452; Kennedy v. McCann, 101 Md. 643, 61 Atl. 625; Russell v. Phillips, 145 Mich. 268, 108 N. W. 718; Prescott v. Johnson, 91 Minn. 273, 97 N. W. 891; Hatcher v. Hatcher, 139 Mo. 614, 39 S. W. 479; Ward v. Ward, 86 Neb. 744, 126 N. W. 305; Simon v. Simon, 163 Pa. 292, 29 Atl. 657; Saufley v. Jackson, 16 Tex. 579;

Jenkins v. Rhodes, 106 Va. 564, 56 S. E. 332; *Burton v. Burton*, 82 Vt. 12, 71 Atl. 812, 17 Ann. Cas. 984; *Woodville v. Woodville*, 63 W. Va. 286, 60 S. E. 140; *Haynes v. Harriman*, 117 Wis. 132, 92 N. W. 1100.

⁵ *Nobles v. Hutton*, 7 Cal. App. 14, 93 Pac. 289; *Griesel v. Jones*, 123 Mo. App. 45, 99 S. W. 769; *Trusts & Guarantee Co. v. Hart*, 31 Ont. Rep. 414; *Mott v. Mott*, 49 N. J. Eq. 192, 22 Atl. 997; *Highberger v. Stiffler*, 21 Md. 338, 83 Am. Dec. 593; *Hensan v. Cooksey*, 237 Ill. 620, 127 Am. St. Rep. 345, 86 N. E. 1107; *Ross v. Ross*, 6 Hun, 80; *Brice v. Brice*, 5 Barb. 533; *Naeseth v. Hommedal*, 109 Minn. 153, 123 N. W. 298; *Fitch v. Reiser*, 79 Iowa, 34, 44 N. W. 214; *Disbrow v. Disbrow*, 31 App. Div. 624, 52 N. Y. Supp. 471, affirmed in 164 N. Y. 564, 58 N. E. 1086; *Stewart's Estate*, 137 Pa. 175, 20 Atl. 554; Where a daughter who furnished to her father care and service made necessary by his illness, it was held that a gift from him to her was presumptively the result of undue influence. *Slack v. Rees*, 66 N. J. Eq. 447, 69 L.R.A. 393, 59 Atl. 466.

⁶ *Crothers v. Crothers*, 149 Pa. 201, 24 Atl. 190; *Mooney v. Mooney*, 80 Conn. 446, 68 Atl. 985; *McAdams v. McAdams*, 80 Ohio St. 232, 88 N. E. 542; *Jones v. Thomas*, 218 Mo. 508, 117 S. W. 1177.

⁷ *Smith v. Smith*, 84 Kan. 242, 35 L.R.A.(N.S.) 944, 114 Pac. 245; *Couch v. Couch*, 148 Ala. 332, 42 So. 624; *Soberanes v. Soberanes*, 97 Cal. 140, 31 Pac. 910; *Sands v. Sands*, 112 Ill. 225; *Reese v. Shutte*, 133 Iowa, 681, 108 N. W. 525; *Paddock v. Pulsifer*, 43 Kan. 718, 23 Pac. 1049; *Harper v. Harper*, 85 Ky. 160, 7 Am. St. Rep. 583, 3 S. W. 5; *Reck v. Reck*, 110 Md. 497, 73 Atl. 144; *Jacox v. Jacox*, 40 Mich. 473, 29 Am. Rep. 547; *Schwingel v. Anthes*, 5 Neb. (Unof.) 345, 98 N. W. 676; *Collins v. Collins*, 45 N. J. Eq. 813, 15 Atl. 849, 18 Atl. 860; *Swanstrom v. Day*, 46 Misc. 311, 93 N. Y. Supp. 192, affirmed without opinion in 101 App. Div. 609, 92 N. Y. Supp. 1147; *Brummond v. Krause*, 8 N. D. 573, 80 N. W. 686; *Doyle v. Welch*, 100 Wis. 24, 85 N. W. 400.

⁸ *Slack v. Rees*, 66 N. J. Eq. 447, 69 L.R.A. 393, 59 Atl. 466; *Coffey v. Sullivan*, 63 N. J. Eq. 296, 49 Atl. 520; *Post v. Hagan*, 71 N. J. Eq. 234, 124 Am. St. Rep. 997, 65 Atl. 1026.

⁹ *Dunlap v. Robinson*, 28 Ala. 106; *Re Ruffino*, 116 Cal. 304, 48 Pac. 127; *Stant v. American Secur. & T. Co.* 23 App. D. C. 25; *Smith v. Henline*, 174 Ill. 184, 51 N. E. 227; *Leighton v. Orr*, 44 Iowa, 679; *Porschett v. Porschett*, 82 Ky. 93, 56 Am. Rep. 880; *Waters v. Reed*, 129 Mich. 131, 88 N. W. 394; *Sunderland v. Hood*, 84 Mo. 293; *Arnault v. Arnault*, 52 N. J. Eq. 801, 31 Atl. 606; *Platt v. Elias*, 186 N. Y. 374, 11 L.R.A.(N.S.) 554, 116 Am. St. Rep. 558, 79 N. E. 1, 9 Ann. Cas. 780; *Dean v. Negley*, 41 Pa. 312, 80 Am. Dec. 620; *O'Neill v. Farr*, 1 Rich. L. 80; *McClure v. McClure*, 86 Tenn. 173, 6 S. W. 44.

¹⁰ *Dickie v. Carter*, 42 Ill. 376; *Re Willford*, — N. J. —, 51 Atl. 501; *Re Evans*, 37 Misc. 337, 85 N. Y. Supp. 491, affirmed without opinion in 81 App. Div. 636, 81 N. Y. Supp. 1125; *Re Westerman*, 29 Misc.

409, 51 N. Y. Supp. 1065; *Monroe v. Barclay*, 17 Ohio St. 302, 93 Am. Dec. 620; *Hummell's Estate*, 7 Kulp, 339; *Stewart v. Lyons*, 54 W. Va. 665, 47 S. E. 442.

For a full review of the authorities on the question of presumption and burden of proof as to undue influence in case of gifts *inter vivos* from parent to child, see note in 35 L.R.A.(N.S.) 944.

b. Acceptance of gift.—The acceptance of a beneficial gift by the donee will be presumed.¹

¹ *Varley v. Sims*, 110 Minn. 331, 8 L.R.A.(N.S.) 828, 111 N. W. 269; *Scott v. Union & Planters' Bank & T. Co.* 123 Tenn. 258, 130 S. W. 757; *Goelz v. People's Sav. Bank*, 31 Ind. App. 67, 67 N. E. 232; *Thompson v. Griggs*, 31 Pa. Super. Ct. 608; *Malone v. Lebus*, 116 Ky. 975, 77 S. W. 180.

4. Sufficiency of proof of.

The evidence to establish a gift must be explicit and convincing in support of every element needed to constitute a valid donation.¹ But one competent credible witness is sufficient to establish a gift *causa mortis*.²

¹ *Whalen v. Milholland*, 89 Md. 199, 44 L.R.A. 208, 43 Atl. 45; *Lehr v. Jones*, 74 App. Div. 54, 77 N. Y. Supp. 213.

A gift *inter vivos* must be established by satisfactory proof; and where the matter is left in doubt upon the whole case the gift must fail. *Bray v. O'Rourke*, 89 App. Div. 400, 85 N. Y. Supp. 907.

To establish a gift *inter vivos* the evidence must show an absolute and unconditional delivery of the thing to the donee, with the relinquishment of the donor's dominion and control over it. *Millard v. Millard*, 123 Ill. App. 264, affirmed in 221 Ill. 86, 77 N. E. 595; *Bowron v. De Selding*, 105 App. Div. 500, 94 N. Y. Supp. 292.

A finding of gift of an insurance policy, including delivery sufficient to make it effective, is supported by declarations of the insured that the policy is the donee's, although it is found among his papers at his banker's after his death. *Lord v. New York L. Ins. Co.* 95 Tex. 216, 56 L.R.A. 596, 93 Am. St. Rep. 827, 66 S. W. 290.

Evidence that the donor indorsed on a memorandum of the purchase of certain bonds the statement that she had that day given one of the bonds, specifying it, to a niece, was held sufficient to constitute a gift *inter vivos*, it appearing that the bonds were at the time in a bank, and that the donor was physically unable to attend to procuring the bond from the bank. *McGavie v. Cossum*, 72 App. Div. 35, 76 N. Y. Supp. 305.

The assignment of shares of stock by the owner to different persons, and the retention of the stock by the secretary of the company, under instructions from the assignor to hold the stock until her death and then deliver it to the assignees, was held not to be a present gift, and not to pass title to the stock. *Noble v. Learned*, 7 Cal. Unrep. 297, 87 Pac. 402. For a collection of the cases relating to gifts *inter vivos* and gifts *causa mortis* and an analysis of the evidence of each case as to sufficiency to establish the necessary relinquishment of title and control of the property by the donor see note in 3 A.L.R. 902.

As to gifts of debts to third persons not evidenced by commercial instrument see note in 3 A.L.R. 933.

* *Thomas v. Lewis* (*Page v. Lewis*), 89 Va. 1, 18 L.R.A. 170, 37 Am. St. Rep. 848, 15 S. E. 389.

GOOD FAITH.

1. Right to prove affirmatively; direct testimony.
2. Presumption and burden of proof.
 - a. In general.
 - b. Possession.
3. Information.
4. Reason for disregard of notice.

See also INTENT; KNOWLEDGE; NOTICE.

1. Right to prove affirmatively; direct testimony.

When the good faith of a party is put in issue, he has a right to give affirmative evidence of it,¹ and he may testify directly to his good faith.²

Thus, a person to whom the want of good faith is imputed in a statement shown to have been made by him may be asked whether he then believed this statement to be correct.³

* *Macon County v. Shores*, 97 U. S. 272, 24 L. ed. 880; *Howland v. Flood*, 160 Mass. 509, 36 N. E. 482; *Miller v. Winfree*, 4 Tex. App. Civ. Cas. (Willson) 383, 15 S. W. 918.

One whose ownership of negotiable paper is put in issue has a right to prove that he became owner in good faith. *Ralls County v. Douglass*, 105 U. S. 728, 26 L. ed. 957.

But good faith on the part of a mortgagee sued for statutory damages for refusing to satisfy the mortgage after lawful tender of the amount due is immaterial. *Campbell v. Seeley*, 43 Mo. App. 23.

² *People v. Rudorf*, 149 Ill. App. 215. But see *Arnd v. Aylesworth*, 145 Iowa, 185, 29 L.R.A. (N.S.) 638, 123 N. W. 1000.

Direct evidence of good faith is admissible for the defense in a prosecution for receiving a rebate in violation of Elkins' Act. *Lehigh Coal & Nav. Co. v. United States*, 250 U. S. 556, 63 L. ed. 1138, 40 Sup. Ct. Rep. 24.

³ *Rawls v. American Mut. L. Ins. Co.* 27 N. Y. 282, 84 Am. Dec. 280, affirming 36 Barb. 357.

2. Presumption and burden of proof.

a. In general.—As a general rule, the law presumes, in the absence of evidence to the contrary, that the business transactions of every man are done in good faith and for an honest purpose; and anyone who alleges bad faith or a dishonest and fraudulent purpose has the burden of proving the same.¹ Thus, holders of negotiable instruments, in the absence of any testimony to impeach their good faith, are presumed to be bona fide holders.² And proof simply that the instrument was without consideration, or that the consideration, originally valid, has since failed, is not sufficient to overcome this presumption.³ But where there is evidence that the instrument had a fraudulent inception, the burden is on the transferee to show under what circumstances the prior title was taken, and that he is himself either a bona fide purchaser for value before maturity, or holds under one who was such a purchaser.⁴ If the purchaser of a negotiable paper for value was put on inquiry, he may be presumed, in support of his good faith, to have made the necessary inquiries.⁵

On the question of the burden of proof as to the good faith of a purchaser claiming against a prior unrecorded conveyance or encumbrance, there is much conflict of opinion,⁶ but the numerical weight of authority, at least, supports the proposition that the burden of proof lies upon the subsequent pur-

chaser to show not only that he purchased the property in question for a valuable consideration, but that he did so without notice of the other party's claim.⁷ In Illinois, however, the rule is established that the presumption is that the one claiming under a recorded deed is a bona fide purchaser, and that the burden of proof to show bad faith and want of consideration is upon one who claims under a prior unrecorded conveyance.⁸ And in Maine, under a statute providing that a prior unrecorded deed is not effectual against other persons claiming under a subsequent recorded deed without "actual notice" of the prior deed, it is held that the burden of proving that the subsequent purchaser had such notice is on the one claiming under the unrecorded deed.⁹

And under statutes declaring prior unrecorded conveyances void as against subsequent purchasers in good faith and for a valuable consideration, whose conveyances were first duly recorded, the burden of proof is also placed upon the party claiming under the unrecorded deed.¹⁰

There is a line of cases which seem to take middle ground as to who has the burden of proof, holding that where a party relies upon being a bona fide purchaser, and shows that he has paid a valuable consideration, the burden of showing that he purchased with notice is on the party alleging or relying on notice to defeat the former's claim.¹¹

The state, and not the accused, in a prosecution for larceny, has the burden of proof as to whether the taking of property is under an honest claim of right.¹²

¹ *Baughman v. Penn*, 33 Kan. 504, 6 Pac. 890; *Cooke v. Cooke*, 43 Md. 522; *Mordhurst v. Ft. Wayne & S. W. Traction Co.* 163 Ind. 268, 66 L.R.A. 105, 106 Am. St. Rep. 222, 71 N. E. 642, 2 Ann. Cas. 967; *Kendrick v. Colyar*, 143 Ala. 597, 42 So. 110; *Freeman v. Topkis*, 1 Marv. (Del.) 174, 40 Atl. 948; *Anthony v. Wheeler*, 130 Ill. 128, 17 Am. St. Rep. 281, 22 N. E. 494; *Jones v. Simpson*, 116 U. S. 609, 29 L. ed. 742, 6 Sup. Ct. Rep. 538.

² *Burke v. American Loan & T. Co.* 155 U. S. 534, 39 L. ed. 251, 15 Sup. Ct. Rep. 214; *Thompson v. Love*, 61 Ark. 81, 32 S. W. 65; *Galvin v. Meridian Nat. Bank*, 129 Ind. 439, 28 N. E. 847; *Billingsly v. Crad-*

dock, 82 Iowa, 721, 47 N. W. 893; *First Nat. Bank v. Elliott*, 46 Kan. 32, 26 Pac. 487; *Rossiter v. Loeber*, 18 Mont. 372, 45 Pac. 560 (even though the holder took after maturity). For a comprehensive treatment and review of cases on this question, see notes to *Canajoharie Nat. Bank v. Diefendorf*, 10 L.R.A. 677 and 17 L.R.A. 326.

This general rule that the burden of proof is upon the true owner to show the bad faith of the purchaser applies also to bonds. *Hotchkiss v. National Shoe & Leather Bank*, 21 Wall. 354, 22 L. ed. 645.

When it appears that the bonds have been stolen, a subsequent purchaser must show that he purchased in the ordinary course of business, in good faith and for a valuable consideration. *Parsons v. Utica Cement Mfg. Co.* 82 Conn. 333, 135 Am. St. Rep. 278, 73 Atl. 785; *Curry v. Wisconsin Nat. Bank*, 149 Wis. 413, 136 N. W. 549.

There is a presumption that the holder of a coupon which had been attached to a bond issued by a corporation is not a bona fide purchaser for value where it appears that the coupon was stolen, but this presumption may be rebutted by evidence that such purchaser received the bond in good faith, and without knowledge that it had been stolen. *Wisner v. Osteyee Bros.* 23 Misc. 123, 50 N. Y. Supp. 689.

For full discussion and additional cases see note in 1 L.R.A. 719.

³ *National Bank v. Miller*, 51 Neb. 156, 70 N. W. 933; *Little v. Mills*, 98 Mich. 423, 57 N. W. 266; *Holden v. Phoenix Rattan Co.* 168 Mass. 570, 47 N. E. 241. And according to *Wright v. Hardie*, — Tex. Civ. App. —, 30 S. W. 675, proof of want of consideration, and transfer in fraud of the maker's rights, does not cast upon the indorsee the burden of showing that he took without notice of the maker's equity; he need only show that he acquired the instruments before maturity in the usual course of business and for a valuable consideration.

⁴ *Hazard v. Spencer*, 17 R. I. 561, 23 Atl. 729; *Doe v. Northwestern Coal & Transp. Co.* 78 Fed. 62; *Graham v. Larimer*, 83 Cal. 173, 23 Pac. 286; *Harrington v. Johnson*, 7 Colo. App. 483, 44 Pac. 368; *Kain v. Bare*, 4 Ind. App. 440, 31 N. E. 205; *Skinner v. Raynor*, 95 Iowa, 536, 64 N. W. 601; *Arnd v. Aylesworth*, 145 Iowa, 185, 29 L.R.A.(N.S.) 638, 123 N. W. 1000; *Brook v. Teague*, 52 Kan. 119, 34 Pac. 347; *Banks v. McCosker*, 82 Md. 518, 34 Atl. 539; *Conant v. Johnston*, 165 Mass. 450, 43 N. E. 192; *Stevens v. McLachlan*, 120 Mich. 285, 79 N. W. 627; *Bank of Montreal v. Richter*, 55 Minn. 362, 57 N. W. 61; *Henry v. Sneed*, 99 Mo. 407, 12 S. W. 663; *Thamling v. Duffey*, 14 Mont. 567, 37 Pac. 363; *See v. Heppenheimer*, 55 N. J. Eq. 240, 36 Atl. 966; *American Exch. Nat. Bank v. New York Belting & Pkg. Co.* 148 N. Y. 698, 43 N. E. 168; *Knowlton v. Schultz*, 6 N. D. 417, 71 N. W. 550, and cases cited; *Ditton v. Purcell*, 21 N. D. 648, 36 L.R.A.(N.S.) 149, 132 N. W. 347; *Piedmont Bank v. Hatcher*, 94 Va. 229, 26 S. E.

505. So, also, where there is proof that the instrument was without consideration, and based on a transaction contrary to public policy. *French v. Talbot Paving Co.* 100 Mich. 443, 59 N. W. 166. Or that the instrument has been materially altered. *Smith v. Eals*, 81 Iowa, 235, 46 N. W. 1110.

The transfer of a note in violation of an agreement that it would be returned if the property for which it was given did not give satisfaction is a fraud, which casts upon the transferee the burden of showing that he took the note in good faith. *Pierson v. Huntington*, 82 Vt. 482, 29 L.R.A.(N.S.) 695, 137 Am. St. Rep. 1029, 74 Atl. 88.

⁵ *Weeks v. Fox*, 3 Thomp. & C. 354; *Miller v. Crayton*, 3 Thomp. & C. 360, Compare *Abbott*, Tr. Ev. (3d ed.) pp. 1147, 1148.

⁶ For full review of authorities, see note in 36 L.R.A.(N.S.) 1124.

⁷ *Eversdon v. Mayhew*, 65 Cal. 167, 3 Pac. 641; *Dundee Realty Co. v. Leavitt*, 87 Neb. 711, 30 L.R.A.(N.S.) 389, 127 N. W. 1057; *Watkins v. Edwards*, 23 Tex. 443; *Errett v. Wheeler*, 109 Minn. 157, 26 L.R.A.(N.S.) 816, 123 N. W. 414; *Young v. Schofield*, 132 Mo. 650, 34 S. W. 497; *Weber v. Rothschild*, 15 Or. 385, 3 Am. St. Rep. 162, 15 Pac. 650; *Gardner v. Early*, 72 Iowa, 518, 34 N. W. 311; *Jackson ex dem. Rounds v. M'Chesney*, 7 Cow. 360, 17 Am. Dec. 521; *Clark v. Sayers*, 55 W. Va. 512, 47 S. E. 312.

⁸ *Ryder v. Rush*, 102 Ill. 338; *Anthony v. Wheeler*, 130 Ill. 128, 17 Am. St. Rep. 281, 22 N. E. 494; *Lowden v. Wilson*, 233 Ill. 340, 84 N. E. 245.

⁹ *Butler v. Stevens*, 26 Me. 484; *Spofford v. Weston*, 29 Me. 140; *Marshall v. Dunham*, 66 Me. 539; *Sidelinger v. Bliss*, 94 Me. 316, 49 Atl. 1094.

¹⁰ *Ward v. Isbill*, 73 Hun, 550, 26 N. Y. Supp. 141; *Austin v. Staten*, 126 N. C. 783, 36 S. E. 338; *Hull v. Diehl*, 21 Mont. 71, 52 Pac. 782; *Center v. Planters' & M. Bank*, 22 Ala. 743.

¹¹ *Osceola Land Co. v. Chicago Mill & Lumber Co.* 84 Ark. 1, 103 S. W. 609; *Block & P. Iron Co. v. Holcomb-Brown Iron Co.* 105 Iowa, 624, 67 Am. St. Rep. 319, 75 N. W. 499; *Walter v. Brown*, 115 Iowa, 360, 88 N. W. 832; *Atkinson v. Greaves*, 70 Miss. 42, 11 So. 688; *Lamar v. Hale*, 79 Va. 147; *Barton v. Barton*, 75 Ala. 400.

¹² *Black v. State*, 83 Ala. 81, 3 Am. St. Rep. 691, 3 So. 814; *Johnson v. United States*, 2 Okla. Crim. Rep. 16, 99 Pac. 1022; *State v. Weckert*, 17 S. D. 202, 95 N. W. 924, 2 Ann. Cas. 191; *State v. Huffman*, 16 Or. 15, 16 Pac. 640; *McMahan v. State*, 50 Tex. Crim. Rep. 244, 96 S. W. 17. For additional cases see note in 41 L.R.A.(N.S.) 554.

b. Possession.—Possession of property raises no presumption as to the good faith of the transfer to the possessor.¹

The rule is otherwise, however, as to possession by an indorsee of negotiable instruments properly indorsed.²

¹ Norton v. McNutt, 55 Ark. 59, 17 S. W. 362, Citing 1 Greenl. Ev. § 39, note; Rawley v. Brown, 71 N. Y. 85.

² First Nat. Bank v. Emmitt, 52 Kan. 603, 35 Pac. 213; Hargis v. Louisville Trust Co. 17 Ky. L. Rep. 218, 30 S. W. 877; Third Nat. Bank v. Angell, 18 R. I. 1, 29 Atl. 500; Bank of Spencer v. Simmons, 43 W. Va. 79, 27 S. E. 299. See also cases reviewed in note to Commercial Bank v. Burgwyn, 17 L.R.A. 326.

3. Information.

The information on which a person acted is original evidence, whether true or false, where the question is whether he acted prudently, wisely, or in good faith.¹

¹ Werner v. Com. 80 Ky. 387, s. p., Criminal Trial Brief; Oberlender v. Spiess, 45 N. Y. 175 (action for deceit); Hathaway v. Sun Mut. Ins. Co. 8 Bosw. 33, 50 (survey, as showing good faith of master). So, the fact of taking competent advice on a statement of all the facts may be shown. Jackson ex dem. Hooker v. Mather, 7 Cow. 301.

4. Reason for disregard of notice.

When circumstances relied on as charging a person with want of good faith by putting him on inquiry have been proved, he has a right to explain them by stating the reasons why he did not pursue inquiry.¹ So, after stating the explanation given to him on inquiry, he may testify that he was satisfied with the explanation.²

¹ Seybel v. National Currency Bank, 54 N. Y. 288, 13 Am. Rep. 583, with note, affirming 4 Abb. Pr. N. S. 352, 2 Daly, 383 (disregard by banker, of notice of losses by theft, left at his office, explainable by his testimony that his business was so large that it was impracticable to attend to such notices).

² Dutchess County Mut. Ins. Co. v. Hachfield, 73 N. Y. 226.

GRANT.

1. When presumed generally.
2. Without actual execution.

For cognate topics, see ACCEPTANCE; CONSIDERATION; DATE; DELIVERY.

1. When presumed generally.

A grant is not to be presumed on the ground of possession and the lapse of time, except when title has been shown by the party who calls for the presumption, good in substance, but wanting some essential matter to make it formally complete, and where the possession has been consistent with the fact presumed.¹

But it is a general rule that a grant will be presumed upon proof of an adverse, exclusive, and uninterrupted possession for twenty years, and that such rule will be applied as a *presumptio juris et de jure* wherever, by possibility, a right may be acquired in any manner known to the law.²

And direct proof of the existence of a deed may be aided by the presumption to be derived from possession and repeated acts of ownership, in establishing the title to real estate.³

¹ *Enders v. Sternbergh*, 2 Abb. App. Dec. 31, reversing 52 Barb. 222; *Brown v. Oldham*, 123 Mo. 621, 27 S. W. 409; *Hasson v. Klee*, 181 Pa. 117, 37 Atl. 184; *Von Rosenberg v. Haynes*, 85 Tex. 357, 20 S. W. 143; *Texas Mexican R. Co. v. Uribe*, 85 Tex. 386, 20 S. W. 153; *Logan v. Ward*, 58 W. Va. 366, 5 L.R.A. (N.S.) 156, 52 S. E. 398.

² *United States v. Chaves*, 159 U. S. 452, 40 L. ed. 215, 16 Sup. Ct. Rep. 57, citing 1 Greenl. Ev. 12th ed. § 17; *Ricard v. Williams*, 7 Wheat. 59, 109, 5 L. ed. 398, 410; *Coolidge v. Learned*, 8 Pick. 503; *Atty. Gen. v. Revere Copper Co.* 152 Mass. 444, 9 L.R.A. 510, 25 N. E. 605; *Smith v. Cornelius*, 41 W. Va. 59, 30 L.R.A. 747, 23 S. E. 599.

In Mississippi a statute provides that adverse possession for twenty-five years under a claim of right or title shall be prima facie evidence that the law authorizing the disposition of the lands had been complied with, and the lease or sale duly made; an adverse possession of land for more than twenty-five years under an alleged lease, whether valid or invalid, is sufficient to entitle the possessor to the benefit of this presumption. *Carroll County v. Estes*, 72 Miss. 171, 16 So. 908. See Hemmingway's Ann. Miss. Code 1917, § 7509, vol. 2, p. 3035.

³ *Cahill v. Cahill*, 75 Conn. 522, 60 L.R.A. 706, 54 Atl. 201, 732.

After a great lapse of time and a series of circumstances disclosing an unchallenged fee-simple title, during such period, of property originally held under a lease, the courts will presume whatever grant is necessary to extinguish the landlord's title, in an ejectment proceeding against one claiming under such title. *Townsend v. Boyd*, 217 Pa. 386, 12 L.R.A.(N.S.) 1148, 66 Atl. 1099

2. Without actual execution.

Possession and use sufficiently long continued may create a presumption of a conveyance or grant, even though they do not satisfy the jury that a conveyance was in point of fact executed. It is sufficient if the evidence leads to the conclusion that the conveyance might have been executed, and that its existence would be a solution of the difficulties arising from its nonexecution.¹

¹ *Dunn v. Eaton*, 92 Tenn. 743, 746, 23 S. W. 163; *Fletcher v. Fuller*, 120 U. S. 534, 30 L. ed. 759, 7 Sup. Ct. Rep. 667, s. c., after retrial, 44 Fed. 34, where the court say: "It is not necessary, in order to presume a conveyance, to believe that the conveyance was in point of fact executed. It is sufficient if the evidence leads to the conclusion that a conveyance might have been executed, and that its existence would be a solution of the difficulties arising from its nonexistence. It is not founded on a belief that a grant has actually been made in the particular case, but on the general presumption that a man will naturally enjoy what belongs to him, the difficulty of proof after lapse of time, and the policy of not disturbing long-continued possessions. It is not indispensable, in order to lay a proper foundation for the legal presumption of a grant, to establish the probability of the fact that a grant ever issued. It would be sufficient ground for a presumption to show that, by legal possibility, a grant might have been issued. Though the presumption of a grant or deed is one that may be rebutted by proof of facts inconsistent with its supposed existence, yet where no such facts are shown, and the things done and the things omitted with regard to the property in controversy by the respective parties, for long periods of time after the execution of the supposed conveyance, can be explained satisfactorily only upon the hypothesis of its existence, it is the duty of the jury to presume a conveyance, and thus quiet the possession."

For the general rule, see *Abb. Tr. Ev.* (3d ed.) pp. 1720, 1922; *Messinger's Appeal*, 109 Pa. 285, 4 Atl. 162, abstr. 32 Alb. L. J. 476.

For the application of the rule to easements, see *Nicholls v. Wentworth*, 100 N. Y. 455, 3 N. E. 482.

As to conclusiveness of presumption, see *House v. Montgomery*, 19 Mo. App. 170.

For an explanation of how the rule as to the presumption arose: and the way it is in part, superseded now in England by historical evidence that the right was always in the supposed grantees and their predecessors, see *Pollock's Land Laws*.

HABIT.

1. Direct testimony.
2. Single instance; and repetition.
3. Limits of time.
4. Reputation.
5. Presumption of continuance.

For cognate topics, see *CARE*; *CHARACTER*; *INTOXICATION*.

1. Direct testimony.

A witness who has had adequate opportunities of observation may testify directly to the existence of a habit.¹

¹ *Gallagher v. People*, 120 Ill. 179, 11 N. E. 335; *Lynch v. Moore*, 154 Mass. 335, 28 N. E. 277.

2. Single instance; and repetition.

Habit may be proved by successive acts,¹ and a single instance is competent,² subject to the discretionary power of the court to limit the number of instances.³ But when proof of habit is necessary, some degree of frequent repetition must be shown.⁴

¹ *Todd v. Rowley*, 8 Allen, 51, 58.

² *United Brethren Mut. Aid Soc. v. O'Hara*, 120 Pa. 256, 13 Atl. 932 (holding it error to exclude the question,—Did you ever see him under the influence of liquor?—when the object was to prove intemperate habits); *Gahagan v. Boston & L. R. Co.* 1 Allen, 187, 59 Am. Dec. 724. (The witness may be asked if he ever saw any indication of intemperance in appearance or conduct).

Evidence of a plea of guilty, by an applicant for insurance, to a charge of drunkenness, is admissible in an action by the assignee of the beneficiary upon the policy, in support of a defense of misrepresentation by the applicant as to his habits in that regard, where the plea was not so remote from the time of the application as to have no evidentiary value. *Langdeau v. John Hancock Mut. L. Ins. Co.* 194 Mass. 56, 18 L.R.A. (N.S.) 1190, 80 N. E. 452.

³ *Com. v. Ryan*, 134 Mass. 223. (Compare § 3, this title, note 2.)

⁴ *Knickerbocker L. Ins. Co. v. Foley*, 105 U. S. 354, 26 L. ed. 1057; *Cosgrove v. Pitman*, 103 Cal. 268, 37 Pac. 232 (to the effect that it cannot be said that to take an occasional social drink, or even to be occasionally "under the influence" of a drink, constitutes a habit of drinking).

3. Limits of time.

To show habit existing at a specified time it is competent, after having given evidence of previous acts of the kind, to give evidence of subsequent acts as proving that the previous conduct was not accidental or unusual, but frequent and the result of a fixed habit.¹ It is error to exclude evidence of such acts because not within an arbitrary period,—such as one year before the time in question,²—or merely because occurring after suit brought.³

¹ *Todd v. Rowley*, 8 Allen, 51, 58 (habit of a horse to shy).

² *Boecher v. Lutz*, 13 Daly, 28, 2 N. Y. City Ct. Rep. 205, note (ferocious habit of dog). (Compare § 2, this title, note 3); *Bailey v. Belfast*, — Me. —, 10 Atl. 452 (habit of horse to shy). Otherwise of a habit of a corporation. *Davidson v. St. Paul, M. & M. R. Co.* 34 Minn. 51, 24 N. W. 324 (holding it proper to confine evidence of the negligent habit of the company, as to construction and use of its engines, to about the time of the fire complained of).

An inquiry as to the habits of sobriety of plaintiff in an action for personal injuries, for the purpose of determining whether his expectation of life is equal to the average shown by the tables of mortality, should not be confined to the date of the injury, but, if confined to his habits at such time, may extend down to the trial two years afterwards,

since habits are not formed hurriedly. *Townsend v. Briggs*, 99 Cal. 481, 34 Pac. 116.

³ *Mack v. Handy*, 39 La. Ann. 491, 2 So. 181 (evidence on intemperance,—in divorce,—not offered to make out cause of action, but to show continuing habit).

4. Reputation.

But proof that a person had the reputation of being intemperate is not proof of the fact that he had such habit, and does not support an inference that he was intoxicated at a specified time.¹

¹ *Cosgrove v. Pitman*, 103 Cal. 268, 37 Pac. 232.

5. Presumption of continuance.

It will be presumed, in the absence of any evidence to the contrary, that a habit, when once proved to exist, continues the same.¹

¹ *Lane v. Missouri P. R. Co.* 132 Mo. 4, 33 S. W. 645, 1128; *McCraw v. McCraw*, 171 Mass. 146, 50 N. E. 526; *Marston v. Dingley*, 88 Me. 546, 34 Atl. 414 (*dictum*).

HANDWRITING.**I. TESTIFYING AS TO ONE'S OWN HANDWRITING.**

1. Direct testimony; authorizing signature.
2. Writing in court.
 - a. On direct examination.
 - b. On cross-examination.
3. Concealing part of writing.

II. TESTIMONY OF NONEXPERT FROM KNOWLEDGE OF HANDWRITING.

4. Acquaintance with handwriting; general rule.
5. Not secondary evidence.
6. Form of question.
7. Competency of witness generally.
8. Means of knowledge.
 - a. Having seen write.
 - b. Having seen genuine writing.
 - c. Only having seen communication received in usual course of business.
 - d. Having received letters.
 - e. Having seen ancient documents.
 - f. Having knowledge of handwriting from family correspondence.
9. Testimony competent, though not positive.
10. Witness prepared out of court.
 - a. In general.
 - b. Refreshing memory.
11. Lost disputed writing.
12. Privilege of professional relation.
13. Testimony of interested witness or party to handwriting of deceased, etc.
14. Ordinary witness cannot make comparison.
15. Testing knowledge.
 - a. In general.
 - b. Refreshing memory on cross-examination.
 - c. Requiring to pick out genuine writing.
16. Cross-examination for purposes of contradiction.

III. TESTIMONY OF EXPERTS, WITH OR WITHOUT THE AID OF STANDARDS OF COMPARISON.

17. Expert defined.
18. Expert's direct opinion founded on comparison.
19. Qualification of witness.
20. Expert's testimony to peculiar characteristics.
21. Expert cross-examination on differences.
22. Cross-examination for purpose of contradiction.

IV. STANDARDS OF COMPARISON, WITH OR WITHOUT THE AID OF EXPERTS.

- 23. Document not already in the case as standard for comparison.
- 24. What is considered as in evidence.
- 25. Use of papers in the record.
- 26. Use of irrelevant documents as standards.
 - a. In general.
 - b. Writing of third person.
- 27. What law controls.
- 28. Disputed writing and standard to be produced before comparison.
- 29. Genuineness of standards, a question for the court.
- 30. Requisite authentication of standards of comparison.
- 31. Comparison by jury or referee.
- 32. Taking to the jury room.

V. PHOTOGRAPHS, LETTER-PRESS COPIES, MAGNIFYING GLASS, AND SUPERIMPOSITION.

- 33. Photographic copies.
- 34. Letter-press copies.
- 35. Use of magnifying glass.
- 36. Tracing and superimposition.

VI. CIRCUMSTANTIAL EVIDENCE AND ADMISSIONS.

- 37. Peculiar usages of language.
- 38. Aptitude to imitate.
- 39. Opportunity.
- 40. Condition of writer.
- 41. Admission of such an instrument.

For kindred topics, see CORROBORATION; GENUINENESS; HABIT; MARK; NEGATIVE; OPINIONS.

I. TESTIFYING AS TO ONE'S OWN HANDWRITING.

1. Direct testimony; authorizing signature.

On the question of the genuineness of the signature the person whose name was used may be asked directly, Did you sign that? Did you authorize anyone to sign it?¹

¹ Such a question to complainant, on trial of indictment for forgery, was approved in *Com. v. Kepper*, 114 Mass. 278.

2. Writing in court.

a. *On direct examination.*—The person whose writing is in dispute cannot write in court and offer the writing on his own behalf for the purpose of comparison with the disputed writing.¹

¹ *King v. Donahue*, 110 Mass. 155, 14 Am. Rep. 589 (reversible error to permit such volunteer writing for comparison by jury. But *dictum* that several signatures made prior to the controversy were properly

received, though not otherwise relevant. Otherwise of signature made on cross-examination, for purposes of contradiction). *S. P., Com. v. Allen*, 128 Mass. 46, 35 Am. Rep. 356, and *People v. DeKroyft*, 49 Hun, 71, 75, 1 N. Y. Supp. 692 (*dictum*); *United States v. Jones*, 20 Blatchf. 235, 10 Fed. 469 (held, no error to refuse to permit the jury to compare the disputed writing with the copy made for the purpose by the accused in their presence; for in the United States courts "the extent of the rule is to permit the jury to compare writings lawfully in evidence for some other purpose").

b. On cross-examination.—At the request of the adverse party, the person whose writing is in dispute may be permitted to write in court for the purposes of comparing; and writing so made may be received in evidence against him.¹

¹ *Bronner v. Loomis*, 14 Hun, 341 (holding that a signature so made at the request of the adverse party, or obtained on cross-examination of the witness, is admissible when offered by such adverse party for the purpose of comparison); *People v. DeKroft*, 49 Hun, 71, 1 N. Y. Supp. 692 (holding signature made in open court admissible at the instance of the adverse party, upon common-law principles, even though the statute [Parson's Practice Manual of New York, 1921, § 332, p. 141] may be broad enough in its provisions to make the evidence competent); *Bradford v. People*, 22 Colo. 157, 43 Pac. 1013 (where the question is discussed at some length, and many cases cited, and it is held that where a witness has denied writing a document which is alleged to be a forgery, or has denied his signature thereto, he may be required to write in open court in order that the jury may compare such writing with the writing disputed); *Chandler v. Le Barron*, 45 Me. 534 (holding it no error to receive, on the offer of plaintiff, a signature made in court by plaintiff, upon his cross-examination, and allow it to go to the jury for comparison; the court stating that by the rule in Maine it was not necessary that the standard be already in evidence). In *Gilbert v. Simpson*, 6 Daly, 29, it was held no error to refuse to compel a witness to sign in court for purpose of comparison,—the refusal being upon the ground that, even if compelled, the signature could not be compared by an expert; but since *Miles v. Loomis*, 75 N. Y. 288, 31 Am. Rep. 470, the law is otherwise.

So, such compulsory writing in court is proper where a juror asked the witness on cross-examination to write, and the opposite party offered the signature as a part of his cross-examination, against objection. *United States v. Mullaney* 32 Fed. 370 (a prosecution for unlawfully writing names in registration for election, holding that where the accused had testified that he did not write them, it was not error to compel him, on cross-examination, to write them in the presence of

the jury, and to allow the government to offer them in rebuttal, and the jury to compare them with the book. Such proceeding is legitimate cross-examination, and the accused cannot be allowed to say that he was thereby compelled to furnish evidence against himself). But see Criminal Trial Brief.

But in *First Nat. Bank v. Robert*, 41 Mich. 710, 3 N. W. 199, a request that a party write was excluded because it would be for comparison of an irrelevant document; and in *State v. Lurch*, 12 Or. 99, 6 Pac. 408, a prosecution for forgery, it was held reversible error to require accused on cross-examination to write his name for comparison, if he has not testified as to the matter of the signature in chief, for, in Oregon, cross-examination is strictly confined by the direct.

In *Smith v. King*, 62 Conn. 515, 26 Atl. 1059, a witness was asked to print his name for the purpose of comparison with the same name on a handkerchief claimed to be his. It appeared that at the time the name had so faded out that it was not legible enough for comparison; the witness himself had disclaimed ownership and all knowledge of the handkerchief, and it was not claimed that the name on the handkerchief was written or printed by him, or resembled his writing, or that he had seen it, or that in fact it could have been seen at the time of the trial. His refusal of the request was upheld by the court on the ground that there was no power to require it. On appeal the court held that while the trial court had power to require it to be done its action, in view of the fact that there appeared to be no reason for such an experiment, was correct.

Compare *Hayes v. Adams*, 2 Thomp. & C. 593 (holding it not error to permit the person whose signature is in question to write his name upon the referee's minutes, by consent, for the purpose of comparison by the referee), and *Spence v. Lindo* (N. Y.) 19 Alb. L. J. 179 (where it seems to have been held reversible error to allow a person whose hand-writing is in question to write in open court upon request of the court, although no objection was made by either party).

It is not error to refuse to compel a witness to rewrite, in the presence of the jury, indorsements which she testifies that she made at the request of the maker and payee of a note, the execution and genuineness of which are controverted, where the indorsements were made many years before the trial, when the witness was a young girl, and she has testified that her handwriting has changed and improved much since she made the indorsements. *Williams v. Riches*, 77 Wis. 569, 46 N. W. 817.

3. Concealing part of writing.

It is not competent, for the purpose of testing the ability of a party to recognize his own handwriting, to show him the signature or other inadequate part of a document the rest

of which is concealed, and require him to say whether it is his or not,¹ unless he has testified to his ability to recognize his handwriting at sight.²

¹It is not error to require defendant's attorney to exhibit the body of a paper to plaintiff on cross-examination before requiring him to state whether the signature thereto was his or not; for it is too severe a test to show him only the signature without the benefit of the context to enable him to identify it. *North American F. Ins. Co. v. Throop*, 22 Mich. 161, 7 Am. Rep. 638.

²It is discretionary and not error, where the party has denied his signature to the note sued upon, and has said on cross-examination: "I guess I can distinguish my signature whenever I see it." Here the party was required to identify signatures purporting to be his, but not in evidence and exhibited to him through a slit in an envelope which concealed the rest of the instrument. The justification of the ruling appears to be in the party's avowal of ability. *Hardy v. Norton*, 66 Barb. 527.

II. TESTIMONY OF NONEXPERT FROM KNOWLEDGE OF HANDWRITING.

4. Acquaintance with handwriting; general rule.

The genuineness or falsity of disputed handwriting may be proved by the testimony of a witness, though not an expert, who is acquainted with the handwriting of the person who is supposed to have written it.¹

¹*Rogers v. Ritter*, 12 Wall. 317, 20 L. ed. 417; *Redding v. Redding*, 69 Vt. 500, 38 Atl. 230; *Poncin v. Furth*, 15 Wash. 201, 46 Pac. 241; *Stone v. Moore*, — Tex. Civ. App. —, 48 S. W. 1097; *Long v. Little*, 119 Ill. 600, 8 N. E. 194; *Com. v. Nefus*, 135 Mass. 533; *Hammond v. Varian*, 54 N. Y. 398. See also cases in next succeeding sections.

5. Not secondary evidence.

The fact that the testimony of the person whose writing is in dispute is available, even when he is disinterested, does not render the testimony of others who are familiar with the handwriting secondary evidence.¹

¹*McCaskle v. Amarine*, 12 Ala. 17; *Royce v. Gazan*, 76 Ga. 79; *Smith v. Prescott*, 17 Me. 277; *McCully v. Malcolm*, 9 Humph. 193; *Foulkes v. Com.* 2 Rob. (Va.) 836. *Contra*: *Haun v. State*, 13 Tex. App. 383; *Cheritree v. Roggen*, 67 Barb 124.

Thus, in *Lefferts v. State*, 49 N. J. L. 26, 6 Atl. 521, it was held reversible error to exclude testimony of the accused that certain complaints were signed by the prosecutor in his presence, for the judge erred in ruling that the testimony of the prosecutor was the best evidence; and as the testimony of the prosecutor was hostile, the defendant had been prejudiced. The court says: "The testimony of the man who signed the documents, with respect to the genuineness of his signature, was not of a higher grade of evidence than the testimony of a man who had seen him make such signature, or who was acquainted with his writing and deposed as to his opinion."

But it is not error to admit testimony of a bank teller acquainted with the handwriting of the president and cashier, as to genuineness of bank notes, even against the objection that there was available the better evidence of the president and cashier who resided in an adjoining county. *Hess v. State*, 5 Ohio, 5, 22 Am. Dec. 767, 769. In this case the court said that "the objection that secondary evidence is substituted for the best does not apply in the case, since there is not such a distinction between one whose knowledge is of his own handwriting, and the knowledge of another's on the same subject, as constitutes the former evidence of a superior degree to the latter."

So, also, in *Com. v. Pratt*, 137 Mass. 98, it was held no error to allow the prosecution to prove the defendant's signature in their own way on a trial for forgery, even though the defendant on trial offered to testify.

6. Form of question.

While it is usual to begin the examination of the witness with the question "Have you seen the party write?" the question "Do you know his handwriting?" involves an answer to the former question, and is sufficient to show the competency of the witness.¹

¹ *Stoddard v. Hill*, 38 S. C. 385, 17 S. E. 138.

7. Competency of witness generally.

A witness, though not an expert, who states that he is acquainted with a person's handwriting, is *prima facie* competent to testify to the genuineness or falsity of an alleged specimen thereof.¹ And where he swears that he is so acquainted with such handwriting, the burden is on the opposite party to show that his sources of information are insufficient to qualify him to testify.²

But it is not error to reject his testimony, if on cross-examination or otherwise he is shown not to be competent to testify.³

¹ Hinchman v. Keener, 5 Colo. App. 300, 38 Pac. 611; Stoddard v. Hill, 38 S. C. 385, 17 S. E. 138; Pate v. People, 8 Ill. 644; State v. Minton, 116 Mo. 605, 22 S. W. 808, and cases cited.

See also cases in note in 63 L.R.A. 966.

But it is not indispensable that the witness state in so many words that he is so acquainted with the handwriting; it is enough if the fact does appear that he is. Riggs v. Powell, 142 Ill. 453, 32 N. E. 482.

In Davis v. Higgins, 91 N. C. 382, the court, quoting from Barwick v. Wood, 48 N. C. (3 Jones, L.) 306, says: "We think when a witness states that he is well acquainted with the handwriting, he is qualified to testify to it prima facie." It is held, also, that proof is not insufficient because the witness does not show how he acquired his knowledge of the handwriting. The latter point is also affirmed in Anderson v. Logan, 99 N. C. 474, 6 S. E. 704.

The mere fact that the witness has "had some business" with the party does not qualify him. Mapes v. Leal, 27 Tex. 345.

² Stone v. Moore, — Tex. Civ. App. —, 48 S. W. 1097, and cases cited.

³ Arthur v. Arthur, 38 Kan. 691, 17 Pac. 187; Guyette v. Bolton, 46 Vt. 228; Richardson Bros. v. Stringfellow, 100 Ala. 416, 14 So. 283.

So held where, although the witness on his direct examination showed himself qualified to speak, a doubt of his competency was raised by the cross-examination. Sartor v. Bolinger, 59 Tex. 411.

8. Means of knowledge.

a. Having seen write.—A witness, though not an expert, is competent to testify to handwriting, where he has seen the party write,¹ although only once,² and then only his name,³ or has seen only one specimen of his writing,⁴ and that only his name.⁵

¹ So held of a witness who states that he has seen the person write often, and knows his writing. Kendall v. Collier, 97 Ky. 446, 30 S. W. 1002; Jacob v. Watkins, 10 App. Div. 475, 42 N. Y. Supp. 6; Poucin v. Furth, 15 Wash. 201, 46 Pac. 241; Redding v. Redding, 69 Vt. 500, 38 Atl. 230; Salazar v. Taylor, 18 Colo. 538, 33 Pac. 369.

See also cases in note in 63 L.R.A. 968.

² Thus, of a witness whose only qualification was in having seen the signer write only on one or more occasions eight years before the trial; and his testimony, without other evidence on the point, was held sufficient to go to the jury. Magee v. Osborn, 32 N. Y. 669, reversing 1 Robt. 689.

So held, also, of a witness who has only seen the person write since the beginning of the trial. Tucker v. Hyatt, 144 Ind. 635, 41 N. E. 1047.

If the witness has seen a party write and sign a receipt, he is competent to testify as to the genuineness of letters alleged to have been written by the same person. *Frank v. Berry*, 128 Iowa, 223, 103 N. W. 358.

Nor is it error to admit the testimony of a witness who has once seen the writer sign his initials to a paper still in possession of the witness, and from the peculiar form of the letters he believes the disputed signature to be genuine. *Jackson ex dem. Van Dusen v. Van Dusen*, 5 Johns. 144, 4 Am. Dec. 330.

³ *Re Diggin*, 68 Vt. 198, 34 Atl. 696; *Hammond v. Varian*, 54 N. Y. 398, (*dictum* that it is no error to admit the testimony of a witness who has seen the person write his name once). To the same effect, *dicta* in *Stevens v. Seibold*, 5 N. Y. S. R. 258, 260, and in *Rogers v. Ritter*, 12 Wall. 317, 20 L. ed. 417.

⁴ *Re Diggin*, 68 Vt. 198, 34 Atl. 696; *Hynes v. McDermott*, 82 N. Y. 41-52, 37 Am. Rep. 538 (*dictum*, that it would be error to reject, as incompetent, the testimony of a witness who had seen only one genuine piece of the handwriting of the person whose handwriting is in dispute).

⁵ In *Clapp v. Betts*, 12 N. Y. Week. Dig. 341, the witness, as maker of promissory notes, had mailed them to the person whose indorsement was in question, and requested his indorsement. In due time they were returned with his name indorsed thereon, and witness thought that such indorsement was the signature of such person. It was held error to hold his testimony insufficient to go to the jury; and nonsuit was reversed.

b. Having seen genuine writing.—It is not necessary that a witness should have seen a party write to render him competent to testify to handwriting. He may testify from an acquaintance with the writing acquired from having seen papers which the party acknowledged or acquiesced in as being genuine.¹

¹ *Berg v. Peterson*, 49 Minn. 420, 52 N. W. 37; *State use of Medford v. Spence*, 2 Harr. (Del.) 348; *Woodman v. Dana*, 52 Me. 9; *State v. Hastings*, 53 N. H. 452; *Hynes v. McDermott*, 82 N. Y. 41, 37 Am. Rep. 538 (holding, however, that as to the witness in question his testimony was, for other reasons, properly rejected; and cases in note in 63 L.R.A. 963).

But one who states that he has "seen considerable" of the handwriting, and "thinks he is acquainted" with it, does not come within this rule. *Gibson v. Trowbridge Furniture Co.* 96 Ala. 357, 11 So. 365.

In *Sill v. Reese*, 47 Cal. 344, it was held that a witness whose knowledge

of another's handwriting is derived from familiarization therewith by examination of official archives and records, several hundred in number, purporting to be signed by the person whose handwriting is the subject of inquiry, is competent to give an opinion. To the same effect, see *Burdell v. Taylor*, 89 Cal. 613, 26 Pac. 1094; *Timmony v. Burns*, — Tex. Civ. App. —, 42 S. W. 133.

c. Only having seen communication received in usual course of business.—A witness, though not an expert, is competent to testify to handwriting, although his only knowledge of it is derived from having seen communications purporting to be from the alleged writer, which have been received and acted upon as such in the ordinary course of business.¹

¹ *Armstrong v. Fargo*, 8 Hun, 175 (holding that testimony of witness that he had seen a large number of receipts which had been signed by an agent of an express company, and from the knowledge thus derived he believed the signature to the receipt to be the agent's, although he had never seen him write, was sufficient proof); *Baker v. Squier*, 1 Hun, 448, 3 Thomp. & C. 465 (that thousands of chemists' certificates of quality of goods had been acted upon by the witness, and received as genuine in the trade, though no other evidence was adduced,—held, no error to admit, as sufficient to go to the jury on the question of genuineness); *Robinson Consol. Min. Co. v. Craig*, 25 N. Y. Week. Dig. 512, 4 N. Y. S. R. 478 (holding that it is not error to allow witness, not having seen the person write, to state that he knew his handwriting from having read his various communications to the company of which the witness was vice president, and which had been acted upon by the company as having come from him); *Stevens v. Seibold*, 5 N. Y. S. R. 258, 260 (*dictum*, that if a witness "has not seen the party write, he must have seen genuine specimens of his handwriting; and the fact that they were genuine must be proved. It is not enough that they purport to come from the person whose handwriting is in question. *Cunningham v. Hudson River Bank*, 21 Wend 557. The authenticity of the specimens may be established by presumptive, as well as direct, evidence; as, when letters are directed to a particular person on business, and answers are received in due course, a fair inference arises that the answers were written by the person from whom they purport to come.")

It is on this ground that clerks, cashiers, or other officers of banks at which a person has been accustomed to do business may be competent to testify to his handwriting, although they may never have seen him write. *Snell v. Bray*, 56 Wis. 156, 14 N. W. 14; *Murieta v. Wolfhagen*, 2 Car. & K. 744.

d. Having received letters.—So also is a witness competent whose knowledge has been acquired by seeing letters purporting to be in the handwriting of the party, and afterwards communicating personally with the supposed writer upon their contents, or otherwise acting upon them by written answers, producing further correspondence or acquiescence by the writer in some matter to which they relate; or by transacting with the writer some business to which they relate; or by any other mode of communication between the witness and the writer which in the usual course of transactions of life induces a reasonable presumption that the letters were in the supposed writer's handwriting.¹

¹ *Campbell v. Woodstock Iron Co.* 83 Ala. 351, 3 So. 369; *Atlantic Ins. Co. v. Manning*, 3 Colo. 224; *Southern Exp. Co. v. Thornton*, 41 Miss. 216; *Empire Mfg. Co. v. Stuart*, 46 Mich. 482, 9 N. W. 527; *Thomas v. State*, 103 Ind. 419, 2 N. E. 808; *Pearson v. McDaniel*, 62 Ga. 100; *Clark v. Freeman*, 25 Pa. 133; *Chaffee v. Taylor*, 3 Allen, 598; *Parker v. Amazon Ins. Co.* 34 Wis. 363; *Violet v. Rose*, 39 Neb. 660, 58 N. W. 216.

See also cases in notes in 63 L.R.A. 971, 981 and 7 L.R.A.(N.S.) 557. But the mere receipt of letters purporting to be from a person never seen, and with whom no subsequent relations existed which were based on them as genuine, does not qualify the recipient to prove the handwriting of the signer. *Pinkham v. Cockell*, 77 Mich. 265, 43 N. W. 921.

Nor does the mere receipt of friendly letters some fourteen years previously, purporting to come from a person. There must be some other admission or acquiescence equivalent to acknowledgment that the letters are genuine. *Flowers v. Fletcher*, 40 W. Va. 103, 20 S. E. 870.

See also cases cited under topic, **LETTERS**, *infra*.

e. Having seen ancient documents.—A witness, though not an expert, is competent to testify to handwriting so old that no witnesses can swear to having seen the parties write, if he has become familiar with their signatures by inspecting other ancient writings bearing such signatures, and which have been treated and regularly preserved as authentic.¹

¹ *Jackson ex dem. Bradt v. Brooks*, 8 Wend. 426, affirmed without opinion in 15 Wend. 111. The other ancient writings from which the witness

here derived his acquaintance were title deeds belonging to the witness. *Jones v. Huggins*, 12 N. C. (1 Dev. L.) 223, 17 Am. Dec. 567, to same effect in regard to ancient maps or plans of survey, where the witness's knowledge of the surveyor's handwriting was derived from inspecting many ancient plots of surveys attached to grants and purporting to have been made by such surveyor, and so treated. Case reversed on other grounds. See also *Stone v. Moore*, — Tex. Civ. App. —, 48 S. W. 1097 (where the rule is applied as to proof of handwriting of a person who had been dead thirty years or more). See also cases in notes in 63 L.R.A. 984, and 36 L.R.A. (N.S.) 162.

f. Having knowledge of handwriting from family correspondence.—Knowledge derived from family correspondence in which he had no part by a member of such family may be sufficient to qualify such member to testify as to the genuineness of such handwriting.¹

¹ *Johnston v. Rice*, 84 W. Va. 532, 7 A.L.R. 252, 100 S. E. 486; *Tuttle v. Rainey*, 98 N. C. 513, 4 S. E. 475; *Sweigart v. Richards*, 8 Pa. 436. *Contra*: *Murphy v. Murphy*, 146 Iowa, 255, 125 N. W. 191; *Carr v. Carr*, 138 Mich. 396, 101 N. W. 550.

For other cases see note in 7 A.L.R. 261.

9. Testimony competent, though not positive.

The testimony of a witness to handwriting is not incompetent merely because he testifies that he thinks it genuine, but will not swear positively.¹

¹ Thus, where a witness was familiar with his brothers' signature five years ago, but had not seen it in a few years, but thought he knew his signature, and that the one in question looked like it, and should judge it was his, and that was all he could swear, as it might be someone else's for all he knew, he was held competent to testify as to genuineness of the signature. *Stevens v. Seibold*, 5 N. Y. S. R. 258, But the case was reversed on other grounds.

Nor was it error to admit the testimony of a witness familiar with handwriting of defendant, that he "thought the signatures" were the defendant's although on cross-examination he could "not swear to the signatures," for this went to the weight, not to the competency, of the evidence. *Com. v. Andrews*, 143 Mass. 23, 8 N. E. 643.

Nor was it error to admit a paper as sufficiently proved to go to the jury where a witness (who had seen the alleged writer make two or three notes and sign his name to another) testified that he was "not

positive, but should judge it was" such person's handwriting. *State v. Stair*, 87 Mo. 268, 56 Am. Rep. 449, where the court said: "If the witness has the proper knowledge [of the handwriting] he may declare his belief."

See also cases in note in 63 L.R.A. 979.

10. Witness prepared out of court.

a. In general.—Knowledge derived by the witness, out of court and after the controversy arose, from examination of genuine writings or seeing the person write, the specimens being chosen or obtained in quest of evidence at the instance of the party calling the witness, does not qualify him to testify to the handwriting; and allowing him to do so upon knowledge obtained by such means is error.¹

¹ *Hynes v. McDermott*, 82 N. Y. 41, 53, 37 Am. Rep. 538 (*dictum*, that if genuine writings are made or chosen by the party calling the witness, so as to prepare him out of court, his testimony, based on the result of such inspection, cannot be received; holding it no error to exclude as incompetent a person employed as a detective to secure evidence from the opposite side, and obtaining his only knowledge of genuine handwriting out of court while thus acting; as such evidence is objectionable as being testimony created *post litem motam*. This decision was based on the law prior to Law 1880, chap. 36); *Reese v. Reese*, 90 Pa. 89, 35 Am. Rep. 634 (holding that a witness having no knowledge of a handwriting other than that derived from seeing the person write several times for the express purpose is incompetent to give an opinion thereof).

b. Refreshing memory.—A witness who shows himself acquainted with defendant's handwriting may, before or at the trial, refer to papers in his possession which he knows to be in defendant's handwriting, to refresh his memory, before testifying.¹

¹ *Thomas v. State*, 103 Ind. 419, 2 N. E. 808 (holding that it is not error to permit a witness to do so on direct examination). See § 14, b, this title, as to refreshing memory on cross-examination.

11. Lost disputed writing.

Where a disputed writing has been lost the testimony of a

nonexpert who has seen such writing is ordinarily excluded,¹ but one court has admitted such evidence.²

¹ Putnam v. Wadley, 40 Ill. 346; Gress Lumber Co. v. Georgia Pine Shingle Co. 120 Ga. 751, 48 S. E. 115.

² Cochran v. Stein, 118 Minn. 323, 41 L.R.A. (N.S.) 391, 136 N. W. 1037.

12. Privilege of professional relation.

The privilege of confidential communications does not render attorney or counsel incompetent to testify to his client's handwriting.¹

¹ Holthausen v. Pondir, 23 Jones & S. 73, 18 N. Y. S. R. 360; Brown v. Jewett, 120 Mass. 215 (held, no error to permit the plaintiff to call defendant's counsel and ask him if signatures on back of a promissory note were the defendants' sued as indorsees, where he had been their counsel for two years, and had seen them write their names four or five times. No opinion was delivered except a memorandum that the evidence was properly admitted; but the trial judge, in overruling the objection of privilege to the question, said that the witness was not required to disclose any matters of confidential communications, or to base his opinion upon any statements of the defendants to him as counsel).

This is on the ground that his knowledge is not necessarily derived from confidential communications. The principle is the same as the familiar rule that the fact of the relation of the attorney and client is not privileged. But knowledge of the handwriting of a communication between the attorney and client would be privileged if the communication was. In other words, the privilege does not exclude acquaintance with handwriting of a client though acquired after retainer, unless the questions to the attorney are pushed far enough to show that he knew nothing but what his client had communicated to him. Johnson v. Daverne, 19 Johns. 134, 10 Am. Dec. 198. (The testimony in this case as stated in the report is not quite clear on this point.)

The same principles doubtless apply to the privilege arising from other professional relations.

Parson's Practice Manual of New York, 1921, §§ 351-354, pp. 149, 150.

13. Testimony of interested witness or party to handwriting of deceased, etc.

The rule disqualifying a party or interested witness from testifying to a personal transaction or communication with the

deceased, etc.,¹ does not disqualify from testifying as to his own handwriting, on an instrument to which the deceased was a party,² nor as to that of the deceased,³ unless the testimony involves an incident of a personal transaction or communication to which the statute applies.⁴

¹ For this rule, see Abbott, Tr. Ev. (3d ed.) pp. 182 et seq.

² *Hussey v. Kirkman*, 95 N. Y. 63 (*dictum*; held, reversible error to exclude the alleged maker's denial of the signature to note after death of payee, who indorsed to plaintiff); *Evans v. Ellis*, 22 Hun, 460 (held reversible error to exclude the question: "Is that your signature?" No opinion reported).

³ *Simmons v. Havens*, 101 N. Y. 427, 433, 5 N. E. 73 (allowing grantee to testify that she had the deed in her possession, and that the signature was that of deceased. Objection overruled because it did not appear from whom she received the deed, nor did the testimony involve any personal transactions, etc.).

In *Stillwell v. Patton*, 108 Mo. 352, 18 S. W. 1075, a widow whose knowledge of her deceased husband's handwriting was founded on acquaintance therewith by having seen him write before their marriage is held competent to testify to his handwriting. And a statement by her on redirect examination: "Here is one just like it (producing a note); I have more in my possession,"—is no more than a further statement as to the means by which she acquired the information which enabled her to testify, and is not to be stricken out on motion.

⁴ Abbott, Tr. Ev. (3d ed.) p. 204.

Garvey v. Owens, 37 Hun, 498 (held, reversible error to allow the witness to testify to the genuineness of the signatures of himself and the deceased; here the testimony apparently implied an interview); *Howell v. Manwaring*, 3 N. Y. S. R. 454 (holding it not error to exclude questions as to whether witness saw the assignment by the deceased signed, and whose signature it was).

Compare *Saratoga County Bank v. Leach*, 37 Hun, 336, and *Evans v. Ellis*, 22 Hun, 460, in last note preceding.

14. Ordinary witness cannot make comparison.

Both under the statute as to comparison, and in the absence of statute, a witness not an expert is incompetent to express an opinion on a comparison of handwriting.¹

¹ *McKay v. Lasher*, 42 Hun, 270 (held, reversible error to allow it, under Laws 1880, chap. 36, now § 332 of Civil Practice Act, which does not change the law in this respect); *Mixer v. Bennett*, 70 Iowa, 329, 30

N. W. 587 (to same effect under Iowa Code); Spottiswood v. Weir, 80 Cal. 448, 22 Pac. 289; Mugge v. Adams, 76 Tex. 448, 13 S. E. 330; Jarvis v. Vanderford, 116 N. C. 147, 21 S. E. 302.

Contra: Bell v. Brewster, 44 Ohio St. 690, 10 N. E. 679 (*dictum*; citing Bragg v. Colwell, 19 Ohio St. 407; Pavey v. Pavey, 30 Ohio St. 600; Calkins v. State, 14 Ohio St. 222).

Compare Benedict, H. & Co. v. Flanigan, 18 S. C. 506, 44 Am. Rep. 583, where it is held no error to admit opinion of one not a professional expert where the direct proof was doubtful; Weaver v. Whilden, 33 S. C. 190, 11 S. E. 686, where it is held that witnesses who are not familiar with the handwriting of a person are not competent to testify as to his alleged signature to a written instrument from a comparison of handwriting.

And see note in 62 L.R.A. 869.

15. Testing knowledge.

a. In general.—To ascertain the knowledge of a witness as to handwriting, it is proper to ask him as to the general character and importance of the other writings he saw signed, though the contents may be irrelevant;¹ and any proper test may be allowed in the discretion of the court.²

¹ Bardin v. Stevenson, 75 N. Y. 164 (defense of forgery, to action on note; held, no error, because although details as to the contents would be incompetent, yet their general importance as imposing upon, or releasing a pecuniary obligation to, the signer "might well call more particular attention of the witness to them" than if unimportant, and thus be relevant to the witness's knowledge).

² Hinchman v. Keener, 5 Colo. App. 300, 38 Pac. 611. In Hardy v. Newton, 66 Barb. 527, an action upon a note, defendant had denied that the signature thereto was his, and upon cross-examination had said: "I guess I can distinguish my signature whenever I see it." It was held discretionary to permit him to be asked whether the signatures purporting to be his to seven different papers not in evidence were his, even though successively shown to him through a slit in a large envelope entirely concealing the rest of the paper; for the only object was to test his knowledge.

But see *contra*, cases cited in § 15, c, this topic, *infra*.

So, in Bank of Commonwealth v. Mudgett, 44 N. Y. 514, where a witness had testified that he knew the person's handwriting in dispute, and that the indorsement to the note sued on was genuine, it was held no error to ask him, on cross-examination: "In the course of your official duties (as assistant appraiser), are you called upon to pass and act upon the signature of the deputy collector" (defendant), and "how

many times a day?" for it was material to show the means and extent of the knowledge of the witness. But it was also held proper to exclude, on cross-examination of a witness who testified that it was his impression that the signature in dispute was genuine, the inquiry, "Would you take it against his denial of the signature?"—for this was mere speculation and vague relief.

b. Refreshing memory on cross-examination.—Independent of any rule allowing use of irrelevant papers as standards of comparison, confessedly genuine writing may be shown to a witness on cross-examination, to refresh his memory in order to have him correct his testimony in respect to the disputed writing.¹

¹ *National Bank v. Armstrong*, 66 Md. 113, 59 Am. Rep. 156, 6 Atl. 584 (held, reversible error to refuse to allow witnesses testifying that a signature was not genuine to be asked, on cross-examination, to refresh their memory by looking at a letter admitted to be genuine, but not relevant, and then state whether they still were of opinion that the disputed signature was not genuine, where they had testified that they were familiar with the defendant's handwriting, and that it was heavier and larger than the one in question. The court said that to have allowed this "would in no wise have infringed the rule, which is well settled in this state, against proof of handwriting by comparison of hands").

In *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 336, it is held that a nonexpert witness, who has testified in regard to the disputed signature of an attesting witness to a will, cannot be cross-examined in regard to the signature of such witness upon a cash book which he has in his possession, on the ground that he may look at such pages to refresh his memory.

c. Requiring to pick out genuine writing.—A witness cannot, on cross-examination, be required to pick out the genuine signatures from a number of specimens, in order to test his knowledge.¹

¹ *Massey v. Farmers' Nat. Bank*, 104 Ill. 327 (held, no error on cross-examination to exclude the question whether the witness could point out the genuine signatures, if any, among a list of sixteen written on a slip to test the knowledge of the witness, who had testified that he had seen the party write some years before, and that it was his impression that the signature to the note in question was genuine). But compare *AGE; IDENTITY*.

Fourth Nat. Bank v. McArthur, 168 N. C. 48, 84 S. E. 39, Ann. Cas. 1917B, 1054, where it was held improper to submit to non-expert witness on cross-examination genuine and imitated signatures with balance of papers covered over in order to test his knowledge. But see note in 28 Harvard L. Rev. 699.

16. Cross-examination for purposes of contradiction.

A witness to handwriting cannot be asked, on cross-examination, his opinion as to a document not relevant to the issue,¹ and not already received as a standard of comparison,² for the purpose of contradicting his answers.

¹ **Van Wyck v. McIntosh**, 14 N. Y. 439; **McDonald v. McDonald**, 142 Ind. 55, 41 N. E. 336, *dictum*; **Bank of Commonwealth v. Mudgett**, 44 N. Y. 514, 523; **United States v. Chamberlain**, 12 Blatchf. 390, Fed. Cas. No. 14,778; **Tyler v. Todd**, 36 Conn. 218 (citing **Bacon v. Williams**, 13 Gray, 525, to the same effect). In **Rose v. First Nat. Bank**, 91 Mo. 399, 60 Am. Rep. 258, 3 S. W. 876, the issue being whether a check was forged, the court, over objection, permitted to be presented to the bank cashier, upon cross-examination, two checks upon which were written the alleged forged name; and subsequently a witness in rebuttal testified that he had written the name at the trial. It was held reversible error, as the rule which excludes comparison with extrinsic papers and signatures is substantially the same in direct and cross-examination.

In **White Sewing Mach. Co. v. Gordon**, 124 Ind. 495, 24 N. E. 1053, it was held to be in the discretion of the court, where witnesses have been examined as to the genuineness of signatures, to refuse to allow them to be asked, on cross-examination, as to the genuineness of other signatures purporting to have been written by the same person. They were not papers in the case, and the signatures thereto had not been admitted or proved as genuine, and could not be used for purposes of comparison.

And in **Brown v. Tourtelotte**, 24 Colo. 204, 50 Pac. 195, an action upon a promissory note alleged to have been made by one deceased, where the defense was that the signature was forged, it was held inadmissible, upon cross-examination of a witness, to show a variance in her signature upon two receipts, which she testified she signed, for the purpose of drawing an inference therefrom that the handwriting of the alleged maker of the note varied, and that the witness might be mistaken in her evidence as to the identity of the signature to the note.

² This qualification is not always stated by the authorities. Where by statute all documents proved genuine are admissible for comparison the distinction becomes unimportant. **Timmons v. Gochenour**, 69 Ind. App.

295, 117 N. E. 279; Plymouth Sav. & Loan Asso. v. Kassing, — Ind. App. —, 125 N. E. 488.

III. TESTIMONY OF EXPERTS, WITH OR WITHOUT THE AID OF STANDARDS OF COMPARISON.

17. Expert defined.

An expert on handwriting is a person accustomed to and skilled in the matter of genuine and spurious handwriting.¹

¹ Griffin v. Working Women's Home Asso. 151 Ala. 597, 44 So. 605. See also Re O'Connor, 105 Neb. 88, 12 A.L.R. 199, 179 N. W. 401.

For full review of authorities as to competency of expert witness, see notes in 63 L.R.A. 937 and 63 L.R.A. 985.

18. Expert's direct opinion founded on comparison.

An expert although having no other knowledge of the handwriting in question than that derived in court from a comparison of the disputed writing with other documents conceded or proved to be genuine, not only may point out the characteristics and differences, but may give his opinion as to the genuineness or simulation of the handwriting from such comparison;¹ or whether two specimens were written at the same time,² or were written by the same person.³ An expert may properly testify as to whether a certain writing was traced,⁴ or whether signatures were facsimiles.⁵ And he may testify as to the age of an entire writing,⁶ or as to whether certain words in a writing were written at the time of examination or subsequently.⁷ It has been held to be no error to refuse to permit an expert in handwriting to testify, from an examination of a will and an erasure therein, that a person who wrote with a nervous hand was unable to make such an erasure, although the witness might properly testify that the hand of the person who wrote the will was nervous and unsteady.⁸ An expert, having testified that the writing in question was written by the defendant, and on cross-examination that there was an attempt in it at disguise, was properly asked on the redirect to the effect whether or not the general characteristics would be likely to exist in the disguised as in the undisguised hand.⁹ So it has been held that he may

testify whether in his opinion a handwriting is in the normal handwriting of a person,¹⁰ but that he might not say what the cause of an abnormal writing was, as he has no way of differentiating between different causes.¹¹

¹ In support of the rule as stated, see *Moon v. Crowder*, 72 Ala. 79; *Hanriot v. Sherwood*, 82 Va. 1; *Calkins v. State*, 14 Ohio St. 222; *Keyser v. Pickrell*, 4 App. D. C. 198; *Walker v. Steele*, 121 Ind. 436, 22 N. E. 142, 23 N. E. 271; *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 336; *Grand Island Bkg. Co. v. Shoemaker*, 31 Neb. 124, 47 N. W. 696; *Tunstall v. Cobb*, 109 N. C. 316, 14 S. E. 28; *Kornegay v. Kornegay*, 117 N. C. 242, 23 S. E. 257; *Durnell v. Sowden*, 5 Utah, 216, 14 Pac. 334; *Bridgman v. Corey*, 62 Vt. 1, 20 Atl. 273; *Archer v. United States*, 9 Okla. 569, 60 Pac. 268; *Miles v. Loomis*, 75 N. Y. 288, 31 Am. Rep. 470, affirming 10 Hun, 372. This decision in effect overrules many earlier decisions of the lower New York courts. *Sudlow v. Warshing*, 108 N. Y. 520, 15 N. E. 532. The restriction of this rule, as laid down in the first case cited, to comparison with documents already in evidence, has been superseded in New York and other states by statute; and in several other jurisdictions has not existed. See N. Y. Civil Prac. Act, § 332; *Parson's Practice Manual of New York*, 1921, p. 141. But that evidence of experts based on a letter improperly admitted as a standard of comparison because its execution is denied by the purported writer is inadmissible to establish the genuineness of a disputed signature, see *Cook v. First Nat. Bank*, — Tex. Civ. App. —, 33 S. W. 998. See, further, cases in note to *Dresler v. Hard*, 12 L.R.A. 456. In conflict with the rule as above stated, see *Tome v. Parkersburg Branch R. Co.* 39 Md. 36, 17 Am. Rep. 540; *Fee v. Taylor*, 83 Ky. 259 (holding it only allowable where the writing is so old that living witnesses cannot be had, but not old enough to prove itself). Compare *Williams v. Conger*, 125 U. S. 397, 31 L. ed. 778, 8 Sup. Ct. Rep. 933 (*dictum*, that "it is well settled that a witness who only knows a person's handwriting from seeing it in papers produced on the trial, and proved or admitted to be his, will not be allowed, from such knowledge, to testify to that person's handwriting, unless the witness be an expert, and the writing in question is of such antiquity that witnesses acquainted with the person's handwriting cannot be had"); *Richardson v. Green*, 61 Fed. 423 (holding expert testimony competent).

In South Carolina the competency of opinions of experts or other sufficiently qualified witnesses to state an opinion formed by comparison in court, is held to depend on whether the direct proof is doubtful or conflicting. *Graham v. Nesmith*, 24 S. C. 285; *Benedict, H. & Co. v. Flanigan*, 18 S. C. 506, 44 Am. Rep. 583.

In Pennsylvania the rule is stated to be that evidence touching the genuineness of a paper may be corroborated by a comparison to be made by a jury between that paper and other well-authenticated writings of the party; but that a mere expert witness cannot make the comparison, and testify to his conclusion from it. *Rockey's Estate*, 155 Pa. 453, 26 Atl. 656. See also *McKinney v. McCain*, 8 Sadler (Pa.) 286, 11 Atl. 111; *Travis v. Brown*, 43 Pa. 9, 82 Am. Dec. 540. But see *Whitmire v. Montgomery*, 165 Pa. 253, 30 Atl. 1016, where it is held that one who has never seen the defendant write, and is not acquainted with his handwriting or signature, may nevertheless testify as an expert to the genuineness of signatures submitted to him.

² *Tally v. Cross*, 124 Ala. 567, 26 So. 912.

³ *Goza v. Browning*, 96 Ga. 421, 23 S. E. 842; *Rogers v. Tyley*, 144 Ill. 652, 32 N. E. 393; *Kornegay v. Kornegay*, 117 N. C. 242, 23 S. E. 257.

And the testimony of an expert as to a disputed signature is not rendered inadmissible as based upon a writing not in the case, by the fact that, before taking the stand, he examined a writing not introduced, where he examined another writing which is in the case, and testified that the handwriting in both was the same, and that he based his opinion as to the signature in question upon "the writing." *Mallory v. Ohio Farmers' Ins. Co.* 90 Mich. 112, 51 N. W. 188.

⁴ *Dolan v. Meehan*, — Tex. Civ. App. —, 80 S. W. 99; *Martin v. Bank of Leesburg*, 137 Ga. 285, 73 S. E. 387.

⁵ *Stitzel v. Miller*, 250 Ill. 72, 34 L.R.A.(N.S.) 1004, 95 N. E. 53, Ann. Cas. 1912B, 412.

⁶ *Putnam, Aldrich & Putnam v. McCormick*, 159 Iowa, 702, L.R.A.1918B. 433, 140 N. W. 886, Ann. Cas. 1915D, 31.

For other cases and discussion of opinion evidence as to age of writing see note in L.R.A.1918B, 437.

⁷ *Lafrentz & K. Co. v. Cavanagh*, 166 Ill. App. 306; *State v. Smails*, 63 Wash. 172, 115 Pac. 82.

⁸ *Scott v. Thrall*, 77 Kan. 688, 17 L.R.A.(N.S.) 184, 127 Am. St. Rep. 449, 95 Pac. 563.

⁹ *McGarry v. Healey*, 78 Conn. 365, 62 Atl. 671.

¹⁰ *Colbert v. State*, 125 Wis. 423, 104 N. W. 61.

¹¹ *Colbert v. State*, *supra*.

19. Qualification of witness.

One who has for many years been engaged in a business requiring him to compare signatures to determine their genuineness is competent to testify as an expert, although he has not made special study of handwriting.¹

But evidence by the alleged maker of a note that he could

read and write, and would know his own signature, does not constitute proper foundation so as to permit him to testify as an expert that the signature to the note was not in his handwriting.²

¹ *Wheeler & W. Mfg. Co. v. Buckhout*, 60 N. J. L. 102, 36 Atl. 772. And according to *People v. Flechter*, 44 App. Div. 199, 60 N. Y. Supp. 777, bank tellers, bank officers, and other persons whose daily business and duties for several years have compelled them to scrutinize and examine writings, are qualified to speak as experts. See also *Christman v. Pearson*, 100 Iowa, 634, 69 N. W. 1055, holding that an attorney whose business for fifteen years has required him to examine different handwriting a great deal, and who has frequently made comparisons and discriminations between handwritings, is competent to testify as an expert whether the same persons wrote two different signatures shown to him, the genuineness of one of which is admitted.

A witness who testifies that he has been a register of deeds for two years, and a merchant for fifteen or twenty years, and has frequent occasion to examine and compare handwritings, and can tell by comparison whether two signatures were made by the same person or not, is competent to testify whether two signatures are in the same handwriting. *Kornegay v. Kornegay*, 117 N. C. 242, 23 S. E. 257. So held, also, in the case of a witness who testifies that he has been register of deeds for ten years, and engaged in mercantile business for forty years, and has been in the habit of comparing writings. And a witness who states that he has been in business as clerk and storekeeper for a long time; that he has been clerk of the court and sheriff, and has been frequently called upon to examine handwriting: and from his means of observation can form an opinion satisfactory to himself as to whether two pieces of writing are by the same person,—is held qualified to testify as an expert, in *Yates v. Yates*, 76 N. C. 142. But a bookkeeper who has seen many different kinds of handwriting, but has never knowingly seen a paper that was forged, and has no skill or experience in comparing forged with genuine handwriting, cannot be asked to compare an alleged forged signature with the genuine signature of the same person, to a paper not in evidence, offered for the purpose of comparison, and state whether the signature is genuine. *Curtis v. State*, 118 Ala. 125, 24 So. 111.

For notes on competency of expert witness to handwriting, see 63 L.R.A. 937 and 985.

² *Pillard v. Dunn*, 108 Mich. 301, 66 N. W. 45.

20. Expert's testimony to peculiar characteristics.

An expert may be asked to point out to the jury peculiarities

in and differences between different handwriting,¹ and give an opinion as to naturalness or simulation,² even in those jurisdictions where experts are not allowed to give an opinion as to genuineness based upon a comparison.³

¹ *Iron City Nat. Bank v. Peyton*, 15 Tex. Civ. App. 184, 39 S. W. 223; *Goodyear v. Vosburgh*, 63 Barb. 154 (*dictum*, in effect, that if a genuine document is properly in evidence for other purposes, an expert may point out the difference between the signature thereto and the signature in dispute, as to naturalness or simulation, color of ink, manner of formation, characteristics of letters, etc., and say that if one is genuine he would reject the other; but holding it reversible error to allow such comparisons to be made with the signature of a document introduced for that sole purpose; the statute [N. Y. Civil Prac. Act, § 332; Parson's Practice Manual of New York, 1921, p. 141] has now superseded the holding upon the latter point); *United States v. Chamberlain*, 12 Blatchf. 390, Fed. Cas. No. 14,778 (ruled on trial for depositing scurrilous postal cards in the mail, that an expert might point out to the jury features of defendant's handwriting already in evidence, identical with those displayed by the cards).

² In *Sudlow v. Warshing*, 108 N. Y. 520, 15 N. E. 532, in an action to recover possession of land, the plaintiffs denied the genuineness of the signatures to the deed under which defendants claimed; but testified that they bore a resemblance to their signatures and to those of the other grantors; and one of them testified that what purported to be his signature to the deed was a fair imitation. An expert for defendants was allowed, against objection, to testify that he found no evidence in the said signatures, that they were "simulated imitations instead of genuine signatures." Held, no error. And in *People v. Hewit*, 2 Park. Crim. Rep. 20, a trial for forgery, it was held no error to permit experts to give their opinion that the instrument alleged to be forged is not a simulated hand. So also in *Moody v. Rowell*, 17 Pick. 490, 28 Am. Dec. 317, it was held no error to permit an expert to give an opinion from a mere inspection of the disputed signature, as to "whether it is a free, natural, and genuine hand, or a stiff, artificial, and imitated one." See also last note above. But it is not competent for an expert to testify that a forger, in disguising and imitating handwritings, is more particular at the beginning than at the close, of the effort. *Miller v. Dill*, 149 Ind. 326, 49 N. E. 272.

³ *Travis v. Brown*, 43 Pa. 9, 82 Am. Dec. 540 (*dictum*, in effect, that experts may give their opinion as to whether a signature appears simu-

lated or natural, and may point out peculiarities thereof; but holding it reversible error for them to compare it with a genuine standard, this being the sole province of the jury in that state). See also *Re McWilliams*, 259 Pa. 526, 103 Atl. 365.

21. Expert cross-examination on differences.

An expert testifying against the genuineness of a signature may be required, on cross-examination, to point out what differences he can discover between such signature and a genuine signature used as a standard of comparison.¹

¹ In *Winnie v. Tousley*, 36 Hun, 190, where a witness had given his opinion that, from its general appearance and the formation of some of its letters, the disputed signature was not genuine,—held, reversible error to exclude, upon cross-examination, a question requiring him to describe what differences he could discover between certain letters in the disputed signature and the same letters in the genuine signature, in evidence as a standard of comparison; for, under the statute (N. Y. Civ. Prac. Act, § 332; *Parson's Practice Manual of New York* 1921, p. 141), both witness and the jury may make comparison, and the opposite party has a right to thus test the witness upon cross-examination. (It does not clearly appear from the report whether the witness was an expert or not.)

22. Cross-examination for purpose of contradiction.

The rule that cross-examination on an irrelevant document not already received as a standard of comparison is not allowable applies to an expert.¹

¹ *McArthur v. Citizens' Bank*, 139 C. C. A. 380, 223 Fed. 1004; *Rose v. First Nat. Bank*, 91 Mo. 399, 60 Am. Rep. 258, 3 S. W. 876. See also *People v. Murphy*, 44 N. Y. S. R. 7, 17 N. Y. Supp. 427, where it is held that expert witnesses, who, upon comparison of disputed writing with concededly genuine writing of defendant, have testified that that in dispute was written by him, and on cross-examination have given their opinion that other writings shown them were also in his handwriting, cannot be contradicted by evidence that the latter writings were in fact written by third persons.

And in *State v. Griswold*, 67 Conn. 290, 33 L.R.A. 227, 34 Atl. 1046, the question how many handwritings a witness found on pieces of paper which had not been in the case was excluded as raising a collateral issue on cross-examination of a witness to handwriting.

But in *Johnston Harvester Co. v. Miller*, 72 Mich. 265, 40 N. W. 420, it was held that where experts have testified from comparison as to the genuineness of signatures, a test of the value of their opinions by inquiring as to the genuineness of the signatures of another name by comparison of papers already in evidence is not improper.

And in *Browning v. Gosnell*, 91 Iowa, 448, 59 N. W. 340, a witness who testified as an expert to the genuineness of a signature was, for the purpose of testing the value of his evidence, asked to give his opinion as to the genuineness of signatures which were prepared for that purpose, and in the handwriting of any person. See to the same effect, *Hoag v. Wright*, 174 N. Y. 36, 63 L.R.A. 163, 66 N. E. 579.

See also other cases cited in § 15, c, this topic, *supra*.

IV. STANDARDS OF COMPARISON, WITH OR WITHOUT THE AID OF EXPERTS.

23. Document not already in the case as standard for comparison.

In the absence of statute, no document can be used as a standard of comparison, unless already in the case for another purpose.¹

¹ Although in some jurisdictions the contrary rule prevails (see § 26, this title), this is according to the weight of authority. *Williams v. Conger*, 125 U. S. 413, 31 L. ed. 786, 8 Sup. Ct. Rep. 933 (*dictum*); *Rogers v. Tyley*, 144 Ill. 652, 32 N. E. 393; *Moon v. Crowder*, 72 Ala. 79; *Miller v. Jones*, 32 Ark. 337; *People v. Parker*, 67 Mich. 222, 34 N. W. 720 (reversible error to use others); *Weidman v. Symes*, 116 Mich. 619, 74 N. W. 1008; *State v. Clinton*, 67 Mo. 380, 29 Am. Rep. 506 (reversible error to allow experts to give their opinion based upon a comparison with others); *Rose v. First Nat. Bank*, 91 Mo. 399, 60 Am. Rep. 258, 3 S. W. 876 (reversible error to permit witness to be cross-examined as to genuineness of signatures to papers not already in evidence for other purposes, and to contradict his answers thereto, for the rule which excludes extrinsic papers and signatures for purposes of comparison applies also in cross-examination); *State v. Miller*, 47 Wis. 530, 3 N. W. 31 (reversible error to admit a letter not already in the case; for standard of comparison must be clearly proved to be genuine, and already in the case for some other purpose. So held, even where the offered letter had been written by defendant at request of the police, who dictated the exact language of an original letter in dispute, and alleged to contain his threat to commit the

crime of which he was charged, and where the copy so made contained a facsimile of words of peculiar form, style, and orthography in the original letter); *Keyser v. Pickrell*, 4 App. D. C. 198 (reversible error to use others, although they had been used without objection on cross-examination); *White Sewing Mach. Co. v. Gordon*, 124 Ind. 495, 24 N. E. 1053; *Territory v. O'Hare*, 1 N. D. 30, 44 N. W. 1003; *Jarvis v. Vanderford*, 116 N. C. 147, 21 S. E. 302; *State v. Koontz*, 31 W. Va. 127, 5 S. E. 328; *Cook v. First Nat. Bank*, — Tex. Civ. App. —, 33 S. W. 998.

Compare *United States v. Chamberlain*, 12 Blatchf. 390, Fed. Cas. No. 14,778; *United States v. Jones*, 10 Fed. 469 (held, no error to refuse to permit an expert, not familiar with the handwriting of the accused, to compare the disputed handwriting with writing made in court by the accused, and give an opinion as to genuineness of the disputed writing, as the writing made in court was not in evidence for other purposes, and under the circumstances might not be regarded as the usual handwriting of the accused).

But that it is proper for either witness or jury to use as standard papers which constitute part of the record, and are undisputed, see *Wilber v. Eicholtz*, 5 Colo. 240; *McCafferty v. Heritage*, 5 Houst. (Del.) 220; *Stokes v. United States*, 157 U. S. 187, 39 L. ed. 667, 15 Sup. Ct. Rep. 617; *Swales v. Grubbs*, 126 Ind. 106, 25 N. E. 877.

24. What is considered as in evidence.

A paper which was put in evidence by the adverse party,¹ or which, on being offered generally against him, was received without objection on his part,² must be deemed proper in evidence for the purpose of using it as a standard of comparison, although it is irrelevant and should have been excluded if objected to.

¹ *Smyth v. Caswell*, 67 Tex. 567, 4 S. W. 848.

² *Miles v. Loomis*, 75 N. Y. 288, 292, 31 Am. Rep. 470, affirming 10 Hun. 372. s. p., *Hanley v. Gandy*, 28 Tex. 213, 91 Am. Dec. 315.

25. Use of papers in the record.

The signature of a party to an affidavit, pleading,¹ or other proceeding, used by him in the cause, may be used as a standard of comparison against him, but is not evidence for that purpose in his favor.²

¹ *Medway v. United States*, 6 Ct. Cl. 421 (a strong case; ruled, that the court of claims, like the jury, could compare a disputed signature with the genuine signature of the claimant to the petition in suit, where such comparison resulted adversely for the claimant).

² *Springer v. Hall*, 83 Mo. 693, 53 Am. Rep. 598 (held, reversible error to permit an expert and the jury to compare the signature disputed by defendant with the genuine signature of the defendant to his answer at the instance of the defendant, because this would encourage the manufacture of evidence for the occasion).

Contra: *Thomas v. State*, 103 Ind. 419, 2 N. E. 808 (held, no error for an expert to compare a disputed letter with a genuine affidavit of defendant made for a change of venue in the case, and to give an opinion as to the genuineness of such letter, in defendant's behalf).

26. Use of irrelevant documents as standards.

a. In general.—In some jurisdictions without statute,¹ and in others by express statute,² any writing proved to the satisfaction of the court,³ or admitted to be genuine, may be used as a standard of comparison; the opinion of experts may be taken on the comparison; and the standards may be submitted for inspection and comparison by the jury.

¹ *Tyler v. Todd*, 36 Conn. 218; *Burdick v. Hunt*, 43 Ind. 381; *Macomber v. Scott*, 10 Kan. 335; *Com. v. Andrews*, 143 Mass. 23, 8 N. E. 643; *State v. Thompson*, 80 Me. 194, 13 Atl. 892; *Morrison v. Porter*, 35 Minn. 425, 59 Am. Rep. 331, 29 N. W. 54; *Wilson v. Beauchamp*, 50 Miss. 24; *Yeomans v. Petty*, 40 N. J. Eq. 495, 4 Atl. 631; *State v. Hastings*, 53 N. H. 452, 461 (*dictum*); *Bell v. Brewster*, 44 Ohio St. 690, 10 N. E. 679; *Travis v. Brown*, 43 Pa. 9, 82 Am. Dec. 540, *dictum* (but in Pennsylvania the opinions of experts are not received. See § 17 note 1, this title); *Smyth v. Caswell*, 67 Tex. 567, 4 S. W. 848; *Kennedy v. Upshaw*, 64 Tex. 411; *Durnell v. Sowden*, 5 Utah, 216, 14 Pac. 334; *Adams v. Field*, 21 Vt. 256; *Rowell v. Fuller*, 59 Vt. 688, 10 Atl. 853; *Bridgman v. Corey*, 62 Vt. 1, 20 Atl. 273; *Moore v. Palmer*, 14 Wash. 134, 44 Pac. 142; *Com. v. Segee*, 218 Mass. 501, 106 N. E. 173.

In Alabama experts accustomed to, and skilled in, the matter of handwriting are competent to institute comparisons between writings of unquestioned genuineness and a writing the genuineness of which is disputed. But it is improper to submit to the inspection of the jury a letter which a witness denies having written, and the signature of such witness thereupon written by him in the presence of the court, for comparison. *Griffin v. State*, 90 Ala. 596, 8 So. 670,

The rule that writings to be used as a basis for comparison must be admitted to be genuine by the person against whom they are sought to be used, or at least clearly proved to be so, applies as well to writings used on cross-examination as on direct. *Gaunt v. Harkness*, 53 Kan. 405, 36 Pac. 739.

Contra: *Texas State Bank v. Scott*, — Tex. —, 225 S. W. 571.

For notes reviewing conflicting authorities, see 62 L.R.A. 866, and 18 L.R.A.(N.S.) 520. See also *Plymouth Sav. & L. Asso. v. Kassing*, — Ind. App. —, 125 N. E. 488, and cases and text books there cited.

* *United States*: *Short v. United States*, 137 C. C. A. 104, 221 Fed. 248; *Maxey v. United States*, 125 C. C. A. 77, 207 Fed. 327.

State Statutes: *Turnure v. Breitung*, 195 App. Div. 200, 186 N. Y. Supp. 620; *Mutual L. Ins. Co. v. Suiter*, 131 N. Y. 557, 29 N. E. 822 (N. Y. Laws 1880, chap. 36, as amended by Laws 1888, chap. 555. [See N. Y. Civil Prac. Act, § 332; *Parson's Practice Manual of New York*, 1921, p. 141; *Re Smart*, 84 Misc. 336, 145 N. Y. Supp. 839, where other documents were admitted to compare with party's subscription. See also note to *Boyd v. Gosser*, 6 A.L.R. 500 and notes, p. 507, for discussion of authorities relating to this New York statute]); *Waggoner v. Clark*, 293 Ill. 256, 127 N. E. 436; *Plymouth Sav. & L. Asso. v. Kassing*, — Ind. App. —, 125 N. E. 488.

Compiled Code of Iowa, 1919, § 7327, p. 2120; *State v. Calkins*, 73 Iowa, 128, 34 N. W. 777; *People v. Bibby*, 91 Cal. 470, 27 Pac. 781; *St. Louis Nat. Bank v. Hoffman*, 74 Mo. App. 203; *Baxter v. Hamilton*, 20 Mont. 327, 51 Pac. 265; *First Nat. Bank v. Carson*, 48 Neb. 763, 67 N. W. 779; *Osmun v. Winters*, 30 Or. 177, 46 Pac. 780; *Munkers v. Farmers' & M. Ins. Co.* 30 Or. 211, 46 Pac. 850; *Powers v. McKenzie*, 90 Tenn. 167, 16 S. W. 559.

In *Kentucky and Georgia* there is such a statute (*Carroll's Ky. Stats.* 1922, § 1649, p. 735; Act May 17, 1886; *Park's Ann. Code of Ga.* 1914, § 5836, vol. 5, p. 3948). But it is further provided therein that the party proposing to use the papers as standards must give notice before trial, or before announcing ready for trial, of such intention, and give reasonable opportunity to examine them. *Bogard v. Johnstone*, 21 Ky. L. Rep. 965, 53 S. W. 651; *Kelly v. Keese*, 102 Ga. 700, 29 S. E. 591. And this notice was held necessary in *Axson v. Belt*, 103 Ga. 578, 30 S. E. 262, in the case of a plea filed by the party in another case, proposed to be used as standard.

* In *New Hampshire*, however, the jury are to pass upon the standard of comparison. *State v. Hastings*, 53 N. H. 452, 461 (*dictum*, that papers for mere purpose of comparison with a disputed handwriting may be put in evidence; and it is for the jury first to determine the genuineness of such papers from the evidence. whether on admission of genuineness or opinion of one acquainted with the handwriting;

and they are to determine whether the disputed writing is genuine, from all the evidence including that of experts making comparisons in court, and also from a comparison made by the jury themselves. Judgment reversed because incompetent evidence had been admitted to prove genuineness of the standard).

b. Writing of third person.—This rule is not extended by implication to the writings of a third person to whom the party contesting the genuineness of the writing in question imputes it.¹ But in New York a statute extends the rule to such cases.²

¹ *Peck v. Callaghan*, 95 N. Y. 73 (held, no error to exclude specimens of handwriting of the person alleged to have forged the signature of a contested will, because no documents other than those in the handwriting of the person whose signature the one in question purports to be could then be put in evidence, under N. Y. Civil Prac. Act, § 332; *Parson's Practice Manual of New York*, 1921, p. 141, authorizing a comparison by witnesses "of a disputed writing with any writing proved to the satisfaction of the court to be genuine"). *Contra*: *Koons v. State*, 36 Ohio St. 195. (Here an expert was permitted to give an opinion in behalf of the prosecution as to whether the alleged forged check and the confessedly genuine signature of the accused on trial for forgery were in the same handwriting. That such comparison is proper seems to have been assumed without discussing the point; but the judgment was reversed on other grounds.)

In Tennessee a statute provides that in all the courts of that state comparisons of disputed writing or signatures with any writing or signatures proved to the satisfaction of the judge to be genuine, shall be permitted to be made by expert witnesses, and such writings or signatures, and the evidence of expert witnesses respecting the same, shall be submitted to the court or jury as evidence of the genuineness or otherwise of the writing or signature in dispute. But this does not authorize comparisons with writings introduced for that purpose as the genuine writing of any person other than the reputed writer of the disputed paper. *Franklin v. Franklin*, 90 Tenn. 44, 16 S. W. 557. See *Thompson's Shannon's Code of Tenn.* 1918 ed. § 5560, p. 2249.

² N. Y. Laws 1888, chap. 555, p. 912. N. Y. Civil Prac. Act, § 332; *Parson's Practice Manual of New York*, 1921, p. 141.

27. What law controls.

A state statute as to competency of evidence is not binding on

the Federal Courts where it conflicts with a United States statute,¹ but in the absence of such conflict the state statute as to comparison of handwriting has been followed by the Supreme Court of the United States.² In 1913 Congress passed the general comparison statute so since then the question of construction of state statutes in the Federal courts has become unimportant.³

¹ In *Whitford v. Clark County*, 119 U. S. 522, 525, 30 L. ed. 500, 501, 7 Sup. Ct. Rep. 306, the court says: "When the statutes of the United States make special provisions as to the competency or admissibility of testimony, they must be followed in the courts of the United States, and not the laws or the practice of the state in which the court is held, when they are different,"—citing cases.

² In *Holmes v. Goldsmith*, 147 U. S. 150, 37 L. ed. 118, 13 Sup. Ct. Rep. 288, a case on error to the circuit court of the United States for the district of Oregon, it was held that the question whether evidence respecting handwriting may be given by a comparison, made by a skilled witness or by the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered, was governed by an Oregon statute. See also *Richardson v. Green*, 61 Fed. 423.

United States v. Jones, 10 Fed. 469 (held, that "the statute of the state of New York, permitting a comparison of writings for the purpose of determining handwriting, has no effect upon criminal proceedings in the courts of the United States." So, held, no error to exclude writing made in court for the purpose of comparison with disputed writing).

³ U. S. Comp. Stat. 1913, § 1471; *Short v. United States*, 137 C. C. A. 104, 221 Fed. 248; *Maxey v. United States*, 125 C. C. A. 77, 207 Fed. 327.

28. Disputed writing and standard to be produced before comparison.

The production of the original writing which is disputed is essential before the opinions of experts can be received.¹ The production of the standard is equally essential.² Neither a letter-press copy,³ nor a photograph,⁴ is available as a substitute for comparison.

(The rule is thus stated in deference to the authorities below stated, but it needs qualification.

There is an important difference of principle, not noticed in the authorities, between allowing counsel to use for comparison a substitute for the disputed writing, such as a photograph or letter-press copy, and allowing him to use a similar substitute for an irrelevant standard. The admission of secondary evidence of the disputed writing rests upon a good excuse for not producing the original. There can hardly be a good excuse for producing imitated instead of original standards, especially as relevancy is not required. And a party who is obliged to submit to having the disputed writing proved by an imitation, without producing the original, ought not thereby to be further deprived of the right to give genuine and original standards of comparison in evidence. In my opinion the true general rule is that he who relies on a facsimile of the original cannot object to comparison with genuine standards. But that he who wishes to disprove an alleged original cannot do so with facsimile standards.

The authorities are below.)

¹ *Spottiswood v. Weir*, 66 Cal. 525, 6 Pac. 381 (held, reversible error to allow an expert to give an opinion upon the genuineness of a disputed writing by comparing a letter-press copy thereof with specimens admitted to be genuine. The court said: "This was not permissible under any rule with which we are acquainted. It is essential that the document whose genuineness is sought to be proved should itself be produced. When the disputed writing is produced, evidence resulting from a comparison of it with other proved or admitted writings is not regarded as evidence of the most satisfactory character, and by some courts is entirely excluded").

Contra: *Koons v. State*, 36 Ohio St. 195. (Here an expert had seen the alleged forged check several months before the trial of defendant for the forgery; but the prosecution after efforts to do so, were unable to produce the check at the trial. Held, that its presence was not indispensable to the competency of the expert in behalf of the prosecution, to state whether the check, in his opinion, was in the same handwriting with a genuine signature of the accused shown to the expert at the trial. But judgment was reversed on other grounds.)

² *Hynes v. McDermott*, 82 N. Y. 41, 49, 37 Am. Rep. 538 (held no error to refuse to allow an expert to give an opinion of the genuineness of a disputed writing by comparison merely with a photographic copy of an admittedly genuine writing, where the original standard was not produced. The court said: "An expert in handwriting, when speaking as a witness only from a comparison of handwriting, that is, with two pieces of it in juxtaposition under his eye, should have before him in court the writing to which he testifies, and the writings from which he testifies; else there can be no intelligent examination of him, either in chief or cross; nor can there be fair means of meeting his testimony by that of other witnesses." And as the correctness of the photograph was not testified to, the court held it was

proper to exclude such comparison. *Tyler v. Todd*, 36 Conn. 218 (*dictum*, that it is error to allow an expert to give an opinion as to genuineness of handwriting, based upon a comparison, out of court, of signatures not before the court).

3 *Com. v. Eastman*, 1 Cush. 189, 217, 48 Am. Dec. 596 (held, reversible error to permit an expert to give an opinion as to genuineness of a disputed writing based upon a comparison with letter-press copies of original letters as a standard of comparison. The court said. "Nothing but original signatures can be used as standards of comparison, by which to prove other signatures to be genuine").

4 *Hynes v. McDermott*, 82 N. Y. 41, 49, 37 Am. Rep. 538 (where, however, stress was laid on the fact that there was no proof of the accuracy of the photographs).

Whether an accurate photograph proved to be accurate, can be received, is perhaps another question.

In *Tome v. Parkersburg Branch R. Co.* 39 Md. 36, 17 Am. Rep. 540, it was held reversible error to allow an expert in handwriting (and photographer by profession) to produce in evidence photographic copies (both exact in size, and also magnified) of the disputed signature, and also of confessedly genuine signatures already in evidence for other purposes, and to give an opinion as to genuineness from comparison of such photographic copies; for under the rule for proving handwriting in Maryland there can be no comparison of originals, much less of photographic copies.

For the rule that refusal to produce the original raises a presumption against the paper, see *Sharon v. Hill*, 26 Fed. 337. Mr. Stewart's argument in this case, with facsimile and magnified reproductions, has been printed. San Fran. 106 pp.

29. Genuineness of standards, a question for the court.

The genuineness of standards of comparison is a preliminary question for the court to determine.¹

1 *Hall v. Van Vrankeen*, 28 Hun, 403 (where the court said: "The sufficiency of the proof which shall show that a paper is genuine so that it may be used for comparison must be also left to the trial judge," but "possibly to admit a paper without any evidence of its genuineness might be error"); *State v. Thompson*, 80 Me. 194, 13 Atl. 892 (holding that his decision is final and conclusive, if there is any proper evidence to support it, unless clearly based on erroneous views of legal principles. Hence, held no error to admit an irrelevant standard for the sole purpose of comparison by experts, where two witnesses claiming to have seen the person write, and to be acquainted with his writing, testified that the standard offered was in his handwriting); *Com. v. Coe*, 115 Mass. 504; *Costelo v. Crowell*, 139 Mass.

590, 2 N. E. 698 (where the court said it was for the judge to determine "whether it is shown by clear testimony that it [standard] is the genuine handwriting of the party sought to be charged. Unless his finding is founded upon error of law, or upon evidence which is, as matter of law, insufficient to justify the finding, this court will not revise it"); Rowell v. Fuller, 59 Vt. 688, 10 Atl. 853 (holding it reversible error for the judge to leave the question of genuineness of standards to the jury, as this is a preliminary question for the court upon the same rules of evidence as to any issue in the case—citing and disapproving the doctrine laid down in State v. Ward, 39 Vt. 225, as a *dictum* not essential to the decision. The court in that case said the question of genuineness of standards is a preliminary one for the court, but in criminal cases the jury must also determine whether the standards of comparison are proved to be genuine beyond a reasonable doubt, before making comparisons with the disputed writings themselves; but held, that it was no error for experts to make the comparison before the papers were given to the jury to compare). In Greenebaum v. Bornhofen, 167 Ill. 640, 47 N. E. 857, it is held that the court, in determining the issue as to the genuineness of a signature in a trial without a jury, should compare the signature in question with the admitted genuine signatures to other papers in evidence, although such papers were not expressly introduced for the purpose of comparison.

Contra: State v. Hastings, 53 N. H. 452 (*dictum*, that the jury are first to determine from the evidence whether such specimens are genuine).

30. Requisite authentication of standards of comparison.

Although under the statute the judge may, on the question of the genuineness of a proposed standard of comparison, hear evidence of any kind that might be received as to a writing actually in issue, and the decision is in his discretion, yet, in general, sound discretion will not admit a standard unless there is direct evidence in its favor (such as evidence of acknowledgment, or admission or knowledge of handwriting, as distinguished from comparison, and from opinions of experts founded on comparison), or unless the indirect evidence relied on is so clear that were it a question for the jury he could properly direct their finding on it.¹

¹This I understand to be the result of the authorities and the statute. Independent of the statute, the better opinion is that the discretion of the court should be exercised to require clear proof, and to refuse to try the collateral question on indirect or conjectural evidence. Under the statute such evidence is doubtless competent; but should rarely

be alone satisfactory. The statute was intended to adopt the judicial rule in force in other jurisdictions allowing use of standards; but what ought to satisfy the judge under the statute is dependent on the same considerations as at common law.

The following cases illustrate the principle laid down in the text:

United States courts.—United States v. McMillan, 29 Fed. 247 (ruling that an expert should not compare disputed signatures with letters not belonging to the witness, nor in his custody, nor parts of the record, nor admitted to be genuine, and as to which the witness only swore to his belief of genuineness).

Alabama.—White v. Tolliver, 110 Ala. 300, 20 So. 97 (to effect that testimony that witness has never seen the person write his name, and cannot say that he is acquainted with his handwriting; that the signature to a letter and the handwriting in the body of it are like other writing he has seen purporting to be the signature of that person,—is insufficient as preliminary proof of handwriting).

California.—Marshall v. Hancock, 80 Cal. 82, 22 Pac. 61 (holding that proof that a certain person, deceased, whose handwriting it is proposed to prove, was a justice of the peace, and that signatures to a docket were made by him, is sufficient to authorize admission of the docket for the sake of comparison of the handwriting of the signatures with that proposed to be proved).

District of Columbia.—Keyser v. Pickrell, 4 App. D. C. 198 (holding that one seeking to hold an executor liable on an indorsement of a note by his testator, the genuineness of which is disputed, who also exhibits in evidence certain letters and a will as having been written by testator, thereby admits the genuineness of the signatures thereto, and is precluded from objecting to their use for the purpose of comparison of handwriting, on the ground that they are not in evidence in support of, or relevant to, any issue in the case).

Georgia.—McVicker v. Conkle, 96 Ga. 584, 24 S. E. 239 (holding that the signature of a deceased person to an affidavit cannot be used on proof merely of the handwriting of the officer who attested the affidavit, where the statute imperatively requires that the genuineness of the instrument must be established before it can be used); Goza v. Browning, 96 Ga. 421, 23 S. E. 842 (that the genuineness of the signature of the grantor to a deed is sufficiently shown by evidence that such deed was thirty years old, and that the grantor surrendered possession thereunder to the purported grantee, who has remained in possession); Travelers' Ins. Co. v. Sheppard, 85 Ga. 751, 12 S. E. 18 (that it is not a valid objection to a document that a part of it was concealed from the witness, and torn off before the part shown was put in evidence).

Indiana.—In Indiana it seemed that the standard must be admitted to be genuine. Chance v. Indianapolis & W. Gravel Road Co. 32 Ind. 472, 474 (*dictum*, that "comparison by experts must be confined to other

writings admitted to be genuine. No collateral issue will be permitted. If there is any dispute as to their authenticity, the comparison will not be permitted"); *Burdick v. Hunt*, 43 Ind. 381.

Iowa.—*Winch v. Norman*, 65 Iowa, 286, 21 N. W. 511 (holding it reversible error to allow a document to go to the jury as a standard, where the only proof of its genuineness consists in comparison by experts with some other writing admitted to be genuine. The court says: "It appears to us that the genuineness of the writing made the basis of comparison, called sometimes the standard writing, should be proved by direct or positive evidence;" and approves of the statement in an early Iowa case, that such proof should be by the testimony of a witness who saw it written, or by the person's admission when offered by himself, or by some other positive proof); *Sankey v. Cook*, 82 Iowa, 125, 47 N. W. 1077 (to the effect that an opinion that handwriting is genuine, based on the witness's knowledge, does not make it admissible for comparison, under Iowa Code, § 3655, which provides that "evidence respecting handwriting may be given by comparison . . . with writings of the same person which are proved to be genuine").

Maine.—*State v. Thompson*, 80 Me. 194, 13 Atl. 892, quotes with apparent approval the language of the court in *State v. Hastings*, 53 N. H. 461, and *Rowell v. Fuller*, 59 Vt. 688, 10 Atl. 853, to the effect that, although great care should be taken that the standard be genuine, yet any competent evidence tending to prove that the paper is genuine is to be received, whether the evidence be in the nature of an admission, or the opinion of a witness who knows his handwriting, or of any other kind whatever. Hence, held, sufficient proof of a standard, where two witnesses claiming to have seen the person write, and to be acquainted with his handwriting, testified that the offered standard was in his handwriting.

Massachusetts.—*Moody v. Rowell*, 17 Pick. 490, 28 Am. Dec. 317 (*dictum*, that proof of genuineness of a standard "must be direct, to the fact of its having been actually written by the party, by one who saw him write it"); *Com. v. Eastman*, 1 Cush. 189, 217, 48 Am. Dec. 596 (*dictum*, that a paper proposed as a standard cannot be "proved to be an original and a genuine signature merely by the opinion of a witness that it is so; such opinion being derived solely from his general knowledge of the handwriting of the person whose signature it purports to be." "The handwriting used as a standard must first be established by clear and undoubted proof, that is, either by direct evidence of the signature or by some equivalent evidence"—citing *Moody v. Rowell*, 17 Pick. 490, 28 Am. Dec. 317; *Bacon v. Williams*, 13 Gray, 525, 527); *Martin v. Maguire*, 7 Gray, 177 (holding it not error to exclude a mortgage as a standard where the only proof offered of the genuineness of the grantor's signature was proof of the handwriting of an absconding subscribing witness; for a standard

"must be unquestionably a genuine paper, and that must be shown beyond a doubt"). But the two following cases relax somewhat the rule of these earlier Massachusetts cases: *Costelo v. Crowell*, 139 Mass. 590, 2 N. E. 698 (where it is held error to admit certain deeds and a discharge of a mortgage as standards, where an attesting witness testified that the body of the documents was in his handwriting as attorney for the signer, and that, although he did not remember seeing the documents signed, yet he knew he either saw them signed, or that the signer acknowledged the signature to be his, before the witness attested them. The court was of the opinion that, under the Massachusetts rule, the evidence "was sufficient to prove the genuineness of the signatures of the defendant which were offered as standards"); *Com. v. Coe*, 115 Mass. 504 (where it is held no error to admit the body of a promissory note as a standard, where the signature was admitted to be genuine, and a witness for the prosecution testified [and it was admitted] that the note was delivered by the defendant to the witness, but there was nothing directly to show that the body of the note was genuine except the inference of fact drawn by the judge from the failure of the defense to offer any evidence in denial that the entire note was in the defendant's handwriting, when within the knowledge and power of the defendant to thus deny, if the body of the note was not genuine).

New York.—*McKay v. Lasher*, 50 Hun, 383, 3 N. Y. Supp. 352 (holding it no error to prove standards by persons familiar with the handwriting; and that proof of their genuineness need not be an admission, nor by the direct evidence of one who saw the offered standards written; for, as there is nothing in the New York statute [N. Y. Civil Prac. Act, § 332; *Parson's Practice Manual of New York*, 1921, p. 141] specifying the mode of proving them, they may be proved in the same manner as before the statute; and as the statute only requires them to be proved "to the satisfaction of the court," this "seems to put the matter exclusively in the judgment of the trial court, unless possibly in a case where there was an entire absence of evidence"); *Hall v. Van Vranken*, 28 Hun, 493 (where it was held no error to admit a deed duly acknowledged, as a standard, without further proof of genuineness of the signature; for such acknowledgment was prima facie evidence of such genuineness, and sufficient; especially so here, in the absence of defendant's denial whose deed it purported to be, and who was present at the trial of this action upon a promissory note, the signature of which he disputed. The court said the judge is to pass upon the sufficiency of the evidence, but that "possibly to admit a paper without any evidence of its genuineness might be error." [Of course it would.]) *Clark v. Douglass*, 5 App. Div. 547, 40 N. Y. Supp. 769 (that the proof required by the New York statute must be so clear that if it were one of the issues of the case a verdict should

be directed in favor of the genuineness); *People v. Dorthy*, 50 App. Div. 44, 63 N. Y. Supp. 592 (that it was error to overrule an objection to testimony that in the witness's opinion a certain memorandum was in the handwriting of a certain person, when such opinion was formed by comparing the memorandum with other writings he thought were defendant's, where the paper on which the memorandum was written was not an exhibit in the case and the other writings introduced for comparison were not shown to have been genuine); *People v. Flechter*, 44 App. Div. 199, 60 N. Y. Supp. 777 (to the effect that an advertisement offering a reward for the return of stolen goods, written by an agent of the owner, and given to the owner for publication, was a sufficiently authenticated standard for comparison of handwriting with a letter offering to return the goods for a reward, claimed to have been written by such agent, although such standard was not such as is mentioned in N. Y. Civil Prac. Act, § 332; *Parson's Practice Manual of New York*, 1921, p. 141); *Sprague v. Sprague*, 80 Hun, 285, 30 N. Y. Supp. 162 (to the effect that the testimony of a witness, showing the circumstances, under which he received papers purporting to be signed by a deceased, leaving no doubt as to the genuineness of the signature, is a sufficient basis for their introduction in evidence upon the issue as to the genuineness of a purported signature); *McKay v. Lasher*, 121 N. Y. 477, 24 N. E. 711 (to the effect that under N. Y. Civil Prac. Act, § 332; *Parson's Practice Manual of New York*, 1921, p. 141, permitting comparison of a disputed handwriting with any writing proved to the satisfaction of the court to be genuine, there is no error in admitting for comparison signatures proved by persons who had on other occasions seen the writing of the person whose signature the one in controversy purported to be, and who had no doubt upon inspection that the signatures presented to them were genuine, of which fact the court was satisfied).

Ohio.—*Bell v. Brewster*, 44 Ohio St. 690, 10 N. E. 679 (holding it no error to admit as a genuine standard a document purporting or proved to be thirty years old, because when such a document is "produced from its proper custody, it is presumed that the signature, and every other part of such document which purports to be in the handwriting of any particular person, is in that person's handwriting" without other proof of their authenticity; and that the proper repository or custody of such papers is the place where papers of its kind are usually deposited).

Oklahoma.—*Archer v. United States*, 9 Okla. 569, 60 Pac. 268 (that the genuineness of the writing or signature made the basis of comparison, and sometimes called the standard writing, must be proved by direct or positive evidence, and cannot be established by comparison).

Pennsylvania.—*Brant v. Dennison*, 1 Sadler (Pa.) 60, 5 Atl. 869 (where it was held no error to exclude receipts as a standard, where the

only proof of genuineness of signature thereto was the testimony of a witness, without personal knowledge of the person's handwriting, that he sent the receipts [by mail] in blank to such person to be signed, and that they were returned by another person by mail); *Fullam v. Rose*, 181 Pa. 138, 37 Atl. 197 (to the effect that testimony that the name signed to a check looks like the purported maker's signature is insufficient to admit the check as a test paper for comparison with other alleged signatures of the purported maker, in the absence of any evidence of its genuineness).

South Carolina.—*State v. Ezekiel*, 33 S. C. 115, 11 S. E. 635 (holding that papers are not admissible in evidence for comparison with an alleged forged instrument, where their genuineness is not admitted, acknowledged, or established by affirmative testimony, merely because the defendant does not deny their genuineness).

Texas.—*Long v. State*, 10 Tex. App. 186 (where a witness adopted as a standard a letter found addressed to himself purporting to come from a penitentiary convict, the authorship of which was subsequently acknowledged by such convict.—Held, error to admit it as a standard; for in Texas a felon is incompetent as a witness, and therefore no admission or fact stated by such felon could be detailed or used as evidence against a third person for any purpose. Judgment reversed on this and other grounds); *Jester v. Steiner*, 86 Tex. 415, 25 S. W. 411 (to the effect that the genuineness of a letter offered in evidence is not sufficiently proved to make it admissible for comparison of handwriting with the signature to a certain deed, by the testimony of a witness who did not see it written or know the writer, and who had not seen him write, but merely testified from handwriting that purported to be that of the writer).

As to sufficiency of proof of genuineness of handwriting, see note in 63 L.R.A. 428.

31. Comparison by jury or referee.

Standards of comparison properly received, either under the judicial, or the statutory, rule, may be compared by the jury,¹ or the referee,² with the handwriting in question, whether witnesses have made comparison or not.³

¹ *Van Wyck v. McIntosh*, 14 N. Y. 439, approved and followed in *Williams v. Conger*, 125 U. S. 414, 31 L. ed. 786, 8 Sup. Ct. Rep. 933, and in *Pontius v. People*, 82 N. Y. 339, affirming 21 Hun. 328; *United States v. Chamberlain*, 12 Blatchf. 390, Fed. Cas. No. 14,778; *Rowell v. Fuller*, 59 Vt. 688, 10 Atl. 853; *State v. Clinton*, 67 Mo. 380, 29 Am. Rep. 506 (*dictum*); *Rose v. First Nat. Bank*, 91 Mo. 399, 60 Am. Rep. 258, 3 S. W. 876 (*dictum* to same effect); *Eve v. Saylor*, 19 Ky. L. Rep. 1697, 44 S. W. 355.

- ² *Hunt v. Lawless*, 7 Abb. N. C. 113, affirmed without opinion in 15 Jones & S. 540.
- ³ *Medway v. United States*, 6 Ct. Cl. 421; *Moore v. United States*, 91 U. S. 270, 23 L. ed. 346; *Com. v. Andrews*, 143 Mass. 23, 8 N. E. 643; *Travis v. Brown*, 43 Pa. 9, 82 Am. Dec. 540 (*dictum*).

32. Taking to the jury room.

Standards of comparison, properly received under either rule, are documents in evidence within the rule allowing the court to permit such documents to be taken out by the jury.¹

- ¹ *Hardy v. Norton*, 66 Barb. 527 (where it was held discretionary with the court, and not error, to allow the jury, upon retiring to consider their verdict, to take the writing in dispute, and other genuine writings already in evidence for other purposes, to the jury room for the purpose of comparison of handwriting. [N. Y. Laws 1880, chap. 36, now § 332 N. Y. Civil Prac. Act, now allows irrelevant standards of comparison]); *Com. v. Andrews*, 143 Mass. 23, 8 N. E. 643; *State v. Scott*, 45 Mo. 302. In *Means v. Means*, 41 S. C. L. (7 Rich.) 533, it is held to be a matter in the discretion of the court.

Contra: *Re Foster*, 34 Mich. 21; *Chance v. Indianapolis & W. Gravel Road Co.* 32 Ind. 472. In *Howell v. Hartford F. Ins. Co.* 6 Biss. 163, Fed. Cas. No. 6,779, reasons are given why it is thought the comparison should be made only in open court; and it was held no ground for a new trial to refuse to permit the jury to take out papers for that purpose. In *Cox v. Straisser*, 62 Ill. 383, a document used for comparison, by consent, was held not a paper "read in evidence," within the meaning of a statute of Illinois allowing such papers to go to the jury room.

As to when documents may be taken out, see *Trial Brief for Civil Issues*, (4th ed.) p. 779; see also *CRIMINAL TRIAL BRIEF*.

V. PHOTOGRAPHS, LETTER-PRESS COPIES, MAGNIFYING GLASS, AND SUPERIMPOSITION.

33. Photographic copies.

Photographic copies and photographic magnified copies of the disputed writing, and of such genuine writings as are available by way of comparison, may be used as aids to assist the jury in their conclusions.¹

But an expert should not be permitted to testify from such

copies alone, without the presence of the originals,—at least in the absence of evidence of the exactness of the photographing.² Where the original document is outside the jurisdiction of the court, as in the case of a hotel register, a duly authenticated photograph is admissible to show signatures.³

¹United States courts.—United States v. Ortiz, 176 U. S. 422, 44 L. ed. 529, 20 Sup. Ct. Rep. 466 (to the effect that enlarged photographic copies of an alleged forged signature offered as a standard of comparison are admissible in evidence on proof by the photographer of the accuracy of the method pursued, and the results obtained by him in making the copies). In *Leathers v. Salvor Wrecking & Transp. Co.* 2 Woods, 680, Fed. Cas. No. 8,164, it was ruled that where, as in that case the original documents necessary for the decision of the case were on file in the United States War Department, and could not well be removed from the files without public detriment, it was proper to introduce photographic copies as the best secondary evidence thereof on “an authentication of their genuineness in the usual way by proof of handwriting.” *S. P.*, *Luco v. United States*, 23 How. 515, 16 L. ed. 545. In *United States v. Messman*, 1 Cent. L. J. 121, it was ruled by Blatchford, J., that upon a defense for forgery photographic copies of the originals alleged to be forged cannot be introduced in evidence where the original can be produced, and the trial was postponed in order that the originals might be procured.

Kentucky.—*First Nat. Bank v. Wisdom*, 111 Ky. 135, 63 S. W. 461, 465 (the signatures whose genuineness was contested and two genuine signatures were enlarged and reproduced by photography, and after proof by the photographers of their accuracy were admitted in evidence).

Illinois.—*Duffin v. People*, 107 Ill. 113, 47 Am. Rep. 431 (*dictum* that the testimony of an artist or expert may be required to prove the process of taking a photograph of a document where it is material to show that the photographic copy is an exact copy of the original in respect to form, shading, and coloring, but holding it no error to admit a photograph copy of a promissory note without proof of the process of taking, where the object was not to prove handwriting, but merely to prove the words of the original, written in rapidly fading ink). *Howard v. Illinois Trust & Sav. Bank*, 189 Ill. 568, 59 N. E. 1106 (where an original deed is in evidence it is error to admit in evidence a photograph of the same size, but enlarged photographs to make the proportions plainer for expert testimony are admissible.)

Maryland.—*Tome v. Parkersburg Branch R. Co.* 39 Md. 36, 17 Am. Rep. 540 (photographs excluded on the ground that such evidence is only secondary, and also on the ground that there can be no comparison of originals by experts in Maryland, much less of photographic copies).

Massachusetts.—*Marcy v. Barnes*, 16 Gray, 161, 77 Am. Dec. 405 (an action upon promissory notes in which the genuineness of the maker's signature being in issue, magnified photographic copies of genuine signatures of defendant, and of the disputed signature having first been proved to be accurate, were admitted. Held, proper. It was similar to an examination with a magnifying glass. Merrick, J., said: "Under proper precautions in relation to the preliminary proof as to the exactness and accuracy of the copies produced by the art of the photographer we are unable to perceive any valid objection to the use of such prepared representations of original and genuine signatures as evidence competent to be considered and weighed by the jury").

Michigan.—In *Re Foster*, 34 Mich. 21, it was held no error to refuse to permit the contestants to furnish the jury with photographic copies of the contested will, where the original was in court, although the court said that if the photographs had been given with such precautions as to secure their identity and correctness it might not have been error.

Missouri.—*Geer v. Missouri Lumber & Min. Co.* 134 Mo. 85, 34 S. W. 1099 (holding that photolithographic copies of certain affidavits, with the signatures of the affiants thereto, are inadmissible for the purpose of comparison, without further preliminary proof that the copy is exact and accurate in all respects, than a certificate that the copy is of the same size, and is "a true and literal exemplification of the original").

New Jersey.—*State v. Skillman*, 76 N. J. L. 464, 70 Atl. 83 (enlarged photographs of a will and of letters containing disputed handwriting are admissible, after proper proof, for the purpose of making the proportions plainer for the jury).

New York.—*Frank v. Chemical Nat. Bank*, 5 Jones & S. 26, 34 (*dictum*, that they may be used). But in *Taylor Will Case*, 10 Abb. Pr. N. S. 300, surrogate Hutchings reviewed at length defects of photographic copies, and held that photographic copies of the disputed, and of genuine, signatures are inadmissible to aid an expert in giving his opinion based on comparison as to the genuineness of the disputed signature, where all of the originals are present in court, because too many collateral issues, as to the accuracy of the photographs, etc., would be involved.

South Dakota.—*Re McClellan*, 20 S. D. 498, 107 N. W. 681 (where documents [enlistment papers] are inaccessible because in another jurisdiction, photographic copies are admissible upon proper proof by photographer that they were accurately made).

Texas.—*Eborn v. Zimpelman*, 47 Tex. 503, 26 Am. Rep. 315 (an action on promissory notes against the personal representatives of the deceased maker, in which, the genuineness of handwriting being the

issue, photographic copies of the instruments sued on were introduced in evidence. The artist taking them testified to their accuracy. Held, reversible error to admit them for the reason that photographic copies of instruments sued on can only be used as secondary evidence, and it did not appear that the originals might not have been produced); *Buzard v. McAnulty*, 77 Tex. 438, 14 S. W. 138 (holding that a photographic copy of an instrument read in evidence without objection, as an exhibit, there being no evidence as to how the copy was taken, or that it was an exact reproduction of the original, and it not being shown that the original could not have been produced,—cannot be used for the purpose of proving a signature by comparison); *Millington v. Millington*, — Tex. Civ. App. —, 25 S. W. 320 (holding that the comparison by the trial judge in a case tried without a jury of a writing the genuineness of which is in issue, with one proved to be genuine, is not extrajudicial, although testimony of experts has been given upon the subject, their opinion not being conclusive upon the question).

Vermont.—*Rowell v. Fuller*, 59 Vt. 688, 10 Atl. 853 (*dictum*, that it is proper to use photographs of the different signatures; for “enlarged copies of a disputed signature or writing and of those used as comparisons may be of great aid to a jury in comparing and examining different specimens of one’s handwriting. Characteristics of it may be brought out and made clear by the aid of a photograph or magnifying glass, which would not be discernible by the naked eye. As well object to the use of an eye-glass by one whose vision is defective”).

Virginia.—*Johnson v. Corn*, 102 Va. 927, 46 S. E. 789 (enlarged photographs of signatures are admissible for the purpose of comparing by expert testimony genuine handwriting with handwriting alleged to be forged).

Washington.—*Crane v. Dexter, H. & Co.* 5 Wash. 479, 32 Pac. 223 (to the effect that photographs of a disputed signature to a check, and of a large number of genuine signatures on paper close together, are properly rejected as immaterial and irrelevant, where the disputed signature as well as concededly genuine ones, are present in court).

For a more comprehensive discussion of the question see notes in 35 L.R.A. 812; 63 L.R.A. 438; 51 L.R.A. (N.S.) 857; and L.R.A. 1918D, 645.

* *Hynes v. McDermott*, 82 N. Y. 41, 50, 37 Am. Rep. 538, affirming 7 Abb. N. C. 98 (held, no error to refuse to permit an expert to testify as to genuineness of a signature by comparison in court with only photographic copies of absent genuine documents, where there is no evidence as to the manner of taking or accuracy of such copies); *People v. Mooney*, 132 Cal. 13, 63 Pac. 1070; *Fourth Nat. Bank v. McArthur*, 168 N. C. 48, 84 S. E. 39, 44, Ann. Cas. 1917B, 1054.

* *Fuller v. Robinson*, 230 Mo. 22, 130 S. W. 343, Ann. Cas. 1912A, 938.

34. Letter-press copies.

Impressions of writings produced by means of a press, or duplicate copies made by a machine, are not admissible as standards of comparison,¹ but a press copy of a letter, although incompetent as a means of comparison by which to judge the characteristics of the handwriting which is in dispute, may retain enough of its original character to be identified by a witness as to the handwriting of the author, when its own genuineness is called in question.²

¹ Com. v. Eastman, 1 Cush. 189, 48 Am. Dec. 596; Cohen v. Teller, 93 Pa. 123.

² Com. v. Jeffries, 7 Allen, 548, 83 Am. Dec. 712.

35. Use of magnifying glass.

A magnifying glass, proved correct by an expert, may be used by a referee to determine whether checks are forged, the referee occupying the place of a jury.¹

¹ Frank v. Chemical Nat. Bank, 13 Jones & S. 452, affirmed, without passing upon this point, in 84 N. Y. 209, 38 Am. Rep. 501 (held, no error for the referee to admit such glass in evidence, and to thus use the same after an oculist had testified that the glass was correct and magnified four times). In Baker v. Stucke, 18 Chicago Legal News, 306, it was held, in effect, that where it is alleged that erasures have been made, any man with ordinary information, and accustomed to examine things through a microscope, is competent to testify as to his opinion thereon from such an examination. The subject of "Microscopic Experts in Writing" is discussed in the New Jersey Law Journal of July, 1880.

36. Tracing and superimposition.

The perfect correspondence of the disputed signature with a genuine one when superimposed against the light is proof of simulation.¹

¹ Hunt v. Lawless, 7 Abb. N. C. 113, ex-Judge Fancher as referee affirmed on his opinion in 15 Jones & S. 540.

It seems that such proof is conclusive, and would require an instruction to the jury to that effect.

VI. CIRCUMSTANTIAL EVIDENCE AND ADMISSIONS.

37. Peculiar usages of language.

Writings not relevant to the cause may be received, irrespective of the rules as to standards of comparison, when offered, not for the purpose of comparing handwriting as such, but for the purpose of showing identical or dissimilar usages of language, such as characteristic mistakes in spelling.¹

¹ *United States v. Chamberlain*, 12 Blatchf. 390, Fed. Cas. No. 14,778 (ruled, upon trial for depositing scurrilous postal cards in the mail, that it was competent to prove other writings of the defendant containing characteristic instances of misspelling identical with such errors in the said cards to connect the defendant with them); *Sprouse v. Com.* 81 Va. 374, 10 Va. L. J. 181 (held, no error to admit evidence that defendant, charged with forgery, was asked by the magistrate before whom he was first brought, to write a certain word occurring in the forged document, and that, without threat or promise, he wrote and misspelled the word precisely as it was misspelled in the document).

Compare *State v. Miller*, 47 Wis. 530, 3 N. W. 31, to the contrary, but the court only considered the question with reference to comparison of handwriting, and the doctrine of the above case in Blatchford's report does not seem to have been called to their attention.

38. Aptitude to imitate.

In a conflict of testimony as to whether one person had forged or imitated the handwriting of another, it is competent to show that the former had scrutinized and commented on peculiarities in the manner of the latter's writing.¹

¹ *Pontius v. People*, 82 N. Y. 339, affirming 21 Hun, 328 (so held in a criminal case, where forgery was relied on, as tending to show motive). Compare *Costelo v. Crowell*, 139 Mass. 588, 2 N. E. 698 (where it was

held no error upon an issue of forgery, to reject evidence that the plaintiff had committed similar forgeries, or that he had the skill, etc., to enable him to forge the note in suit).

39. Opportunity.

Evidence of opportunity tending to show that an hypothesis of fabrication suggested by the evidence may have been the fact, is competent.¹

¹ *Brant v. Dennison*, 1 *Sadler* (Pa.) 60, 5 *Atl.* 869 (assignment bearing indications that it was written over a pre-existing signature. Held, competent to show that he whose name was affixed was in the habit of writing his name on pieces of paper, and leaving them about); *State v. Hastings*, 86 *N. C.* 596 (not error to receive, as pointing to one accused of a forgery, evidence that he had a genuine instrument, of which the false one was a reproduction,—even though of itself insufficient to sustain conviction).

In *Re Brown*, 83 *Wash.* 528, 145 *Pac.* 591, where a dissenting opinion discusses at length what evidence will sustain proof of forgery.

40. Condition of writer.

The condition of the alleged writer at the time of the alleged writing may be shown by either side, on the question whether the writing is genuine or not.¹

¹ *People v. Parker*, 67 *Mich.* 222, 34 *N. W.* 720 (*dictum* as to intoxication).

See also *Taylor Will Case*, 10 *Abb. Pr. N. S.* 300, 312, 313, where the various circumstances and conditions affecting handwriting are discussed, such as the state of the bodily health, the natural, or rheumatic, or neuralgic, or gouty, or other abnormal condition of the parts of the body used in writing, the mental condition of the writer, as affected in various ways, whether by grief, anger, momentary vexations of life, pressure of business, haste or deliberation induced by the solemnity of the occasion (as the act of signing a will), or the physical circumstances surrounding the writer, such as the difference between sitting and standing in writing, the height of the table, the flexibility and peculiar character of the pen or quill, the kind of ink, the quality of paper, ruled or unruled, sized or unsized, the substance supporting the paper, whether paper, wood, cloth, or marble, etc.

41. Admission of such an instrument.

In a conflict of testimony as to whether a signature was genuine, it is competent to prove that the alleged signer had admitted in conversation having made a note of a specified description, which corresponds to the instrument in question.¹

¹ Bardin v. Stevenson, 75 N. Y. 164, 167.

As to limitations of evidence to handwriting, see note in 64 L.R.A. 303.

HEALTH AND DISEASE.

1. Direct testimony by person affected.
2. Matter of observation.
3. Expert testimony.
4. Disease of animals.

For cognate topics, see **ABILITY; AUTOPSY; CAUSE; CONDITION; FEELINGS; INTOXICATION.**

And as to inspection of person, Civil Trial Brief (4th ed.) p. 425; Criminal Trial Brief; and, as to medical books, Civil Trial Brief (4th ed.) pp. 467, 688.

1. Direct testimony by person affected.

A person may testify as to the condition of his health before an injury, and afterward, as against an objection that no facts were proved upon which to base his opinion.¹

¹ West Chicago Street R. Co. v. Carr, 170 Ill. 478, 48 N. E. 992. The question does not call for an opinion, but for facts which may be stated.

2. Matter of observation.

A witness, having had adequate opportunities of observation, may testify whether a person was sick or well,¹ and describe his

general physical condition in respect to health,² and state symptoms discernible by a nonexpert;³ but cannot, unless an expert, testify to the nature or character of a disease.⁴ Nor can a non-expert testify as to physical condition in respect to health; based on what he has been told by others, or state his conclusion from such information.⁵

¹ *Higbie v. Guardian Mut. L. Ins. Co.* 53 N. Y. 603, affirming 66 Barb. 462; *Rawls v. American Mut. L. Ins. Co.* 27 N. Y. 282, 84 Am. Dec. 280, affirming 36 Barb. 357 (allowing testimony to good health and sound constitution). *s. p.* *Smalley v. Appleton*, 70 Wis. 340, 35 N. W. 729; *Com. v. Sturtivant*, 117 Mass. 122, 134, 19 Am. Rep. 401, citing *Willis v. Quimby*, 31 N. H. 485; *Baltimore & L. Turnp. Co. v. Cassell*, 66 Md. 419, 59 Am. Rep. 175, 7 Atl. 805; *Cleveland, C. C. & St. L. R. Co. v. Gray*, 148 Ind. 266, 46 N. E. 675; *Billings v. Metropolitan L. Ins. Co.* 70 Vt. 477, 41 Atl. 516 (to the effect that the witness may testify that a person was in "sound health" at a specified time); *Robinson v. Exempt Fire Co.* 103 Cal. 1, 24 L.R.A. 715, 36 Pac. 955.

² *Price v. Richmond & D. R. Co.* 38 S. C. 199, 17 S. E. 732; *Kosteletzky v. Scherhart*, 99 Iowa, 120, 68 N. W. 591; *Keller v. Gilman*, 93 Wis. 9, 66 N. W. 800 (*dictum*). In *Carthage Turnp. Co. v. Andrews*, 102 Ind. 138, 52 Am. Rep. 653, 1 N. E. 364, such testimony was held competent, provided the witness stated the facts observed, before stating his opinion; but to omit to do so was held unavailing for want of objection below.

The more prevalent view is that such testimony from a nonexpert is received, not as matter of opinion based on facts to be stated, but as stating a collective fact depending upon the observation of minutiae not capable of being set before the jury with the effect that they properly produce on an observer.

³ *United Brethren Mut. Aid Soc. v. O'Hara*, 120 Pa. 256, 13 Atl. 932 (error to exclude question whether witness had observed the person's shortness of breath; but not error to exclude testimony that such person had asthma).

⁴ *Grattan v. Metropolitan L. Ins. Co.* 80 N. Y. 281, 36 Am. Rep. 617, with note; *United Brethren Mut. Aid Soc. v. O'Hara*, 120 Pa. 256, 13 Atl. 932. Compare *Duntzy v. Van Buren*, 5 Hun, 648 (holding that wife may be asked whether her husband had a rupture, the fact not resting in opinion nor involving skill or science); and *Owens v. Kansas City, St. J. & C. B. R. Co.* 95 Mo. 169, 8 S. W. 350 (party may testify to his own nerves being paralyzed).

⁵ *Tenney v. Harvey*, 63 Vt. 520, 22 Atl. 659.

3. Expert testimony.

Medical experts may give an opinion as to when and where

a person contracted a disease, on a hypothetical question stating facts testified to by such person, and including substantially all of such testimony.¹ Or if they have actual knowledge of the physical condition of the person, they may testify as to his condition as to health, without the question being put in hypothetical form.²

¹ *Kliegel v. Aitken*, 94 Wis. 432, 35 L.R.A. 249, 69 N. W. 67.

² *Clegg v. Metropolitan Street R. Co.* 1 App. Div. 207, 37 N. Y. Supp. 130. In *Illinois C. R. Co. v. Griffin*, 25 C. C. A. 413, 53 U. S. App. 22, 80 Fed. 278, a witness was permitted to answer the question whether he had seen sufficient of the person since the trial commenced to be able to state whether there was or was not a certain condition existent; the court saying that if the question contained phrases of doubtful meaning, it was part of a cross-examination to clear away those doubts.

4. Disease of animals.

An ordinary witness cannot testify as to the cause of a disease in a horse;¹ but may testify to facts observed by him.²

Long experience in the care of horses is, however, sufficient to qualify a witness as to such diseases, without having made a business of treating them.³

¹ *Russell v. Cruttenden*, 53 Conn. 564, 4 Atl. 267.

² *Harris v. Panama R. Co.* 4 Jones & S. 373, 378, affirmed, without discussing this point, in 58 N. Y. 660 (holding that the mate of a vessel on which a horse was carried, having testified that the horse was sick, might be asked if he observed any alteration afterward).

³ *Johnson v. Moffett*, 19 Mo. App. 159; *Slater v. Wilcox*, 57 Barb. 604; *Burden v. Pratt*, 1 Thomp. & C. 554; *Pierson v. Hoag*, 47 Barb. 243. (An expert may be asked, "What is the best opinion by the best medical authority?")

HEARING.

1. Direct testimony as to conversation.
2. As to sounds.

Compare ABILITY; NEGATIVE; POSSIBILITY.

1. Direct testimony as to conversation.

A witness may testify that a conversation occurred within the hearing of another person; ¹ but cannot give an opinion that such other person must have heard it.²

¹ Raymond v. Glover, 122 Cal. 471, 55 Pac. 398; Criminal Trial Brief.

² People v. Holfelder, 5 N. Y. Crim. Rep. 179 (reversing judgment because an officer testifying to the silence of the accused when an incriminating statement was made in his presence was allowed to testify that the accused must have heard it).

But in Raymond v. Glover, 122 Cal. 471, 55 Pac. 398, testimony that a person seemed to be giving attention to the conversation was allowed to go in.

2. As to sounds.

A witness may also testify directly to hearing a sound, with which she is so familiar as to be able to state its source, cause, or origin as a fact, and not as a mere matter of opinion.¹

¹ Thus, a witness living in a house opposite a depression in the street which she had seen may testify that she heard wagons going into the depression at night, since such evidence is that of the senses, and not a mere conclusion. Grundy v. Janesville, 84 Wis. 574, 54 N. W. 1085.

HORSE POWER.

1. Comparison.
2. Tables.

For cognate topics, see **CAPACITY; CONDITION; CONSTRUCTION.**

1. Comparison.

The power of an engine with which plaintiff had tried to run his mill, as compared with that of three water wheels of known power by which the mill had been run, may be shown by witnesses who have been engaged in operating the mill, and recognize the engine in question.¹

¹ Blackmore v. Fairbanks, M. & Co. 79 Iowa, 282, 44 N. W. 548.

2. Tables.

The number of horse power obtained from a given quantity of water may be shown by an expert whose information comes from Leffel's Tables, those tables being testified to be ordinarily used by millwrights, and by all of them considered as accurate.¹

¹ Garwood v. New York C. & H. R. R. Co. 45 Hun, 128.

Expert testimony as to which rating is meant in an advertisement, not competent. Harrington v. Smith, 138 Mass. 92.

IDENTITY.

1. Inspection in court.
2. Pointing out person without naming him.
3. Direct testimony.
 - a. In general.
 - b. Identifying from voice.
 - c. Uncertainty.
4. Photographs.
5. Answering to name.
6. Slight evidence.
7. Name as evidence of identity.
8. Oral evidence.
9. Commingled assets.
10. Rebuttal.
 - a. Testing witness.
 - b. Inspection and experiment.
 - c. Existence of a "double."
 - d. Name.
11. Opinion evidence.

For cognate topics, see CAUSE; CONDITION; CORROBORATION; MISNOMER; NAME; OPINION.

1. Inspection in court.

On the trial of an issue involving the identity of a person, the court may allow him to be brought before the jury in order that a witness may look upon him and testify.¹

And a party summoned as a witness, though not sworn, may, on request of his adversary, be required to uncover her face to permit a witness on the stand to identify her.²

¹ Atty. Gen. v. Fadden, 1 Price, 403 (where habeas corpus ad testificandum was allowed, to bring him up).

As to privilege against criminating one's self, see Criminal Trial Brief. Compelling accused to exhibit himself to determine, see note in 28 L.R.A. 699.

² Rice v. Rice, — N. J. Eq. —, 19 Atl. 736.

This for the purpose of identification only, however; whether he may be required to do some act in or out of court by which he will be furnishing or giving testimony against himself is another question.

2. Pointing out person without naming him.

The act of a witness in pointing out to the jury the person to

whom his testimony refers, though without naming him, is competent evidence of his identity.¹ Mistake in attempting such identification may be corrected and explained by the witness.²

If a party refuses to stand up in court to be identified, the failure of the witness to identify him does not entitle him to have the testimony of the witness against him stricken out.³

¹ *Com. v. Whitman*, 121 Mass. 361, s. p., *Sylvester v. State*, 71 Ala. 17 (dying declarations; identifying by pointing out without naming, competent).

² *People v. Foley*, 27 N. Y. Week. Dig. 217.

³ *Walsh v. People*, 13 N. Y. Week. Dig. 570, affirmed in 88 N. Y. 458, without discussing this point.

3. Direct testimony.

a. In general.—A witness may testify directly to the identity of a person or thing seen by him at different times;¹ but not to the fact of the identity of a person or thing with the one intended by a description given out of court by another person² (except in the case of lands³), for this would be matter of opinion.

Nor is testimony that a third person identified the subject competent, except where it is made so by being part of the *res gestæ*.⁴

¹ *Abbott, Tr. Ev.* (3d ed.) pp. 312, 1661; *Com. v. Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401; *State v. Dickson*, 78 Mo. 438; *Brotherton v. People*, 75 N. Y. 159, affirming 14 Hun, 486 (identity of a person disguised); *J. I. Case Threshing Mach. Co. v. Stein*, 133 Ill. App. 169.

And if the subject be one for expert testimony, a witness so qualified to speak may testify. *Askew v. People*, 23 Colo. 446, 48 Pac. 524.

But a witness cannot testify that he believes a certain person was the identical person he represented himself to be. *McCamant v. Roberts*, 80 Tex. 316, 327, 15 S. W. 580, 1054.

² *Henze v. People*, 82 N. Y. 611 (question whether cloth found with the prisoner was that described in the indictment, not competent); *Whiznant v. State*, 71 Ala. 383 (reversible error to receive testimony that the oxen witness had seen corresponded with unsworn description given him of stolen oxen).

³ *Whyland v. Weaver*, 67 Barb. 116. (Any witness, acquainted with lands and the adjoining premises, may testify whether the premises described in one instrument are part of those described in another).

⁴ *Hopt v. Utah*, 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202 (testimony of surgeon who made a *post mortem* that the body was identi-

fied by a third person); *Felder v. State*, 23 Tex. App. 477, 59 Am. Rep. 777, 5 S. W. 145 (testimony that someone in the crowd pointed out a person whom witness had just met about two doors from the place of the shooting, as the one who had done the shooting).

Compare *Jordan v. Com.* 25 Gratt. 943. Here evidence was received that the victim of the robbery, immediately, as part of the *res gestæ*, described the robber to the witness, who thereupon pursued and caught the accused, who corresponded to the description.

Approved in *Merkle v. Bennington Twp.* 58 Mich. 157, 55 Am. Rep. 666, 24 N. W. 776, 778. And see *People v. Mead*, 50 Mich. 228, 15 N. W. 95; *People v. Cox*, 83 N. Y. 610, affirming 21 Hun, 47; *Truitt v. State*, 8 Tex. App. 148; *Tyler v. State*, 11 Tex. App. 388.

b. Identifying from Voice.—A witness may be permitted to identify a person solely from having heard his voice, and such testimony will be admissible and legitimate to establish identity.¹

¹ *Mack v. State*, 54 Fla. 55, 13 L.R.A. (N.S.) 373, 44 So. 706, 14 Ann. Cas. 78; *Com. v. Kelly*, 186 Mass. 403, 71 N. E. 807; *State v. Herbert*, 63 Kan. 516, 66 Pac. 235; *Stepp v. State*, 31 Tex. Crim. Rep. 349, 20 S. W. 753; *People v. Willett*, 92 N. Y. 29; *State v. Howard*, 92 N. C. 772.

Testimony of a witness who had stated that a voice heard by him a few minutes after a homicide had been committed "sounded" like the voice of the defendant is admissible as tending to prove the identity of the accused. *Deal v. State*, 140 Ind. 354, 39 N. E. 930.

And the mere fact that a witness had made a mistake in the voice of another person upon a former occasion was held, in *State v. Hurst*, 23 Mont. 488, 59 Pac. 911, not competent as tending in any way to show that her observation was at fault at another time, under conditions which may have been totally different.

See other cases in note in 13 L.R.A. (N.S.) 373.

c. Uncertainty.—If the impression of the witness is based on personal knowledge or observation, lack of positiveness in testifying to identity does not alone render the testimony incompetent, but goes only to its weight.¹

¹ *People v. Rolfe*, 61 Cal. 540 (robbery; as to identity of accused, witness expressed belief); *State v. Babb*, 76 Mo. 501 (larceny; identity of goods); *King v. New York C. & H. R. R. Co.* 72 N. Y. 607 (holding that it was not error to allow the witness to be asked, Have you any

doubt whether this is the same?); *State v. Howard*, 118 Mo. 127, 24 S. W. 41 (murder; identity of accused); *White v. Van Horn*, 159 U. S. 3, 40 L. ed. 55, 15 Sup. Ct. Rep. 1027 (identity of document). For other cases see note to *Spotten v. Keeler*, 22 Abb. N. C. 105.

Contra Compare People v. Williams, 29 Hun, 522, 17 N. Y. Week. Dig. 356 (holding that a witness should not be allowed in the first instance, as evidence in chief, to state "impressions" or "thoughts" in respect to the identity of a person, but only knowledge, recollection, or memory of facts). *s. p.*, *Rich v. Jones*, 9 Cush. 329 (where witness only "supposed" it was the same thing).

And that a witness cannot testify as to his belief as to the identity of certain persons whom he saw on a given occasion, where the belief is based simply on the fact that one of the persons whom he saw was taller than the other, see *Phoenix Ins. Co. v. Padgitt*, — Tex. Civ. App. —, 42 S. W. 800.

For interesting reviews of questions of mistaken identity, see 2 Crim. L. Mag. 287, 1 Crim. L. Mag. 1, 10 Crim. L. Mag. 725, and Ram on Facts.

4. Photographs.

Photographs are admissible for the purpose of interrogating a witness as to the identity of one absent or deceased.¹

¹ *Ruloff v. People*, 45 N. Y. 213 (identity of person found drowned); *Marion v. State*, 20 Neb. 233, 57 Am. Rep. 825, 29 N. W. 911 (photograph of deceased taken before his death. The court says, although of little or no service in identifying the remains, it might be of importance in identifying the person last seen with the accused); *Washington L. Ins. Co. v. Schaible*, 1 W. N. C. 369 (colored photograph of the insured); *Udderzook v. Com.* 76 Pa. 340 (photograph of the deceased received to aid identification of remains); *Luke v. Callhoun County*, 52 Ala. 115 (holding it error to exclude photograph taken in life, to identify the deceased as plaintiff's husband). See fully on this question cases reviewed in note to *Dederichs v. Salt Lake City R. Co.* (Utah) 35 L.R.A. 802.

In *Wilcox v. Wilcox*, 46 Hun, 32, it was held that copies of photographs shown to be correct may be used equally as original photographs for this purpose.

In a criminal action, photographs of defendant and his confederates, taken four years previously, which were sufficiently verified, and had been shown to witnesses soon after the photographs were taken, were properly used for the purpose of identifying the defendant and his confederates. *Considine v. United States*, 50 C. C. A. 272, 112 Fed. 342. See also *Shaffer v. United States*, 24 App. D. C. 417.

5. Answering to name.

Evidence of interview had at the proper place, with a person answering to the name, is competent.¹

¹ Howard v. Holbrook, 9 Bosw. 237, 23 How. Pr. 64 (holding such evidence sufficient alone to sustain verdict); Hunt v. Maybee, 7 N. Y. 266. See also ABSENCE; FICTITIOUS PERSON.

6. Slight evidence.

Evidence tending to show identity is not incompetent because slight or fragmentary, unless no other evidence is to be given.¹

¹ Johnson v. Com. 115 Pa. 369, 9 Atl. 78 (held, that no matter how slight may be the inference of identity to be drawn from any single fact, it is admissible as a fragment of the material from which the induction is to be made). s. p., Whart. Crim. Ev. 9th ed. § 27 .

Another similar offense, competent for purpose of identifying the perpetrator. Goersen v. Com. 99 Pa. 388; State v. Maxwell, 51 Iowa, 314, 1 N. W. 666; Washington v. State, 8 Tex. App. 377.

Billhead, and the name on it, without producing the paper. Roosevelt v. Eckard, 17 Abb. N. C. 58, s. p., Com. v. Blood, 11 Gray, 74.

Clothing, Early v. State, 9 Tex. App. 476; and articles found upon the person, State v. Dickson, 78 Mo. 438; and contents of valise found near the body. Campbell v. State, 8 Tex. App. 84. (*Contra*, as to clothing where there was no evidence there had not been a change, People v. Simpson, 48 Mich. 474, 12 N. W. 662.) And the clothes identified as those worn by the accused at the time of the crime, if preserved in the same condition, may be inspected by the jury. People v. Gonzalez, 35 N. Y. 49.

Habits the same. Udderzook v. Com. 76 Pa. 340.

Hair found where the remains of deceased were, admissible as a circumstance tending to aid in the identification of his person. Marion v. State, 20 Neb. 233, 57 Am. Rep. 825, 29 N. W. 911.

Handwritings of each, and comparison between them. Bell v. Brewster, 44 Ohio St. 690, 10 N. E. 679. s. p., Cluverius v. Com. 81 Va. 787. (*Contra*: article in 32 Alb. L. J. 101.)

Physical characteristics, such as color of hair and whiskers, the measure of the body, the stature, absence of certain teeth, and marks on those remaining. Lindsay v. People, 63 N. Y. 143, affirming 5 Hun, 104, more fully, 67 Barb. 548. Identifying the hand or foot of a deceased person may be sufficient evidence of personal identity. People v. Graves, 5 Park. Crim. Rep. 134.

Possession of horse like the one ridden by the culprit, competent. *Williams v. State*, 24 Tex. App. 17, 5 S. W. 655.

Signature, by name on one deed, and by mark on another, but slight evidence against identity. *Mackay v. Easton*, 19 Wall. 619, 22 L. ed. 211.

Sound of voice. *Com. v. Hayes*, 138 Mass. 185. So, also, of a dog's bark. *Wilbur v. Hubbard*, 35 Barb. 303.

Tracks. Evidence that the shoes of a person were of a size and shape that would make a track like that attributed to a particular person is competent as tending to show that the tracks were made by him. *People v. McCallam*, 3 N. Y. Crim. Rep. 189; s. p., *Hotchkiss v. Germania F. Ins. Co.* 5 Hun, 90. See also *People v. McCurdy*, 68 Cal. 576, 10 Pac. 207 (holding that the facts that the measurements of the footprints were made two weeks after the footprints were made, did not render the evidence incompetent).

And an ordinary witness having testified to his examination of footprints and shoes may testify as to the correspondence between them. *Com. v. Pope*, 103 Mass. 440, s. p., *Com. v. Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401; *Hotchkiss v. Germania F. Ins. Co.* 5 Hun, 90. Similarity of tracks of horse not alone enough. *State v. Melick*, 65 Iowa, 614, 22 N. W. 895.

See also cases cited under title, **FINGER PRINTS, PALM PRINTS AND FOOTPRINTS**, ante, herein.

Miscellaneous cases: Evidence by witness who arrested defendant charged with robbery, found on him some of the stolen property, competent to identify him as one of the perpetrators of the crime. *Wyatt v. State*, 38 Tex. Crim. Rep. 256, 42 S. W. 598.

Testimony that witness saw the marks where plaintiff had slipped into the ditch, the next morning after an accident, competent to prove the spot where the accident occurred. *Britton v. St. Louis*, 120 Mo. 437, 25 S. W. 366.

Evidence of the attempt of persons to take hold of and detain one whom they had seen about a half hour before peeking in a window is admissible for the purpose of identifying him on his trial for such disorderly conduct. *Grand Rapids v. Williams*, 112 Mich. 247, 36 L.R.A. 137, 70 N. W. 547.

Competent in libel suit, for the purpose of showing that the article, which did not name the person aspersed, was intended to apply to plaintiff, and would be so understood by the reading public, to introduce similar articles published the same day, on which the article in question was based, which named the plaintiff. *Van Ingen v. Mail & Exp. Pub. Co.* 156 N. Y. 376, 50 N. E. 979, affirming 14 Misc. 326, 35 N. Y. Supp. 838.

So where a physician told of an experience in his practice with a young woman, the plaintiff was permitted to show people thought the story

was about her, even though the physician did not mean her. *Newton v. Grubbs*, 155 Ky. 479, 48 L.R.A.(N.S.) 355, 159 S. W. 994. See also note in 27 Harvard L. Rev. 389.

Evidence as to the trailing by dogs nearly a month after a theft in question, indicating that defendant had been visiting various places at night, incompetent. *Spillman v. State*, — Tex. Crim. Rep. —, 44 S. W. 150.

Evidence that one of three persons standing in different relations to a railroad company gave an unauthorized signal for the movement of a train while a switchman was engaged in uncoupling cars does not tend to identify one standing in place of the company as the person who gave the signal. *Rutledge v. Missouri P. R. Co.* 123 Mo. 121, 24 S. W. 1053, affirmed on rehearing in 123 Mo. 140, 27 S. W. 327.

Evidence that a given person stole his sister's earrings and a horse is irrelevant on the issue of his identity with a person having the same name. *Wallace v. Byers Bros.* 14 Tex. Civ. App. 574, 38 S. W. 228.

The declarations of one to his brother in 1838, that he was from the southwestern part of Texas, and had been with Sam Houston and Davy Crockett, are hearsay, and inadmissible for the purpose of identifying him as the person to whom a bounty warrant for services in the war between Texas and Mexico was granted, as such declarations do not relate to a matter of pedigree. *Sargent v. Lawrence*, 16 Tex. Civ. App. 540, 40 S. W. 1075.

7. Name as evidence of identity.

Identity of name raises a legal presumption of identity of person, in the absence of anything, such as the commonness of some name or evidence imputing different residences, or other circumstances, raising a doubt.¹

The same principal applies to real property.²

¹ *Lee v. Murphy*, 119 Cal. 364, 51 Pac. 549 (Cal. Code Civ. Proc. § 1963, subd. 25); *Scott v. Hyde*, 21 D. C. 531; *Summer v. Mitchell*, 29 Fla. 179, 14 L.R.A. 815, 10 So. 562; *Gross v. Grossdale*, 177 Ill. 248, 52 N. E. 372; *Bayha v. Mumford*, 58 Kan. 445, 49 Pac. 601; *Morris v. McClary*, 43 Minn. 346, 46 N. W. 238; *Green v. Haritage*, 63 N. J. L. 455, 43 Atl. 698; *Liscomb v. Eldredge*, 20 R. I. 335, 38 Atl. 1052; *Smith v. Gillum*, 80 Tex. 120, 15 S. W. 794; *Ritchie v. Carpenter*, 2 Wash. 512, 28 Pac. 380; *Sweetland v. Porter*, 43 W. Va. 189, 27 S. E. 352; *Crandall v. Lynch*, 20 App. D. C. 73. See also *Abbott, Tr. Ev.* (3d ed.) pp. 310, 1017; *Crim. Tr. Brief*, and notes in 17 L.R.A. 824, and later note in 4 L.R.A.(N.S.) 539.

Identity of surname merely, not sufficient. *Fanning v. Lent*, 3 E. D. Smith, 206.

But trivial difference in given name not enough to preclude the presumption,—for instance, “William” instead of “Williams.” *Rust v. Eckler*, 41 N. Y. 488, 492, 496 (name of commission to take deposition).

A deed over fifty years old, from James Smith, of the county of Cape Girardeau, not to be excluded upon a presumption that it is not the deed of J. Smith, of Little Prairie, the owner of the land, where the identity is sufficiently stated in the body of the instrument. *Mackay v. Easton*, 19 Wall. 619, 22 L. ed. 211.

Addition of an alias does not preclude the presumption. *State v. Kelsoe*, 76 Mo. 505 (name and alias in a former conviction).

Instances: The presumption avails, to establish—

Corpus delicti: *State v. Kilgore*, 70 Mo. 546 (holding identity of name sufficient proof of identity of person killed).

Death and survivorship: Where there is evidence tending to show the place of residence and death of one partner, proof of the death at the same place of a person bearing the same name establishes, *prima facie*, the title of the other partner as survivor. *Daby v. Ericsson*, 45 N. Y. 786.

Liability on covenants: *Lawrence v. Farley*, 24 Hun, 293, 9 Abb. N. C. 371 (identity of person sued upon the assumption clause as grantee in a deed).

—*on judgment:* In action on a foreign judgment, the fact that defendant has the same name as the one against whom the judgment was recovered is presumptive evidence (and sufficient, no suspicious circumstances appearing) of his identity, and the judge at the trial may assume that fact without submitting it to the jury. *Hatcher v. Rocheleau*, 18 N. Y. 86.

Tracing titles: Slight proof of identity of a grantor is sufficient in tracing titles. Identity of names is *prima facie* evidence of the identity of persons. *Stebbins v. Duncan*, 108 U. S. 32, 27 L. ed. 641, 2 Sup. Ct. Rep. 313.

There is no presumption that the First National Bank of Boise City, Idaho, is identical with the First National Bank of Idaho. *Pinkham v. Cockell*, 77 Mich. 265, 43 N. W. 921.

Where the name of the grantee in a deed, and that of the grantor in a subsequent conveyance of the same land, are the same except as to the initial letter of the middle name, it will not be presumed that they were the same persons. *Ambs v. Chicago, St. P. M. & O. R. Co.* 44 Minn. 266, 46 N. W. 321.

² *Lyon v. Adde*, 63 Barb. 89. Note in 5 A.L.R. 428.

8. Oral evidence.

Oral evidence, to show who was intended by the name in a written instrument,¹ or which simply identifies the subject of

a written instrument,² is not necessarily excluded by the rule against varying a writing by parol nor by the statute of frauds.³

¹ *Jacobs v. Benson*, 39 Me. 132, 63 Am. Dec. 609; *Berniaud v. Beecher*, 71 Cal. 38, 11 Pac. 802 (oral evidence that masculine pronoun was used by mistake for feminine, the given name being only represented by an initial); *Bristol v. Ontario Orphan Asylum*, 60 Conn. 472, 22 Atl. 848 (oral evidence to identify charitable institution to which a bequest has been made); *Fisher v. Fielding*, 67 Conn. 91, 32 L.R.A. 236, 34 Atl. 714; *Hicks v. Ivey*, 99 Ga. 648, 26 S. E. 68; *Hogan v. Wallace*, 166 Ill. 328, 46 N. E. 1136; *Missionary Soc. of M. E. Church v. Cadwell*, 69 Ill. App. 280; *Wilson v. Stevens*, 59 Kan. 771, Appx. 51 Pac. 903; *Haskell v. Tukesbury*, 92 Me. 551, 43 Atl. 500; *Wheeler v. Hanson*, 161 Mass. 370, 37 N. E. 382; *Lankford v. Gebhart*, 130 Mo. 621, 32 S. W. 1127; *Smith v. Kimball*, 62 N. H. 606; *Salmer v. Lathrop*, 10 S. D. 216, 72 N. W. 570; *Dodd v. Templeman*, 76 Tex. 57, 13 S. W. 187; *Morrison v. State*, 40 Tex. Crim. Rep. 473, 51 S. W. 358. See also cases cited in notes to *Ferguson v. Rafferty*, 6 L.R.A. 33; *General Assembly v. Guthrie*, 6 L.R.A. 321; *Re Woods*, 33 Misc. 12, 67 N. Y. Supp. 1123.

Where given name of grantee left blank parol evidence admitted to show who grantee was. *Sutherland v. Gent*, 116 Va. 783, 82 S. E. 713; note in 13 Mich. L. Rev. 162.

Bullard v. Leach, 213 Mass. 117, 100 N. E. 57, where oral evidence was admitted to show testatrix had no funds in one of three banks named in devise but did have funds in a fourth bank of somewhat similar name; *Kingman v. New Bedford Home for Aged*, 237 Mass. 323, 129 N. E. 449, where bequest was to New Bedford Home for Aged People and there was no institution of that name and parol evidence was admitted to show which of two institutions with somewhat similar names was meant by testator.

Extrinsic evidence may be resorted to in order to ascertain the devisee or legatee intended, whenever, from the will itself or from the proof of extrinsic facts, the person or corporation entitled to the devise or legacy is uncertain: *Siegley v. Simpson*, 73 Wash. 69, 47 L.R.A. (N.S.) 514, 131 Pac. 479, Ann. Cas. 1915B, 63; *Gilmer v. Stone*, 120 U. S. 586, 30 L. ed. 734, 7 Sup. Ct. Rep. 689; *McDonald v. Shaw*, 81 Ark. 235, 98 S. W. 952; *Re Donnellan*, 164 Cal. 14, 127 Pac. 166; *Beardsley v. American Home Missionary Soc.* 45 Conn. 327; *Guerard v. Guerard* 73 Ga. 506; *Woman's Union Missionary Soc. v. Mead*, 131 Ill. 361, 23 N. E. 603; *Harness v. Harness*, 50 Ind. App. 364, 98 N. E. 357; *Chambers v. Watson*, 56 Iowa, 676, 10 N. W. 239; *Howard v. American Peace Soc.* 49 Me. 288; *Bullard v. Leach*, 213 Mass. 117, 100 N. E. 57; *Gilchrist v. Corliss*, 155 Mich. 126, 130 Am. St. Rep. 568, 118

N. W. 938; *Wheaton v. Pope*, 91 Minn. 299, 97 N. W. 1046; *McMahan v. Hubbard*, 217 Mo. 624, 118 S. W. 481; *Second United Presby. Church v. First Union Presby. Church*, 71 Neb. 563, 99 N. W. 252; *Smith v. Kimball*, 62 N. H. 606; *German Pioneer Verein v. Meyer*, 70 N. J. Eq. 192, 63 Atl. 835; *Bowman v. Domestic & F. Missionary Soc.* 182 N. Y. 494, 75 N. E. 535; *McLeod v. Jones*, 159 N. C. 74, 74 S. E. 733; *Townsend v. Townsend*, 25 Ohio St. 477; *Amberson's Estate*, 204 Pa. 397, 54 Atl. 484; *Peard v. Vose*, 19 R. I. 654, 35 Atl. 1046; *Re Robb*, 37 S. C. 19, 16 S. E. 24; *Gass v. Ross*, 3 Sneed, 211; *Re Welch*, 78 Vt. 16, 61 Atl. 145; *Roy v. Rowzie*, 25 Gratt. 599; *Reformed Presby. Church v. McMillan*, 31 Wash. 643, 72 Pac. 502; *Ross v. Kiger*, 42 W. Va. 402, 26 S. E. 193; *Re Paulson*, 127 Wis. 612, 5 L.R.A.(N.S.) 804, 107 N. W. 484, 7 Ann. Cas. 652; and for additional cases see note in 47 L.R.A.(N.S.) 514.

See also *Re Halston* [1912] 1 Ch. 435, 81 L. J. Ch. N. S. 265, 106 L. T. N. S. 182, 56 Sol. Jo. 311, and note in 26 Harvard L. Rev. 90.

But oral evidence is not admissible to identify the intended vendee of lands in a contract of sale in which he is not designated other than by the use of the personal pronoun "you." *Carrick v. Mincke*, 60 Mo. App. 140.

Nor is it admissible to substitute a third person as *cestui que trust* in place of the person named in a deed of trust. *American Nat. Bank v. Harlan*, 82 Md. 675, 43 Atl. 756.

* *Lonergan v. Buford*, 148 U. S. 581, 37 L. ed. 569, 13 Sup. Ct. Rep. 684; *Watson v. Kirby*, 112 Ala. 436, 20 So. 624; *Byrne v. Ft. Smith Nat. Bank*, 1 Ind. Terr. 680, 43 S. W. 957; *Webster v. Fleming*, 178 Ill. 140, 52 N. E. 975; *Tufts v. Hunter*, 63 Minn. 464, 65 N. W. 922; *Skinker v. Haagsma*, 99 Mo. 208, 12 S. W. 659; *Woods v. Hart*, 50 Neb. 497, 70 N. W. 53; *Harris v. Allen*, 104 N. C. 86, 10 S. E. 127; *Ft. Worth Nat. Bank v. Red River Nat. Bank*, 84 Tex. 369, 19 S. W. 517; *Taylor v. Moore*, 63 Vt. 60, 21 Atl. 919; *Lynch v. Henry*, 75 Wis. 631, 44 N. W. 837; *Forst v. Leonard*, 112 Ala. 296, 20 So. 587.

But extrinsic evidence which goes beyond the purpose of aiding in the interpretation of a written insurance policy and tends to show that the subject thereof was other and different from that described in the instrument is inadmissible to sustain an action to enforce the contract as though it applied to property not described therein. *Sanders v. Cooper*, 115 N. Y. 279, 5 L.R.A. 638, 22 N. E. 212.

* *Salmon Falls Mfg. Co. v. Goddard*, 15 How. 446, 454, 14 L. ed. 493, 496 (sale of merchandise); *McDuffie v. Clark*, 39 Hun, 166 (deed of lands) And see *Rudicel v. State*, 111 Ind. 595, 13 N. E. 114.

9. Commingled assets.

Identity of fraud may be traced through commingling of assets.¹

¹ *Hooley v. Gieve*, 9 Abb. N. C. 8, 41; note to *Haynes v. Brooks*, 17 Abb. N. C. 160; *Englar v. Offutt*, 70 Md. 78, 16 Atl. 497, 28 Cent. L. J. 341, with note; *Denton v. Merrill*, 43 Hun, 224, 229. And see DEPOSIT.

10. Rebuttal.

a. Testing witness.—To rebut testimony of a witness to the identity of a person, the witness may be tested by pointing out a third person, and interrogating the witness as to the resemblance of the latter to the one in question.¹

¹ Whart. Crim. Ev. 10th ed. 1912 § 808, p. 1566.

b. Inspection and experiment.—One against whom evidence of physical peculiarities has been adduced as evidence of identity has a right to submit himself to the inspection of the jury in rebuttal, if the peculiarities relied on are such that the evidence afforded thereby could not be made for the occasion, such, for instance, as the conformation of a limb,¹

Otherwise of peculiarities that could be so produced, such as the tone of voice.²

¹ *Lipes v. State*, 15 Lea, 125, 54 Am. Rep. 402 (error to refuse to allow accused to exhibit his feet).

So, it is error to refuse to allow evidence that he had not used shoes capable of making the tracks proved (*Stone v. State*, 12 Tex. App. 219); or that the horse could not wear such shoes as to make the horse tracks proved. *State v. Melick*, 65 Iowa, 614, 22 N. W. 895.

See also cases cited under title, FINGER PRINTS, PALM PRINTS, AND FOOT-PRINTS, ante.

² *Com. v. Scott*, 123 Mass. 222, 25 Am. Rep. 81 (not error to refuse to allow him to prove his usual and natural voice, by using his voice in the courtroom).

See also ABILITY; CONDITION.

c. Existence of a "double."—Whether it is competent to prove that a third person has been seen closely resembling the one in question, without producing such person, see.¹

¹ *Affirmative*: *White v. Com.* 2 Ky. L. J. 256.

Negative: *Com. v. Webster*, 5 Cush. 295, 52 Am. Dec. 711.

d. Name.—To disprove identity, it is not competent to show difference of name, without offering to show that a different person was intended.¹

Existence of a person in one place is not disproved by evidence of previous death of one of the same name residing in another place.²

¹ *Rutherford v. State*, 13 Tex. App. 92 (name of injured person, as stated in indictment). *S. P., Com. v. Gornley*, 133 Mass. 580 (name of person to whom liquor was sold).

² *People v. Cline*, 44 Mich. 290, 6 N. W. 671 (conviction for false pretenses not sustainable).

11. Opinion evidence.

The opinions of nonexpert witnesses on questions of identity are admissible.¹ And this seems to be true although such opinions are based on the sound of the voice and the motion of the person, rather than a view of the features.² On the question of the identity of partly decomposed bodies, the courts are not in agreement, one case holding that the witness can state the points of resemblance in such a way that the jury is in as good a position as he to determine the question,³ and another holding that, although the body is decomposed, there still remain a number of indefinable points of resemblance, necessitating an expression of opinion.⁴ Opinion evidence is also admissible as to identity of inanimate objects.⁵

¹ *Beavers v. State*, 103 Ala. 36, 15 So. 616; *Jordan v. State*, 50 Fla. 94, 39 So. 155; *Gentry v. McMinnis*, 3 Dana, 382; *Hopper v. Com.* 6 Gratt. 684.

² *State v. Hopkirk*, 84 Mo. 278.

³ *People v. Wilson*, 3 Park. Crim. Rep. 199.

⁴ *Keith v. State*, 157 Ind. 376, 61 N. E. 716; and for additional cases and full discussion see note in L.R.A.1918A, 713.

⁵ *Jackson v. State*, 167 Ala. 77, 52 So. 730; *J. I. Case Threshing Mach. Co. v. Stein*, 133 Ill. App. 169; *State v. Maxwell*, 51 Iowa, 314, 1 N. W. 666; *Baltes Land, Stone & Oil Co. v. Sutton*, 32 Ind. App. 14, 69 N. E. 179; *Altman v. Young*, 38 Mich. 410; *State v. James*, 194 Mo. 268, 92 S. W. 679, 5 Ann. Cas. 1007; *Crumes v. State*, 28 Tex. App. 516, 19 Am. St. Rep. 853, 13 S. W. 868; *Winding Gulf Colliery Co. v. Campbell*, 72 W. Va. 449, 78 S. E. 384; and for additional cases and full discussion, see L.R.A.1918A, 717.

ILLEGALITY.

For kindred topics, see **INTENT**; **KNOWLEDGE**.

Oral evidence.

The rule that oral evidence is not competent to vary a written contract does not preclude oral evidence of legality,¹ or of illegality.²

¹ See § 6, **CONSIDERATION**.

² *Cassard v. Hinman*, 1 Bosw. 207 (wager contract). And see *Brown v. Brown*, 34 Barb. 533 (lobby services); *Roe v. Kiser*, 62 Ark. 92, 34 S. W. 534 (usury); *Daw v. Niles*, 4 Cal. Unrep. 144, 33 Pac. 1114; *Wainwright v. Talcott*, 60 Conn. 43, 22 Atl. 484; *Ryan v. Potwin*, 60 Ill. App. 637; *Humbert v. Larson*, 99 Iowa, 275, 68 N. W. 703; *Friend v. Miller*, 52 Kan. 139, 34 Pac. 397; *Gould v. Leavitt*, 92 Me. 416, 43 Atl. 17; *Saginaw Bldg. & L. Asso. v. Tennant*, 111 Mich. 515, 69 N. W. 1118; *Lewis v. Willoughby*, 43 Minn. 307, 45 N. W. 439; *Paterson v. Baker*, 51 N. J. Eq. 49, 26 Atl. 324; *Smith v. Stevens*, 81 Tex. 461, 16 S. W. 986. *Contra*: *Dewey*, Contr. 65, 66. See further, on this question, cases reviewed in notes to *Ferguson v. Rafferty*, 6 L.R.A. 33, and 17 L.R.A. 273.

Whether illegality is available unless alleged, see *May v. Burras*, 13 Abb. N. C. 388; *Cary v. Western U. Teleg. Co.* 47 Hun, 610, with note in 20 Abb. N. C. 333, 342; *Maitland v. Zanga*, 14 Wash. 92, 44 Pac. 117.

INDEBTEDNESS.

1. State of account.
2. Municipal indebtedness.
3. Admission.

For kindred topics, see **ABSTRACTS; ACCORD AND SATISFACTION; ACCOUNTS; ACCOUNT STATED; ADMISSIONS; COMPROMISE; CORROBORATION; PAYMENT.**

1. State of account.

The state of an account, when indirectly involved, may be testified to directly by a witness cognizant of it, without producing the books.¹

¹ *Lewis v. Palmer*, 28 N. Y. 271, 278. See also **ABSTRACTS; ACCOUNTS.**

2. Municipal indebtedness.

It will be presumed, in the absence of proof to the contrary, that a limitation upon the amount of indebtedness which a municipal corporation may incur has not been exceeded.¹

¹ *Gladstone v. Throop*, 18 C. C. A. 61, 37 U. S. App. 481, 71 Fed. 341; *Keene Five-Cent Sav. Bank v. Lyon County*, 90 Fed. 523; *German Ins. Co. v. Manning*, 95 Fed. 597; *Thompson v. Independent School Dist.* 102 Iowa, 94, 70 N. W. 1093; *Johnson v. Pawnee County*, 7 Okla. 686, 56 Pac. 701; *Custer County v. DeLana*, 8 Okla. 213, 57 Pac. 162; *Linn v. Chambersburg*, 160 Pa. 511, 25 L.R.A. 217, 28 Atl. 842.

3. Admission.

The admission by a testatrix that she had money belonging to other persons, and her request to her friends to see that the money was duly paid to those entitled to it, are competent to bind her estate for the payment of such debts.¹

¹ *Deuterman v. Ruppel*, 103 Ill. App. 106.

INDORSEMENT OF A BILL OR NOTE.

1. Admissibility of parol evidence to explain or vary the contract implied from the regular indorsement of a bill or note.
 - a. Unqualified indorsement by a bona fide payee or indorsee.
 - b. Qualified indorsement.
 - c. Evidence to show absence of contract.
 - d. Negotiable instruments law.

1. Admissibility of parol evidence to explain or vary the contract implied from the regular indorsement of a bill or note.

a. Unqualified indorsement by a bona fide payee or indorsee.

—Where a payee or subsequent indorsee unqualifiedly indorses an instrument the decided weight of authority holds that the contract implied from such an indorsement, cannot even as between the parties be varied or explained by parol evidence of a prior or contemporaneous agreement,¹ and even where the indorsement is made by an accommodation party.² Several states hold that such parol evidence is admissible whether the indorsement is by an actual payee³ or by an accommodation indorser.⁴ Some jurisdictions, which follow the majority rule as to regular indorsements in the ordinary case, hold that as to accommodation indorsers parol evidence may be admitted to show the exact nature and extent of his contract.⁵ The weight of authority sustains the admissibility of parol evidence to explain an indorsee's contract, where the question arises between him and other indorsers or original parties.⁶

¹ *Van Vleet v. Sledge*, 45 Fed. 743; *Preston v. Ellington*, 74 Ala. 133; *Citizens' Bank v. Jones*, 121 Cal. 30, 53 Pac. 354; *Torbert v. Montague*, 38 Colo. 325, 87 Pac. 1145; *Hopkins v. Merrill*, 79 Conn. 626, 66 Atl. 174; *Dunn v. Welsh*, 62 Ga. 241; *George E. Lloyd & Co. v. Matthews*, 223 Ill. 477, 7 L.R.A. (N.S.) 376, 114 Am. St. Rep. 346, 79 N. E. 172; *Brown v. Nichols S. & Co.* 123 Ind. 492, 24 N. E. 339; *Porter v. Moles*, 151 Iowa, 279, 131 N. W. 23; *Guaranty Invest. Co. v. Gamble*, 102 Kan. 791, 171 Pac. 1152; *Helm v. Ducayet*, 20 La. Ann. 417; *Ortmann v. Canadian Bank*, 39 Mich. 518; *Lake Harriet State Bank v. Miller*, 138

- Minn. 481, 164 N. W. 989; *Hawkins v. Shields*, 100 Miss. 739, 4 A.L.R. 760, 57 So. 4; *Lewis v. Dunlap*, 72 Mo. 174; *Barry v. Morse*, 3 N. H. 132; *Johnson v. Ramsey*, 43 N. J. L. 279, 39 Am. Rep. 580; *Hodgens v. Jennings*, 148 App. Div. 879, 133 N. Y. Supp. 584; *Farr v. Ricker*, 46 Ohio St. 265, 21 N. E. 354; *Clark v. Sallaska*, — Okla. —, 4 A.L.R. 746, 174 Pac. 505; *Smith v. Caro*, 9 Or. 278; *Smith Bros. v. Brabham*, 48 S. C. 337, 26 S. E. 651; *Schmitz v. Hawkeye Gold Min. Co.* 8 S. D. 544, 67 N. W. 618; *Barger v. Brubaker*, — Tex. Civ. App. —, 187 S. W. 1025; *Riverview Land Co. v. Dance*, 98 Va. 239, 35 S. E. 720; *Holt Mfg. Co. v. Brotherton*, 91 Wash. 354, 157 Pac. 849; *Halbach v. Trester*, 102 Wis. 530, 78 N. W. 759.
- ² *Eaves v. Keeton*, 196 Mo. App. 424, 193 S. W. 629; *Union Bank v. Commercial Securities Co.* 163 Wis. 470, 157 N. W. 510; *Foley v. Emerald & P. Brewing Co.* 61 N. J. L. 428, 39 Atl. 650.
- ³ *Sykes v. Everett*, 167 N. C. 600, 4 A.L.R. 751, 83 S. E. 585; *Roads v. Webb*, 91 Me. 406, 64 Am. St. Rep. 246, 40 Atl. 128; *Jaster v. Currie*, 69 Neb. 4, 94 N. W. 995; *Breneman v. Furniss*, 90 Pa. 186, 35 Am. Rep. 651; *Brewer v. Woodward*, 54 Vt. 581, 41 Am. Rep. 857; *Howell v. McCarthy*, 77 W. Va. 695, 88 S. E. 181.
- ⁴ *Marquardt's Estate*, 251 Pa. 73, 95 Atl. 917; *Taylor v. French*, 2 Lea, 257, 31 Am. Rep. 609.
- ⁵ *Commercial Nat. Bank v. Atkinson*, 62 Kan. 775, 64 Pac. 617; *Barger v. Farnham*, 130 Mich. 487, 90 N. W. 281.
- ⁶ *Weeks v. Parsons*, 176 Mass. 570, 58 N. E. 157; *Breitengross v. Farr*, 100 Wis. 215, 75 N. W. 893.

b. Qualified indorsement.—The general rule is that parol evidence is not admissible to vary or explain a qualified indorsement “without recourse”¹ or “with recourse”² or “for collection.”³ Exceptions to the rule occur where indorsement is part of a larger contract⁴ or in case of mistake.⁵

- ¹ *Odom Realty Co. v. Central Trust Co.* 22 Ga. App. 711, 97 S. E. 116; *Youngberg v. Nelson*, 51 Minn. 172, 38 Am. St. Rep. 497, 53 N. W. 629. But see *Carroll v. Nodine*, 41 Or. 412, 93 Am. St. Rep. 743, 69 Pac. 51.
- ² *Kinsel v. Ballou*, 151 Cal. 754, 91 Pac. 620; *Phillips v. Bridges*, 20 Ga. App. 489, 93 S. E. 115.
- ³ *United States Nat. Bank v. Geer*, 55 Neb. 462, 41 L.R.A. 444, 70 Am. St. Rep. 390, 75 N. W. 1088; *White v. Miner's Nat. Bank*, 102 U. S. 658, 26 L. ed. 250.
- ⁴ *Northrup Nat. Bank v. Yates Center Nat. Bank*, 98 Kan. 563, 159 Pac. 403.
- ⁵ *Johnson v. Williard*, 83 Wis. 420, 53 N. W. 776.

c. Evidence to show absence of contract.—Evidence may ordinarily be introduced to show that there was no contract between the parties and this rule applies to indorsements of a bill or note.¹

¹ *Clark v. Sallaska*, — Okla. —, 4 A.L.R. 746, 174 Pac. 505; *Johnston v. Schnabaum*, 86 Ark. 82, 17 L.R.A. (N.S.) 838, 126 Am. St. Rep. 1082, 109 S.W. 1163, 15 Ann. Cas. 876.

d. Negotiable instruments law.—The provision that a person signing “otherwise than as maker, drawer or acceptor is deemed to be an indorser” in the absence of express words to the contrary, has been construed to prevent the introduction of parol evidence to vary or explain the contract implied from the payee’s indorsement.¹ Parol evidence is not admissible to show that an unqualified indorsement was intended as qualified on the theory that such evidence proves the delivery to have been conditional.² As between original indorsers parol evidence may be offered to show an agreement that indorsers should be liable in a different order than shown³ or as to whom words “without recourse” apply.⁴ Other provisions of the act have been construed to make parol evidence inadmissible.⁵

¹ *Kopf v. Yordy*, 200 Ill. App. 409; *Porter v. Moles*, 151 Iowa, 279, 131 N. W. 23; *Eaves v. Keeton*, 196 Mo. App. 424, 193 S. W. 629; *Lyons Lumber Co. v. Stewart*, 147 Ky. 653, 145 S. W. 376.

² *Schine v. Johnson*, 92 Conn. 590, 4 A.L.R. 744, 103 Atl. 974; *Morris-Miller Co. v. Von Pressentin*, 63 Wash. 74, 114 Pac. 912.

³ *National Newark Bkg. Co. v. Sweeney*, 88 N. J. L. 140, 96 Atl. 86; *Goldman v. Goldberger*, 126 C. C. A. 35, 208 Fed. 877.

⁴ *Leahmer v. McCullough*, 99 Kan. 451, 162 Pac. 297; *Porter v. Moles*, 151 Iowa, 279, 131 N. W. 23.

⁵ *Guaranty Invest. Co. v. Gamble*, 102 Kan. 791, 171 Pac. 1152.

For additional cases on this general subject see note in 4 A.L.R. 746.

INDUCEMENT.

1. What would you have done?
2. Oral evidence.
3. Cogency of evidence.

See also GOOD FAITH; INTENT.

1. What would you have done?

The rule that a witness may testify that he was induced to certain conduct by specified representations,¹ and that he believed the representations,² does not allow him to be asked, on direct examination, if he would have done so had no such representation been made.³

¹ *Hardt v. Schulting*, 13 Hun, 537; *Cressler v. Rees*, 27 Neb. 515, 43 N. W. 363; *Lyons v. Allen*, 11 App. D. C. 543. See also INTENT.

² *McGrann v. Pittsburgh & L. E. R. Co.* 111 Pa. 171, 2 Atl. 872; *Rogers v. Ferris*, 107 Mich. 126, 64 N. W. 1048. See also GOOD FAITH.

³ *Benedict v. Penfield*, 42 Hun, 176; *Learned v. Ryder*, 61 Barb. 552, 5 Lans. 539. Much less, what others would have done. *Northwestern Benev. & Mut. Aid Assn. v. Hall*, 118 Ill. 169, 8 N. E. 764. But see *Browning v. National Capital Bank*, 13 App. D. C. 1 (an action for deceit in representing that a specified person was worth a designated amount to defendant's personal knowledge, without saying anything about the indebtedness of such person, of which defendant knew, in reliance upon which plaintiff bank made a loan to such person, holding that the testimony of the president and directors of the bank that they would not have made a loan if defendant had disclosed the indebtedness of the borrower, is admissible); *Pridham v. Weddington*, 74 Tex. 354, 12 S. W. 49 (that a party defending an action to recover for corporate stock purchased, on the ground of deceit, might testify that he could not have purchased the stock had not the representations been made to him); *Jandt v. Potthast*, 102 Iowa, 223, 71 N. W. 216 (that the credit man of a seller of goods on credit to defendant might testify that the sale would not have been made if he had known defendant's financial condition).

2. Oral evidence.

The rule that oral evidence is inadmissible to vary or change the terms of a written instrument does not apply to such evidence when offered for the purpose of impeaching the instru-

ment for false or fraudulent representations, upon the faith of which it was entered into.¹

¹ *Gustafson v. Rustemeyer*, 70 Conn. 125, 39 L.R.A. 644, 39 Atl. 104; *Grand Tower & C. G. R. Co. v. Walton*, 150 Ill. 428, 37 N. E. 920; *McCormick Harvesting Mach. Co. v. Williams*, 99 Iowa, 601, 68 N. W. 907; *Peck v. Janison*, 99 Mich. 326, 58 N. W. 312; *Bryant v. Thesing*, 46 Neb. 244, 64 N. W. 967; *Cass v. Brown*, 68 N. H. 85, 44 Atl. 86; *Mayer v. Dean*, 115 N. Y. 556, 5 L.R.A. 540, 22 N. E. 261; *Sidney School Furniture Co. v. Warsaw School Dist.* 130 Pa. 76, 18 Atl. 604; *Fine v. Stuart*, — Tenn. —, 48 S. W. 371; *Reed v. Newcomb*, 62 Vt. 75, 19 Atl. 367.

3. Cogency of evidence.

A written instrument on which contractual rights are founded cannot be impeached by the person executing it on the ground that he had been fraudulently induced to do so by a slight preponderance of evidence; but the evidence of fraud must be clear, decided, and satisfactory.¹

¹ It is true that the law in such cases requires nothing but a preponderance of evidence, but it requires that preponderance to be great enough to overcome all opposing evidence and repel all opposing presumptions. In order to do so it should be of such weight and cogency as to satisfactorily establish the wrongful conduct charged. *Kansas Mill Owners' & Mfrs. Mut. F. Ins. Co. v. Rammelsberg*, 58 Kan. 531, 50 Pac. 446. To the same effect, see *Barr v. Chandler*, 47 N. J. Eq. 532, 20 Atl. 733; *Hand v. Waddell*, 167 Ill. 402, 47 N. E. 772; *Strickland v. Isett*, 186 Pa. 280, 40 Atl. 513; *Straight v. Wilson*, 176 Pa. 520, 35 Atl. 230; *Martin v. Hill*, 41 Minn. 337, 43 N. W. 337; *Archer v. California Lumber Co.* 24 Or. 341, 33 Pac. 526.

INFANCY.

1. Admission.
2. Burden of proof.
3. Physical appearance.

For cognate topics, see AGE; BIRTH.

1. Admission.

Against an infant when he is a party, his own admission of being a minor is competent.¹

¹ People v. Tripp, 4 N. Y. Legal Obs. 344 (indictment for offering to vote).

2. Burden of proof.

A defendant who pleads infancy has the burden of establishing it.¹

¹ Goodwine v. Acton, 97 Ill. App. 11.

3. Physical appearance.

If a defendant pleads infancy, but offers no independent proof on this question, the court may consider his physical appearance, in connection with other circumstances, in determining whether the allegation is sustained.¹

¹ Garbarsky v. Simkin, 36 Misc. 195, 73 N. Y. Supp. 199.

INSANITY.

I. PRESUMPTIONS AND BURDEN OF PROOF.

1. In general.
2. With relation to contracts and conveyances.
3. With relation to wills.
 - a. In general.
 - b. As to fraud and undue influence.
 - c. Burden of proof after probate.
4. As to capacity of one contracting marriage.
5. Presumption of insanity from suicide.
6. Presumption of continuance of insanity.
 - a. Habitual insanity.
 - b. Temporary insanity.
 - c. Alcoholism and alcoholic insanity.
 - d. Presumption of continuance of a lucid interval.
 - e. Nature of the presumption.

II. OPINION EVIDENCE.

7. Expert opinions.
 - a. Admissibility generally.
 - b. Privilege of witnesses.
 - c. From observation or examination.
 - d. From the evidence.
 - e. On hypothetical questions or statements.
 - (1) Admissibility.
 - (2) Hypothesis; upon what based.
 - (3) Evidence in support of hypothesis.
 - (4) Form of question.
 - f. Qualifications of experts.
 - g. Cross-examination; contradiction.
 - h. Weight.
 - (1) In general.
 - (2) As affected by facts and opportunity to observe.
 - (3) As affected by character, bias, and nature of the question.
 - (4) As compared with other expert opinions.
 - (5) As compared with nonexpert opinions.
 - (6) As a question for the jury.
8. Nonexpert opinions generally.
 - a. General rules.
 - b. Who may give.
 - c. Acquaintance necessary.
 - d. Time to which opinion relates.
 - e. Cross-examination, rebuttal, and impeachment.
 - f. Weight.

9. Opinion of subscribing witnesses as to sanity or insanity.

- a. Admissibility generally.
- b. Necessity of giving.
- c. Contradiction; weight.

III. MISCELLANEOUS.

- 10. Photographs.
- 11. Declarations.
- 12. General reputation.
- 13. Insanity in blood relatives.
 - a. Hereditary insanity.
 - b. Nonhereditary insanity.
- 14. Presence of defendant in lunacy proceedings.
- 15. Conduct and circumstances.
- 16. Belief in spiritualism, witchcraft, etc.

I. PRESUMPTIONS AND BURDEN OF PROOF.

1. In general.

The rule is practically universal that every person is presumed to be sane until the contrary appears,¹ and the burden of proof to establish insanity rests with the party alleging it.²

¹ *Ethridge v. Bennett*, 9 Houst. (Del.) 295, 31 Atl. 813; *Argo v. Coffin*, 142 Ill. 368, 34 Am. St. Rep. 86, 32 N. E. 679; *Wallace v. Lehring*, 134 Ind. 447, 34 N. E. 231; *Chandler v. Barrett*, 21 La. Ann. 58, 99 Am. Dec. 701; *Ricketts v. Jolliff*, 62 Miss. 440; *Perkins v. Perkins*, 39 N. H. 163; *Jackson ex dem. Van Dusen v. Van Dusen*, 5 Johns. 144, 4 Am. Dec. 330; *Ean v. Snyder*, 46 Barb. 230; *Odom v. Riddick*, 104 N. C. 515, 7 L.R.A. 118, 17 Am. St. Rep. 686, 10 S. E. 609; *Miller v. Rutledge*, 82 Va. 863, 1 S. E. 202; *Giebel v. State*, 28 Tex. App. 151, 12 S. W. 591; *United States v. Chisholm*, 153 Fed. 808; *Howard v. State*, 172 Ala. 402, 34 L.R.A. (N.S.) 990, 55 So. 255; *Bailey v. State*, 105 Ark. 228, 150 S. W. 1030; *People v. Loper*, 159 Cal. 6, 112 Pac. 720, Ann. Cas. 1912B, 1193; *Pribble v. People*, 49 Colo. 210, 112 Pac. 220; *State v. Jack*, 4 Penn. (Del.) 470, 58 Atl. 833; *Johnson v. State*, 57 Fla. 18, 49 So. 40; *Hobbs v. State*, 8 Ga. App. 53, 68 S. E. 515; *State v. Wetter*, 11 Idaho, 433, 83 Pac. 341; *People v. Geary*, 297 Ill. 608, 131 N. E. 97; *Freese v. State*, 159 Ind. 597, 65 N. E. 915; *State v. Thiele*, 119 Iowa, 659, 94 N. W. 256; *Miracle v. Com.* 148 Ky. 453, 146 S. W. 1136; *Com. v. Spencer*, 212 Mass. 438, 99 N. E. 266, Ann. Cas. 1913D, 552; *People v. Quimby*, 134 Mich. 625, 96 N. W. 1061; *Caffey v. State*, — Miss. —, 24 So. 315; *State v. Barker*, 216 Mo. 532, 115 S. W. 1102; *State v. Peel*, 23 Mont. 358, 75 Am. St. Rep. 529, 59 Pac. 169; *Davis v. State*, 90 Neb. 361, 133 N. W. 406; *State v.*

Maioni, 78 N. J. L. 339, 74 Atl. 526, 20 Ann. Cas. 204; *Territory v. McNabb*, 16 N. M. 625, 120 Pac. 907; *People v. Tobin*, 176 N. Y. 278, 68 N. E. 359; *People v. Egnor*, 175 N. Y. 419, 67 N. E. 906; *State v. Cloninger*, 149 N. C. 567, 63 S. E. 154; *Maas v. Territory*, 10 Okla. 714, 53 L.R.A. 814, 63 Pac. 960; *Com. v. Barner*, 199 Pa. 335, 49 Atl. 60; *State v. Quigley*, 26 R. I. 263, 67 L.R.A. 322, 58 Atl. 905, 3 Ann. Cas. 920; *Montgomery v. State*, 68 Tex. Crim. Rep. 78, 151 S. W. 813; *State v. Brown*, 36 Utah, 46, 24 L.R.A. (N.S.) 545, 102 Pac. 641; *State v. Clark*, 34 Wash. 485, 101 Am. St. Rep. 1006, 76 Pac. 98; *State v. Cook*, 69 W. Va. 717, 72 S. E. 1025; *Duthey v. State*, 131 Wis. 178, 10 L.R.A. (N.S.) 1032, 111 N. W. 222; *State v. Pressler*, 16 Wyo. 214, 92 Pac. 806, 15 Ann. Cas. 93. For additional cases and discussion, see note in 44 L.R.A. (N.S.) 120.

But the presumption that every man is sane until the contrary is proved is not a presumption of law, but one of fact, or at least a mixed presumption of law and fact. *Sutton v. Sadler*, 3 C. B. N. S. 87, 26 L. J. C. P. N. S. 284, 3 Jur. N. S. 1150, 5 Week. Rep. 880.

And whatever force is given to the presumption of sanity is due, not to its intrinsic weight as a distinct item of proof, but to its operation in some degree in rendering the circumstances adduced to prove sanity more persuasive. *McGinnis v. Kempsey*, 27 Mich. 363.

Where, upon the whole evidence pro and con, it is doubtful whether the party be sane or not, the presumption in favor of sanity may operate to decide the question. *Hawkins v. Grimes*, 13 B. Mon. 257.

² *Frazier v. Frazier*, 2 Del. Ch. 260; *Guild v. Hull*, 127 Ill. 523, 20 N. E. 665; *Ricketts v. Jolliff*, 62 Miss. 440; *Jackson ex dem. Cadwell v. King*, 4 Cow. 207, 15 Am. Dec. 354; *People v. Pine*, 2 Barb. 556; *Ballew v. Clark*, 24 N. C. (2 Ired. L.) 23; *Odom v. Riddick*, 104 N. C. 515, 7 L.R.A. 118, 17 Am. St. Rep. 686, 10 S. E. 609; *Pennypacker v. Pennypacker*, 5 Sadler (Pa.) 408, 8 Atl. 634; *Coyle v. Com.* 100 Pa. 573, 45 Am. Rep. 397; *Miller v. Rutledge*, 82 Va. 863, 1 S. E. 202; *Burton v. Scott*, 3 Rand. (Va.) 399; *Hall v. Unger*, 2 Abb. (U. S.) 507, Fed. Cas. No. 5,949; *Worthington v. Mencer*, 96 Ala. 310, 17 L.R.A. 407, 11 So. 72.

2. With relation to contracts and conveyances.

The sanity and competency of a party to a contract are universally presumed in the absence of evidence to the contrary.¹ And the burden of proof to avoid a contract upon the ground that the grantor had not sufficient understanding to know the nature and consequences of his act rests with the party alleging it.² Thus, a grantor is presumed to be sane and competent at the time of executing a deed when nothing to the contrary ap-

pears, and the burden of proof of unsoundness of mind and incapacity rests with the party seeking to impeach it,³ unless a previous condition of insanity has been established.⁴ The same rule applies to gifts.⁵ And the burden of proof in an action to set aside a mortgage on the ground of alleged mental incompetency of the mortgagor rests with the complainant to show such incompetency.⁶ So, the burden of proof as to the mental incapacity of the assignor at the time of the execution of the assignment rests with the party asserting it.⁷ So, also, the burden of proving incapacity to give a release rests with the complainant in an action brought to set it aside on that ground.⁸ Old age and physical infirmity, however, raise no presumption of incompetency to execute a deed or make a contract.⁹

¹ *Killian v. Badgett*, 27 Ark. 166; *Menkins v. Lightner*, 18 Ill. 282; *State v. Geddis*, 42 Iowa, 268; *Hiett v. Shull*, 36 W. Va. 563, 15 S. E. 146; *Powell v. Powell*, 27 Miss. 783.

² *Day v. Seeley*, 17 Vt. 542; *White v. Farley*, 81 Ala. 563, 8 So. 215; *Wray v. Wray*, 32 Ind. 126; *State v. Geddis*, 42 Iowa, 268; *Trimbo v. Trimbo*, 47 Minn. 389, 50 N. W. 350; *Cutler v. Zollinger*, 117 Mo. 92, 22 S. W. 895.

One who seeks to avoid an express contract upon the ground of his intoxication at the time must produce clear and satisfactory proof that he was in such a state of drunkenness as not to know what he was doing. *Johns v. Fritchey*, 39 Md. 259.

³ *Doe ex dem. Guest v. Beeson*, 2 Houst. (Del.) 246; *Titcomb v. Vantyle*, 84 Ill. 371; *Achey v. Stephens*, 8 Ind. 411; *Buckey v. Buckey*, 38 W. Va. 168, 18 S. E. 383; *Dicken v. Johnson*, 7 Ga. 484; *Howe v. Howe*, 99 Mass. 88; *Brown v. Brown*, 39 Mich. 792; *Hoge v. Fisher*, Pet. C. S. 163, Fed. Cas. No. 6,585.

If there is only a balance of evidence or a mere doubt of the sanity of the maker of a deed, the presumption in favor of sanity must turn the scale in favor of its validity. *Myatt v. Walker*, 44 Ill. 485; *Lilly v. Waggoner*, 27 Ill. 395; *Wall v. Hill*, 1 B. Mon. 290, 36 Am. Dec. 578.

⁴ *Buckey v. Buckey*, 38 W. Va. 168, 18 S. E. 383.

⁵ *Kimball v. Cuddy*, 117 Ill. 213, 7 N. E. 589.

⁶ *Gates v. Cornett*, 72 Mich. 435, 40 N. W. 740; *Youn v. Lamont*, 56 Minn. 216, 57 N. W. 478; *Fay v. Burditt*, 81 Ind. 435, 42 Am. Rep. 142.

⁷ *Dorchester v. Dorchester*, 18 N. Y. S. R. 402, 3 N. Y. Supp. 238.

⁸ *Swayze v. Swayze*, 37 N. J. Eq. 180; *Chicago West Div. R. Co. v. Mills*, 91 Ill. 39.

⁹ *Williams v. Haid*, 118 N. C. 481, 24 S. E. 217; *Lewis v. Pead*, 1 Ves. Jr. 19, 30 Eng. Reprint 210.

3. With relation to wills.

a. In general.—Every person of full age is presumed to have sufficient mental capacity to make a will until the contrary appears.¹ This presumption extends throughout his life, no matter to what age the testator may live.² And the presumption is usually required to be rebutted by proof.³ As to the burden of proof, there is a conflict in the authorities. In many jurisdictions it is declared that insanity or incapacity of a testator alleged to defeat the probate of his will must be proved by the contestant when the formal execution of the will has been duly proved.⁴ But the opposite rule, that testamentary capacity must be proved by the proponent, is also adopted by many courts.⁵ The general rule in favor of testamentary capacity applies on an issue of *devisavit vel non*.⁶ So, in an ejectment case, in which the title depends on a will, the presumption of law is in favor of the testator's sanity, and the burden of proof is upon him who denies it.⁷ Where general insanity is shown before the making of a will, the presumption in favor of competency is changed, and testamentary capacity must be proved affirmatively.⁸ But a temporary mental disorder at some time prior to the making of a will does not change the rule in favor of testamentary capacity.⁹

¹ O'Donnell v. Rodiger, 76 Ala. 222, 52 Am. Rep. 322; Panaud v. Jones, 1 Cal. 488; Jamison v. Jamison, 3 Houst. (Del.) 108; Higgins v. Carlton, 28 Md. 115, 92 Am. Dec. 666; Payne v. Banks, 32 Miss. 292; Jackson v. Hardin, 83 Mo. 175; Pettes v. Bingham, 10 N. H. 515; Elkinton v. Brick, 44 N. J. Eq. 154, 1 L.R.A. 161, 15 Atl. 391; Re Flansburgh, 82 Hun, 49, 31 N. Y. Supp. 177; Grabill v. Barr, 5 Pa. 441, 47 Am. Dec. 418; Dean v. Dean, 27 Vt. 746; Cole's Will, 49 Wis. 179, 5 N. W. 346; Sutton v. Sadler, 3 Jur. N. S. 1150, 3 C. B. N. S. 87, 26 L. J. C. P. N. S. 284, 5 Week Rep 880; Groom v. Thomas, 2 Hagg. Eccl. Rep. 433, 162 Eng. Reprint, 914.

² Higgins v. Carlton, 28 Md. 115, 92 Am. Dec. 666.

³ Payne v. Banks, 32 Miss. 292; Landis v. Landis, 1 Grant Cas. 248.

⁴ Coble v. Grant, 3 N. J. Eq. 629; Elkinton v. Brick, 44 N. J. Eq. 154, 1 L.R.A. 161, 15 Atl. 391; Baxter v. Abbott, 7 Gray, 71; Chrisman v. Chrisman, 16 Or. 127, 18 Pac. 6; Allen v. Griffin, 69 Wis. 529, 35 N. W. 21; Cotton v. Ulmer, 45 Ala. 378, 6 Am. Rep. 703; McCullough v. Campbell, 49 Ark. 367, 5 S. W. 590; Chandler v. Ferris, 1 Harr. (Del.) 454; Taylor v. Creswell, 45 Md. 422; Perkins v. Perkins, 39

N. H. 163; *Delafield v. Parish*, 25 N. Y. 9; *Grubbs v. McDonald*, 91 Pa. 236; *Kinloch v. Palmer*, 1 Mill. Const. 216; *Stephenson v. Stephenson*, 62 Iowa, 163, 17 N. W. 456; *Groom v. Thomas*, 2 Hagg. Eccl. Rep. 433, 162 Eng. Reprint, 914, *Re Scott's*, 128 Cal. 57, 60 Pac. 527.

But later decisions in the lower courts of New York have inclined to the rule that the proponent of the will must give affirmative proof of competency. *Re Ramsdell*, 6 Dem. 244, affirmed in 20 N. Y. S. R. 446, 3 N. Y. Supp. 499, and also affirmed by memorandum decision in 117 N. Y. 636; *Harper v. Harper*, 1 Thomp. & C. 35.

5 *Comstock v. Hadlyme Ecclesiastical Soc.* 8 Conn. 254, 20 Am. Dec. 100; *Knox's Appeal*, 26 Conn. 20; *Evans v. Arnold*, 52 Ga. 169; *Prentis v. Bates*, 93 Mich. 234, 17 L.R.A. 494, 53 N. W. 153; *Gerrish v. Nason*, 22 Me. 438, 39 Am. Dec. 589; *Barnes v. Barnes*, 66 Me. 286; *Seebrook v. Fedawa*, 30 Neb. 424, 46 N. W. 650; *Beazley v. Denson*, 40 Tex. 416; *Williams v. Robinson*, 42 Vt. 658, 1 Am. Rep. 359; *Crowninshield v. Crowninshield*, 2 Gray, 524; *Phelps v. Hartwell*, 1 Mass. 71; *Silverthorn's Will*, 68 Wis. 372, 32 N. W. 287 (obiter); *Turner v. Butler*, 253 Mo. 202, 161 S. W. 745. See also note in 12 Mich. L. Rev. 423.

The doctrine is very materially modified in Illinois, where a party asserting the validity of a will is required in the first instance to make a *prima facie* case of the testator's sanity, but, when this has been done and contradictory testimony is produced, proof of sanity must prevail unless the contradictory testimony is sufficient to overcome or neutralize the general rule of law that all men are presumed sane until the contrary is proved, as well as affirmative testimony in favor of the will. *Wilbur v. Wilbur*, 129 Ill. 392, 21 N. E. 1076; *Pendlay v. Eaton*, 130 Ill. 69, 22 N. E. 853; *Carpenter v. Calvert*, 83 Ill. 62; *Donovan v. St. Joseph's Home*, 295 Ill. 125, 129 N. E. 1.

6 *McMasters v. Blair*, 29 Pa. 298; *Grabill v. Barr*, 5 Pa. 441, 47 Am. Dec. 418; *Kinloch v. Palmer*, 1 Mill. Const. 216; *Mayo v. Jones*, 78 N. C. 404.

7 *Den ex dem. Trumbull v. Gibbons*, 22 N. J. L. 117, 51 Am. Dec. 253; *Thompson v. Kyner*, 65 Pa. 368; *Jackson ex dem. Van Dusen v. Van Dusen*, 5 Johns, 144, 4 Am. Dec. 330; *Jones v. Jones*, 43 N. Y. S. R. 434, 17 N. Y. Supp. 905.

8 *Morrison v. Smith*, 3 Bradf. 209; *Symes v. Green*, 1 Swabey & T. 401, 164 Eng. Reprint, 785, 28 L. J. Prob. N. S. 83, 5 Jur. N. S. 742; *Groom v. Thomas*, 2 Hagg. Eccl. Rep. 433, 162 Eng. Reprint, 914; *Duffield v. Robeson*, 2 Harr. (Del.) 375; *Saxon v. Whitaker*, 30 Ala 237.

9 *McMasters v. Blair*, 29 Pa. 298.

Thus, a paralytic stroke producing unconsciousness does not raise a presumption of incapacity at the time of making a subsequent will. *Triah v. Newell*, 62 Ill. 197, 14 Am. Rep. 79. And proof of a par-

ticular delusion at some time prior to the making of a will does not raise a presumption of incapacity. *Townshend v. Townshend*, 7 Gil, 10. Nor proof that testator had occasional paroxysms of pain during which he did not know anything. *Blake v. Rourke*, 74 Iowa, 519, 38 N. W. 392. And the occasional intemperance of a testator rendering him for a time incompetent to do business will not cast the burden of proving his capacity on the proponent of his will. *Goble v. Grant*, 3 N. J. Eq. 629; *Lee's Case*, 46 N. J. Eq. 193; *Kahl v. Schober*, 35 N. J. Eq. 461. Even habitual intoxication is not sufficient to raise a presumption of incapacity. *Lee's Case*, 46 N. J. Eq. 193; *Elkinton v. Brick*, 44 N. J. Eq. 154, 1 L.R.A. 161, 15 Atl. 391; *Andress v. Weller*, 3 N. J. Eq. 604.

For other cases, see notes in 17 L.R.A. 495, and 36 L.R.A. 724.

b. As to fraud and undue influence.—Where the capacity of a testator is weakened or impaired, though not destroyed, and there is evidence of undue influence, fraud, imposition, or mistake, the presumption that he signed the will of his own free will and that he knew the contents thereof, derived from former execution, is diminished, if not entirely overcome.¹ And the legal presumption that a testatrix understood the contents of her will, which had been read to her, is only *prima facie* where she is of great age and addicted to the use of opiates and ardent spirits to such an extent as to enfeeble and impair her faculties.² So, the presumption of knowledge on the part of a testator of the contents of his will from execution does not arise where he is blind or illiterate, and in such case there must be proof of knowledge as well as the formal execution.³ The fact that a party preparing a will for a testator takes a benefit under it is a circumstance which excites the suspicion of the court and which will invalidate the will unless that suspicion is removed.⁴ And a will written by the principal legatee devising the testator's estate to strangers without apparent cause necessitates proof of the testator's volition, capacity, and knowledge of the contents of the instrument and an explanation as to the disposition of the estate and the preparation of the paper.⁵ But the fact that a legatee in a will prepared it does not in all cases and under all circumstances create a presumption that the testator did not know of or assent to its contents, and compel the adduction of additional evidence of knowledge and consent.⁶ And it cannot

be implied from the mere weakness of a testator that a devisee has been guilty of wrong and fraud in procuring a devise of property which it might be supposed he would not have been likely to have obtained except by coercion.⁷ But weakness of mind on the part of the testator, though not sufficient to create testamentary incapacity, together with the fact that a person whose advice had been taken receives a large benefit under his will, casts the burden upon the beneficiary to rebut the presumption of undue influence and of affirmatively showing mental capacity,⁸ and to show affirmatively both testamentary capacity and that the testator acted with the full knowledge of the value of his estate.⁹

¹ *Burger v. Hill*, 1 Bradf. 360.

² *Rutland v. Gleaves*, 1 Swan, 198.

³ *Bartee v. Thompson*, 8 Baxt. 508.

⁴ *Barry v. Butlin*, 1 Curt. Eccl. Rep. 637, 163 Eng. Reprint, 223.

⁵ *Renn v. Samos*, 33 Tex. 760.

⁶ *Cramer v. Crumbaugh*, 3 Md. 491.

⁷ *Thompson v. Kyner*, 65 Pa. 368.

⁸ *Wilson v. Mitchell*, 101 Pa. 495.

⁹ *Caldwell v. Anderson*, 104 Pa. 199. See also *Re Nutt*, 181 Cal. 522, 185 Pac. 393; article entitled "Burden of Proof in Fraud and Undue Influence" by Ralph W. Gifford, 20 Columbia L. Rev. 874; and note in 20 Columbia, L. Rev. 358.

For other cases, see note in 36 L.R.A. 726, 737.

c. Burden of proof after probate.—There is the same conflict of authority with reference to the burden of proof in a proceeding to set aside a will after probate or on appeal in a probate proceeding as that with relation to burden of proof in probate proceedings. Thus, it is laid down upon the one hand that one who seeks to set aside a will which has been established in the probate court upon an allegation of mental incapacity or undue influence assumes the affirmative and has the burden of proof.¹ Upon the other hand, the rule has been laid down that the burden of proof on a bill in chancery to contest a will after its admission to probate rests with those seeking to maintain it to show that at the time of its execution the testator was of sound mind and memory to the extent of understanding what

he was about,² and that the burden of proof rests with the proponent on appeal from an order of probate to establish not only the execution of the will, but also the capacity of the testator;³ and that the burden of proving the proper execution of a will rests with the defendant in ejectment claiming under it, and that for that purpose he must call the subscribing witnesses, making them his own, to testify to the fact of the execution and the mental capacity of the testator at the time, leaving to the plaintiff the benefit of cross-examining the witnesses afterwards touching matters pertinent to the question of mental capacity.⁴

¹ Jenkins v. Tobin, 31 Ark. 306; Rich v. Bowker, 25 Kan. 7; Moore v. Allen, 5 Ind. 521; Blough v. Barry, 144 Ind. 463, 40 N. E. 70; Copeland v. Copeland, 32 Ala. 512.

² Trish v. Newell, 62 Ill. 196, 14 Am. Rep. 79.

³ Seebrock v. Fedawa, 30 Neb. 425, 46 N. W. 650; Potts v. House, 6 Ga. 324, 50 Am. Dec. 329; Comstock v. Hadlyme Ecclesiastical Soc. 8 Conn 254, 20 Am. Dec. 100.

⁴ Waters v. Waters, 35 Md. 531.

4. As to capacity of one contracting marriage.

Where a marriage has been in fact solemnized, the person alleging the incapacity of one of the parties thereto must prove it.¹ And if the proofs in the case on this question are of equal weight and reliability, the presumption of sanity must prevail.² So, deaf and dumb persons are presumed to have capacity to contract marriage, and the burden of establishing the contrary rests with the party seeking to impeach the marriage.³ But, where the existence of insanity is once established in an action to annul the marriage, the onus is cast upon the party seeking to sustain the marriage to prove by testimony as clearly convincing as that required to establish insanity that the particular contract was entered into during a lucid interval.⁴ And the burden of proof rests with the party asserting the validity of a marriage entered into by a person under a decree of lunacy and guardianship to establish that it was entered into during a lucid interval or that it was subsequently ratified.⁵

Proof of insanity to invalidate a marriage on an application for its annulment must be clear and unquestionable,⁶ especially

after the death of one of the parties.⁷ And going through the marriage ceremony with propriety and decorum is of itself prima facie evidence of sufficient understanding of the contract to make it valid.⁸ The question of soundness or unsoundness of mind depends upon the general frame and habit of mind, and cannot be determined from particular actions.⁹

¹ *Browning v. Reane*, 2 Phillim. Eccl. Rep. 69, 161 Eng Reprint, 1080; *Baughman v. Baughman*, 32 Kan. 538, 4 Pac. 1003; *Rawdon v. Rawdon*, 28 Ala. 565; *Nonnemacher v. Nonnemacher*, 159 Pa. 634, 28 Atl 439; *Cannon v. Smalley*, L. R. 10 Prob. Div. 96.

² *Nonnemacher v. Nonnemacher*, 159 Pa. 634, 28 Atl. 439.

³ *Harrod v. Harrod*, 1 Kay & J. 4, 69 Eng. Reprint, 344, 18 Jur. 853, 2 Week. Rep. 612.

⁴ *Rawdon v. Rawdon*, 28 Ala. 565.

⁵ *Goodheart v. Ransley*, 28 Ohio L. J. 227.

⁶ *Cole v. Cole*, 5 Sneed, 57, 70 Am. Dec. 275; *Ward v. Dulaney*, 23 Miss. 410.

⁷ *Powell v. Powell*, 27 Miss. 783.

⁸ *Anonymous*, 4 Pick. 32.

For other cases, see note in 40 L.R.A. 742.

⁹ *Foster v. Means*, Speers, Eq. 569, 42 Am. Dec. 332.

5. Presumption of insanity from suicide.

No presumption of insanity arises from the mere fact of the death of a person caused by his own physical act.¹ This is a fact for the consideration of the jury on the question of the existence of insanity.² And in case of a condition in a life insurance policy making it void in case the assured shall die by his own act, the burden rests with the insurer to prove responsibility, and not with the assured to negative it.³ And such burden is not shifted by proof of death, with a coroner's verdict showing suicide attached, when the proof taken as a whole contained no concession and denied the existence and authenticity of such verdict.⁴ Upon the other hand, however, it has been held that the insanity of an insured person who takes his own life which will save the policy from forfeiture must be proved by the party claiming under the policy.⁵ And proof merely that he was insane at times will not be sufficient.⁶

The authorities are uniformly in accord in holding that suicide alone is not sufficient to invalidate a will, although it was made only a short time prior to the suicide, since suicide is not conclusive evidence of insanity.⁷ Some of the cases, however, seem to give the fact of suicide considerable probative force in determining the question of sanity. Thus, it has been said that, though suicide is not, as an inflexible rule, considered as in itself evidence of insanity, it cannot be denied that in most cases it is committed in moments of mental aberration and is an act which nothing else can otherwise justify.⁸ And the fact of suicide may be shown in evidence on the question of disposing mind.⁹

¹ Coffey v. Home L. Ins. Co. 44 How. Pr. 481; Phadenhauer v. Germania L. Ins. Co. 7 Heisk. 567, 19 Am. Rep. 623; Moore v. Connecticut Mut. L. Ins. Co. 1 Flipp. 363, Fed. Cas. No. 9,755.

² Duffield v. Robeson, 2 Harr. (Del.) 375.

³ John Hancock Mut. L. Ins. Co. v. Moore, 34 Mich. 41; Mutual Ben. L. Ins. Co. v. Daviess, 87 Ky. 541, 9 S. W. 812; Phillips v. Louisiana Equitable L. Ins. Co. 26 La. Ann. 404, 21 Am. Rep. 549; Schultz v. Insurance Co. 40 Ohio St. 217, 48 Am. Rep. 676; Stormont v. Waterloo Life & Casualty Assur. Co. 1 Fost. & F. 22.

⁴ Goldschmidt v. Mutual L. Ins. Co. 102 N. Y. 486, 7 N. E. 408.

⁵ Phadenhauer v. Germania L. Ins. Co. 7 Heisk. 567, 19 Am. Rep. 623; Waters v. Connecticut Mut. L. Ins. Co. 2 Fed. 892.

⁶ Knickerbocker L. Ins. Co. v. Peters, 42 Md. 414.

⁷ Brooks v. Barrett, 7 Pick. 94; Bey's Succession, 46 La. Ann. 773, 24 L.R.A. 577, 15 So. 297; Burrows v. Burrows, 1 Hagg. Eccl. Rep. 109, 162 Eng. Reprint, 524; Bailey's Goods, 2 Swabey & T. 156, 164 Eng. Reprint, 953, 31 L. J. Prob. N. S. 178, 4 L. T. N. S. 477, 7 Jur. N. S. 712.

⁸ Godden v. Burke, 35 La. Ann. 160; Frary v. Gusha, 59 Vt. 257, 9 Atl. 549.

⁹ Pettitt v. Pettitt, 4 Humph. 191.

6. Presumption of continuance of insanity.

a. Habitual insanity.—When habitual, chronic, or continuous insanity is once proved to exist, it is presumed to continue until the contrary is shown.¹ So a person adjudged to be insane is presumed to continue such until it is shown that sanity has re-

turned.² And the burden rests upon the party asserting it of proving restoration or a lucid interval at the very time of the act in question.³ But such presumption may be rebutted by proof of a change of mental condition or the existence of a lucid interval at the time of the act which is called in question.⁴ And the fact that a party had formerly been insane is of no effect where it also appears that he had once recovered from it.⁵ These rules apply to actions on contract. Thus, where a party to a contract is afflicted with insanity of a permanent nature, and such insanity is alleged as a defense to the contract, he who claims the performance must prove that it was entered into during a lucid interval,⁶ or that he had recovered and was *compos mentis*.⁷ So, where general insanity on the part of the grantor is shown, it is presumed to continue to the time of the execution of the deed in question.⁸ And the burden of proving his sanity at the time of the execution rests with the person offering it in evidence or claiming under it.⁹ The same doctrine is applicable to wills and will contests.¹⁰

¹ Pike v. Pike, 104 Ala. 642, 16 So. 689; Duffield v. Robeson, 2 Harr. (Del.) 375; Armstrong v. State, 30 Fla. 170, 17 L.R.A. 484, 11 So. 618; Dicken v. Johnson, 7 Ga. 484; Menkins v. Lightner, 18 Ill. 282; Rush v. Megee, 36 Ind. 69; Corbit v. Smith, 7 Iowa, 60, 71 Am. Dec. 431; Hawkins v. Grimes, 13 B. Mon. 257; Hadley v. Webster, 21 Me. 461; Wright v. Wright, 139 Mass. 177, 29 N. E. 380; Mullins v. Cottrell, 41 Miss. 291; Boylan v. Meeker, 28 N. J. L. 274; Rogers v. Walker, 6 Pa. 371, 47 Am. Dec. 470; Dexter v. Hall, 15 Wall. 9, 21 L. ed. 73; Smith v. Tebbitt, L. R. 1 Prob. & Div. 401, 36 L. J. Prob. N. S. 35, 15 L. T. N. S. 594, 15 Week. Rep. 562.

² People v. Farrell, 31 Cal. 576; Langdon v. People, 133 Ill. 382, 24 N. E. 874; Mileham v. Montague, 148 Iowa, 476, 125 N. W. 664; State v. McMurray, 61 Kan. 87, 58 Pac. 961; Clark v. Trail, 1 Met. (Ky.) 35; Herndon v. Vick, 18 Tex. Civ. App. 583, 45 S. W. 852; Lucas v. Parsons, 23 Ga. 267; Small v. Champeny, 102 Wis. 61, 78 N. W. 407; Johnson v. Safe Deposit & T. Co. 104 Md. 460, 65 Atl. 333; State v. Davis, 27 S. C. 609, 4 S. E. 567; State ex rel. Thompson v. Snell, 46 Wash. 327, 9 L.R.A.(N.S.) 1191, 89 Pac. 931.

Contra: Chase v. Chase, 216 Mass. 394, 103 N. E. 857. For additional cases and discussion of principles see note in 7 A.L.R. 588.

³ O'Donnell v. Rodiger, 76 Ala. 222, 52 Am. Rep. 322; Cabbage v. Cabbage,

- 1 Harr. (Del.) 461, note; Griffin v. Griffin, R. M. Charl't. (Ga.) 217; Emery v. Hoyt, 46 Ill. 258; Kenworthy v. Williams, 5 Ind. 375; Bever v. Spangler, 93 Iowa, 576, 61 N. W. 1072; Higgins v. Carlton, 28 Md. 115, 92 Am. Dec. 666; State v. Schaefer, 116 Mo. 96, 22 S. W. 447; Turner v. Cheesman, 15 N. J. Eq. 243; Jackson ex dem. Cadwell v. King, 4 Cow. 207, 15 Am. Dec. 354; Clark v. Fisher, 1 Paige, 171, 19 Am. Dec. 402; Harden v. Hays, 9 Pa. 151; Vance v. Upson, 66 Tex. 476, 1 S. W. 179; Jarrett v. Jarrett, 11 W. Va. 584; Hoge v. Fisher, Pet. C. C. 163, Fed. Cas. No. 6,585; Groom v. Thomas, 2 Hagg. Eccl. Rep. 433, 162 Eng. Reprint, 914.
- 4 Mullins v. Cottrell, 41 Miss. 291.
- 5 State v. Spencer, 21 N. J. L. 196; Snow v. Benton, 28 Ill. 306.
- 6 Emery v. Hoyt, 46 Ill. 258; Wade v. State, 37 Ind. 180.
- 7 Russell v. Lefrancois, 8 Can. S. C. 335; Ricketts v. Jolliff, 62 Miss. 540.
- 8 Rogers v. Walker, 6 Pa. 371, 47 Am. Dec. 470; Aurentz v. Anderson, 3 Pittsb. 310; Dicken v. Johnson, 7 Ga. 484.
- 9 Ballew v. Clarke, 24 N. C. (2 Ired. L.) 23; Pike v. Pike, 104 Ala. 642, 16 So. 689; Jarrett v. Jarrett, 11 W. Va. 584; Hoge v. Fisher, Pet. C. C. 163, Fed. Cas. No. 6,585; Young v. Young, 10 Grant, Ch. (U. C.) 365.
- 10 Thus, where permanent insanity of a testator is established previous to the making of a will, its continuance is presumed. Kinloch v. Palmer, 1 Mill, Const. 216; Boylan v. Meeker, 28 N. J. L. 274. And proof that a testator a short time before making his will was afflicted with general and fixed insanity casts the burden of proof on those who support the will to show his restoration to sanity or a lucid interval at the time the will was made. O'Donnell v. Rodiger, 76 Ala. 222, 52 Am. Rep. 322; Griffin v. Griffin, R. M. Charl't. (Ga.) 217; Kenworthy v. Williams, 5 Ind. 375; Halley v. Webster, 21 Me. 461; Goble v. Grant, 3 N. J. Eq. 629; Clark v. Fisher, 1 Paige, 171, 19 Am. Dec. 402; Harden v. Hays, 9 Pa. 151; Lee v. Lee, 15 S. C. L. (4 M'Cord,) 183, 17 Am. Dec. 722; Burton v. Scott, 3 Rand. (Va.) 399; Vance v. Upson, 66 Tex. 476, 1 S. W. 179.

b. Temporary insanity.—Insanity which is not shown to be settled or general, as contradistinguished from a mere temporary aberration or hallucination, will not be presumed to continue until the contrary is shown.¹ And the fact of the existence of a prior or subsequent lunacy, except where it is habitual, does not suffice to change the burden of proof.² Fitful and exceptional attacks of insanity are not presumed to be continu-

ous.³ The maxim "Once insane, presumed to be always insane," does not apply where the malady or delusion under which the alleged insane person labored was in its nature accidental or temporary,⁴ or the effect of some violent disease.⁵

¹ *People v. Francis*, 38 Cal. 183; *Turner v. Rush*, 53 Md. 65.

² *Hall v. Unger*, 2 Abb. (U. S.) 507, Fed. Cas. No. 5,949; *Dexter v. Hall*, 15 Wall. 9, 21 L. ed. 73.

³ *Leache v. State*, 22 Tex. App. 279, 58 Am. Rep. 638, 3 S. W. 539; *Ward v. State*, 19 Tex. App. 664; *Ford v. State*, 71 Ala. 385.

⁴ *Townshend v. Townshend*, 7 Gill, 10.

⁵ *Hix v. Whittemore*, 4 Met. 545; *Staples v. Wellington*, 58 Me. 453; *Richardson v. Smart*, 65 Mo. App. 14; *Webb v. State*, 5 Tex. App. 596.

c. Alcoholism and alcoholic insanity.—Drunkenness is temporary unsoundness of mind which does not draw after it any presumption of continuance.¹ And long-continued inebriety, although resulting in occasional fits of insanity, does not require proof of a lucid interval to give validity to the acts of a drunkard as is required where insanity is proved.² And insanity from intemperance is generally of a temporary kind and followed not simply by lucid intervals but by permanent restoration of reason, and to such insanity therefore the presumption of continuance does not apply.³ And proof of instances of longer or shorter duration of incapacity from drunkenness will not disturb the legal presumption of a testator's capacity or shift the burden of proof of capacity to the proponent of the will.⁴ So, proof that a testator about the time of the execution of his will was addicted to the habitual use of intoxicating liquors to such an extent that he was occasionally drunk is not sufficient to render it incumbent upon the proponents to show that at the time of its execution he was free from incapacitating intoxication.⁵ But when alcoholism has produced permanent derangement, it is presumed to continue, and proof of a lucid

interval is necessary to give validity to the subsequent acts of the party.⁶

¹ State v. Reddick, 7 Kan. 143; Rather v. State, 25 Tex. App. 624. 9 S W. 69.

² Gardner v. Gardner, 22 Wend. 526, 34 Am. Dec. 340; Lee's Case, 46 N. J. Eq. 193, 18 Atl. 525.

³ Duffield v. Robeson, 2 Harr. (Del.) 375.

⁴ Black v. Ellis, 21 S. C. L. (3 Hill,) 68.

⁵ Elkinton v. Brick, 44 N. J. Eq. 154, 1 L.R.A. 161, 15 Atl. 391.

⁶ Gardner v. Gardner, 22 Wend. 526, 34 Am. Dec. 340; State v. Potts, 100 N. C. 457, 6 S. E. 657; Cochran's Will, 1 T. B. Mon. 263, 15 Am. Dec. 116.

d. Presumption of continuance of a lucid interval.—A lucid interval is in its nature temporary and uncertain in its duration, and there is no legal presumption of its continuance.¹ And the fact that a testator proved to be insane had lucid intervals on the morning of, and before, the execution of his will does not shift the burden of proof to the contestant to establish that he was not in a lucid state when he executed the instrument, as it rests with the proponent to prove a lucid interval at the very moment of its execution.² It has been held, however, that where a lucid interval is established upon the part of a grantor who was previously insane a short time before the execution of his deed, the burden is thereby placed upon the party claiming insanity to show that he had again become insane at the time the deed was executed.³

¹ Pike v. Pike, 104 Ala. 642, 16 So. 689.

² Saxon v. Whitaker, 30 Ala. 237.

³ Wright v. Jackson, 59 Wis. 569, 18 N. W. 486.

e. Nature of the presumption.—The presumption that insanity continues is not a presumption of law, but an inference of fact varying with the circumstances of the case.¹ And the question whether a delusion is temporary or habitual is one exclusively within the province of the jury.²

¹ Manley v. Staples, 65 Vt. 370, 26 Atl. 630; Missouri P. R. Co. v. Brazil,

72 Tex. 233, 10 S. W. 403; *Fay v. Burditt*, 81 Ind. 435, 42 Am. Rep. 142; *Webb v. State*, 5 Tex. App. 596.

² *Townshend v. Townshend*, 7 Gill, 10.

II. OPINION EVIDENCE.

7. Expert opinions.

a. Admissibility generally.—The opinions of medical experts and experts with relation to mental disease are admissible in evidence generally on an issue as to sanity or insanity.¹ And they may be based upon symptoms and circumstances which come within their own observation or as testified to by others, or upon hypothetical statements or questions assuming their existence.² And the testimony of a medical expert examined in a former trial of the same cause as to the sanity or insanity of the maker of notes is admissible in evidence on a subsequent trial.³ Medical men are allowed to give their opinions on an issue of sanity or insanity because they are supposed by their study and practice to understand the symptoms of insanity and to possess peculiar knowledge on that subject.⁴ They are received because the facts are of such a character that they cannot be weighed or understood by the jury, the expert giving his opinion as to what they do or do not indicate.⁵ But expert testimony as to insanity is to be received with caution and subject to patient and intelligent investigation.⁶ And the opinions of witnesses are never received as evidence where all the facts upon which such opinions are founded can be ascertained and made intelligible to the court or jury.⁷ And it is not an abuse of discretion for the court in a will contest to limit the number of expert witnesses upon the question of insanity to five upon each side.⁸

¹ *Jamison v. Jamison*, 3 Houst. (Del.) 108; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329; *Baxter v. Abbott*, 7 Gray, 71; *People v. Finley*, 38 Mich. 482; *Clarke v. Sawyer*, 3 Sandf. Ch. 351; *Gibson v. Gibson*, 9 Yerg. 329; *Charter Oak L. Ins. Co. v. Rodel*, 95 U. S. 232, 24 L. ed. 433.

- ² Potts v. House, 6 Ga. 324, 50 Am. Dec. 329; Pidcock v. Potter, 68 Pa. 342, 8 Am. Rep. 181; McAllister v. State, 17 Ala. 439, 52 Am. Dec. 180; Boardman v. Woodman, 47 N. H. 120.
- ³ First Nat. Bank v. Wirebach, 106 Pa. 37.
- ⁴ Lake v. People, 1 Park. Crim. Rep. 495.
- ⁵ People v. Young, 151 N. Y. 210, 45 N. E. 460.
- ⁶ Wilcox v. State, 94 Tenn. 106, 28 S. W. 312.
- ⁷ Clark v. Fisher, 1 Paige, 171, 19 Am. Dec. 402.
- ⁸ Fraser v. Jennison, 42 Mich. 206, 3 N. W. 882.

b. Privilege of witnesses.—The opinion of physicians as to the unsoundness of mind of a testator during a designated period, based on knowledge acquired by them while attending him respectively in a professional capacity, is objectionable within the prohibition against divulging professional communications.¹ Such prohibition extends to the records of an insane asylum as to the mental and physical condition of an inmate.² The fact that a medical expert was the jail physician of the jail into which a person accused of crime was confined, however, does not create the relation of patient and physician between him and the accused so as to exclude his opinion in a prosecution for a criminal act, in the absence of proof that the accused was at any time sick during his confinement or that the witness ever attended or prescribed for him, or that he derived any of the information upon which his opinion could be based while attending him as a physician.³ And the opinion of a medical expert based on an examination made for the people under employment by the district attorney for the purpose of the prosecution is not subject to the objection that it was based upon information acquired in attending a patient in a professional capacity.⁴

The general rule is that the privilege of a physician under statutes prohibiting the disclosure of confidential communications may be waived by the persons interested.⁵ But the executor or administrator of a party cannot waive the privilege of the deceased party given by a code of civil procedure (N. Y. Civil Practice Act, § 352 [See Parson's Practice Manual of New York, 1921, p. 149.]) prohibiting a practising physician

from disclosing information acquired by him in a professional capacity so as to permit him to give evidence on the issue of the mental capacity of the deceased.⁶

¹ *Re Coleman*, 111 N. Y. 220, 19 N. E. 71; *Re Connor*, 27 N. Y. S. R. 905, 7 N. Y. Supp. 855; *Renihan v. Dennin*, 103 N. Y. 574, 57 Am. Rep. 770, 9 N. E. 320; *Heuston v. Simpson*, 115 Ind. 62; 7 Am. St. Rep. 409, 17 N. E. 261; *Re Goldthorp*, 94 Iowa, 336, 58 Am. St. Rep. 400, 62 N. W. 845.

The general question of disqualification of physician as a witness to mental condition of patient is discussed in note in L.R.A.1918E, 994.

² *Massachusetts Mut. L. Ins. Co. v. Michigan Asylum*, 178 Mich. 193, 51 L.R.A.(N.S.) 22, 144 N. W. 538, Ann. Cas. 1915D, 146, holding that such records are not public records and so open to public inspection.

³ *People v. Schuyler*, 106 N. Y. 298, 12 N. E. 783.

⁴ *People v. Hoch*, 150 N. Y. 291, 44 N. E. 976; *People v. Kemmler*, 119 N. Y. 580, 24 N. E. 9.

⁵ *Denning v. Butcher*, 91 Iowa, 425, 59 N. W. 69; *Fraser v. Jennison*, 42 Mich. 206, 3 N. W. 882; *Thompson v. Ish*, 99 Mo. 160, 17 Am. St. Rep. 552, 12 S. W. 510.

⁶ *Westover v. Aetna L. Ins. Co.* 99 N. Y. 56, 52 Am. Rep. 1, 1 N. E. 104. See also *Dewey v. Cohoes & Lansingburgh Bridge Co.* 170 App. Div. 117, 155 N. Y. Supp. 887.

c. From observation or examination.—An expert witness who has had opportunities of knowing and observing a person whose insanity is alleged may give an opinion as to his sanity or insanity based on knowledge obtained from such observation.¹ Thus, the opinion of a physician who has long been acquainted with a testator and his habits, conduct, and conversation is admissible in a proceeding to contest his will on the ground of mental incapacity.² So, an expert witness in a will contest who has testified fully as to his knowledge of the testatrix may give his opinion as to her sanity based upon his own knowledge, such knowledge consisting of the facts which she has already stated.³ But, while medical experts may give their opinions as to the testator's sanity in a will contest where they are based upon observation or examination, they must give the symptoms or circumstances from which they draw their

conclusions.⁴ And depositions of physicians stating their opinion that a party was insane will be rejected where the deponents state no facts on which they ground their opinions.⁵

¹ *McAllister v. State*, 17 Ala. 434, 52 Am. Dec. 180; *People v. Wood*, 126 N. Y. 251, 27 N. E. 362.

² *Bitner v. Bitner*, 65 Pa. 347; *Rice v. Rice*, 53 Mich. 432, 19 N. W. 132.

³ *Foster v. Dickerson*, 64 Vt. 233, 24 Atl. 253; *Puryear v. Reese*, 6 Coldw. 21.

⁴ *Gibson v. Gibson*, 9 Yerg. 329; *Puryear v. Reese*, 6 Coldw. 21.

⁵ *Dickinson v. Barber*, 9 Mass. 225, 6 Am. Dec. 58; *White v. Bailey*, 10 Mich. 155; *Hathorn v. King*, 8 Mass. 371, 5 Am. Dec. 106.

d. From the evidence.—The general rule is that an expert witness in an action involving the question of insanity who has heard all the testimony given on the part of the defendant on that question may be asked his opinion upon the hypothesis that the testimony given by the witnesses is all true,¹ though he has not seen the patient.² And men of medical skill who have no personal knowledge of the facts may be asked their opinions whether certain appearances detailed by other witnesses are symptoms of insanity.³ And testimony of medical experts as to the sanity or insanity of a testator is admissible though their opinions are based on facts proved in the case, and not upon facts known to the witnesses themselves.⁴ But the opinion of an expert upon the question of sanity is not admissible where he had heard only a part of the testimony given by one of several witnesses and the opinion was based upon the testimony thus read and upon a newspaper account of the other testimony.⁵ So, medical experts will not be allowed to determine from the evidence what the facts are and give their opinions from them.⁶

A rule contrary to the general rule stated above, however, has been adopted by a few of the cases which hold the doctrine that the opinions of expert witnesses on the question of sanity or insanity founded on testimony already in the case can only be given on a hypothetical case.⁷

¹ *Negroes*, *Jerry v. Townshend*, 9 Md. 145; *State v. Windsor*, 5 Harr. (Del.) 512; *Schneider v. Manning*, 121 Ill. 376, 12 N. E. 267; *State v. Potts*, 100 N. C. 457, 6 S. E. 657; *McAllister v. State*, 17 Ala. 434, 52 Am. Dec. 180; *Yardley v. Cuthbertson*, 108 Pa. 395, 56 Am. Rep.

- 218, 1 Atl. 765; *Pidcock v. Potter*, 68 Pa. 342, 8 Am. Rep. 181; *Foster v. Dickerson*, 64 Vt. 233, 24 Atl. 253; *Rex v. Searle*, 1 Moody & R. 75; *Rex v. Wright*, Russ. & R. C. C. 456.
- ² *State v. Windsor*, 5 Harr. (Del.) 512.
- ³ *Doe ex dem. Sutton v. Reagan*, 5 Blackf. 217, 33 Am. Dec. 466; *Rex v. Searle*, 1 Moody & R. 75.
- ⁴ *Vance v. Upson*, 66 Tex. 476, 1 S. W. 179; *Kempsey v. McGinniss*, 21 Mich. 123.
- ⁵ *Williams v. State*, 37 Tex. Crim. Rep. 348, 39 S. W. 687.
- ⁶ *Dexter v. Hall*, 15 Wall. 9, 21 L. ed. 73.
- ⁷ *McMechen v. McMechen*, 17 W. Va. 683, 41 Am. Rep. 682; *McCarty v. Com.* 14 Ky. L. Rep. 285, 20 S. W. 229; *Doe ex dem. Bainbrigge v. Bainbrigge*, 4 Cox, C. C. 454; *Price v. Richmond & D. R. Co.* 38 S. C. 199, 17 S. E. 732; *Woodbury v. Obear*, 7 Gray, 467.

e. On hypothetical questions or statements.—(1) *Admissibility.*—Witnesses who are experts upon the question of mental condition may give their opinions on an issue as to sanity upon a hypothetical question or statement of facts established by other evidence.¹ And an expert witness in a proceeding *de lunatico inquirendo* may answer a hypothetical question based in part upon proved facts and in part upon the testimony of other witnesses.²

- ¹ *Pittard v. Foster*, 12 Ill. App. 132; *Massie v. Com.* 15 Ky. L. Rep. 562, 24 S. W. 611; *Choice v. State*, 31 Ga. 424; *Pidcock v. Potter*, 68 Pa. 342, 8 Am. Rep. 181; *Lake v. People*, 1 Park. Crim. Rep. 495; *Hathaway v. National L. Ins. Co.* 48 Vt. 336; *Dexter v. Hall*, 15 Wall. 9, 21 L. ed. 73.
- ² *Re Mason*, 60 Hun, 46, 14 N. Y. Supp. 434.

(2) *Hypothesis; upon what based.*—A hypothetical question as to mental condition addressed to an expert witness should embrace all the facts of the case when there is no dispute as to such facts, and the witness should take them all into consideration in giving his answer.¹ And a hypothetical case submitted for the opinion of an expert upon the question of insanity in a will case containing only a partial statement of the material evidence adduced should be excluded.² In putting hypothetical questions to expert witnesses upon the question of mental capacity, however, counsel may assume the facts in accordance with their theory, and it is not essential that they

the facts as they exist, but the hypothesis should be based on a state of facts which the evidence tends to prove.³ Keeping within the range of the relevant testimony, they need not embody in the question all the matters of which there is any evidence.⁴ But they cannot be based on mere conjecture.⁵ The attention of the expert may be called to such facts as are claimed by one party to show sanity and his opinion taken as to whether the existence of these facts, together with those claimed to have been proved by the other party, is inconsistent with the claim of sanity.⁶

¹ *Davis v. State*, 35 Ind. 496, 9 Am. Rep. 760; *Re Miller*, 26 Pittsb. L. J. N. S. 428; *Hathaway v. National L. Ins. Co.* 48 Vt. 336.

² *McCullough's Will*, 35 Pittsb. L. J. 169.

³ *Kerr v. Lunsford*, 31 W. Va. 680, 2 L.R.A. 668, 8 S. E. 493; *Bever v. Spangler*, 93 Iowa, 576, 61 N. W. 1072.

⁴ *Goodwin v. State*, 96 Ind. 550; *People v. Hill*, 116 Cal. 562, 48 Pac. 711.

⁵ *Kelly v. Perrault*, 5 Idaho, 221, 48 Pac. 45.

⁶ *Prentis v. Bates*, 93 Mich. 234, 17 L.R.A. 494, 53 N. W. 153.

(3) *Evidence in support of hypothesis.*—A witness cannot testify as an expert in answer to a hypothetical question on the issue of mental soundness unless there is evidence tending to prove the matters stated in the hypothetical question.¹ Thus, the evidence as to the mental incapacity of a testatrix, of distinguished alienists who had never seen her and only pronounced her demented on the assumption of the truth of certain hypotheses touching her character and conduct, was rejected upon the ground that the hypotheses were not proved to be well founded.² But, while hypothetical questions to experts upon the question of insanity should be based upon facts which the evidence tends to prove, technical accuracy is not required and the questions need not be based upon conceded facts.³

¹ *Bomgardner v. Andrews*, 55 Iowa, 638, 8 N. W. 481; *Meeker v. Meeker*, 74 Iowa, 352, 7 Am. St. Rep. 489, 37 N. W. 773; *Hovey v. Chase*, 52 Me. 305, 83 Am. Dec. 514; *Re Lyddy*, 24 N. Y. S. R. 607, 5 N. Y. Supp. 636; *Prather v. McClelland*, 76 Tex. 574, 13 S. W. 543.

² *Cornwell v. Riker*, 2 Dem. 354.

³ *Meeker v. Meeker*, 74 Iowa, 352, 7 Am. St. Rep. 489, 37 N. W. 773.

(4) *Form of question.*—Where the opinion of a medical ex-

pert on an issue of sanity or insanity is based on testimony already in the case, the hypothesis must be clearly stated, so that the jury may know with certainty upon precisely what state of assumed facts the expert bases his opinion.¹ Thus, after enumerating a great number of facts as to the basis for a hypothetical question, it is improper to incorporate the entire testimony of the witnesses without stating that it is to be considered in connection with the other facts and propositions named.² And the hypothetical question must be so framed as fairly to reflect the facts admitted or proved by other witnesses.³

¹ *McMechen v. McMechen*, 17 W. Va. 683, 41 Am. Rep. 682.

² *Barber's Appeal*, 63 Conn. 393, 22 L.R.A. 90, 27 Atl. 973.

³ *Burgo v. State*, 26 Neb. 639, 42 N. W. 701; *Ballard v. State*, 19 Neb. 610, 28 N. W. 271.

f. Qualifications of experts.—Only persons of scientific training upon the subject and medical men are to be regarded as experts.¹ Thus, a minister of the Gospel who has read some authorities on moral and intellectual science, but nothing on insanity or medical jurisprudence, is not qualified as an expert to give his opinion as to sanity or insanity.² But a Catholic priest regularly educated and who had officiated as a priest for ten years, and part of whose preparatory education was to become competent to pass upon the mental condition of communicants in his church to the end that the rites of his church administered to invalids or dying persons might be administered to persons ascertained to be in a proper state of reason, and who was daily required to exercise and pass his judgment upon the mental condition of such persons, is an expert who may give his opinion as to sanity or insanity of a testator in a will contest.³ And proof that a witness in a will contest had been a nurse in an insane asylum for many years and had had extended experience in nursing the insane in private houses and in large institutions, and that she had conversed with the testatrix for an hour or two at a time on three different occasions, is sufficient to lay a foundation for her opinion as to the sanity or insanity of the testatrix.⁴ And physicians who have been practising their profession for a number of years and who have given the sub-

ject of medical jurisprudence some attention by reading works on the subject and by attending lectures, may testify on the question of the existence of the disease of insanity.⁵ So, a regular and continuous practice by a physician in his profession for thirty years entitles him to be regarded as an expert on questions of mental soundness or unsoundness.⁶

¹ Com. v. Brayman, 136 Mass. 438.

² Burt v. State, 38 Tex. Crim. Rep. 397, 39 L.R.A. 305, 330, 40 S. W. 1000, 43 S. W. 344.

³ Toomes's Estate, 54 Cal. 509, 35 Am. Rep. 83.

⁴ Foster v. Dickerson, 64 Vt. 233, 24 Atl. 253.

⁵ Davis v. State, 35 Ind. 496, 9 Am. Rep. 760.

⁶ Flynt v. Bodenhamer, 80 N. C. 205.

And a physician of experience who had been the medical adviser of testator and practised for many years in his neighborhood, and who saw and conversed with him a short time before the making of his will, is competent to give his opinion as to the testator's sanity, though he had not made mental diseases a special study. *Baxter v. Abbott*, 7 Gray, 71; *Hastings v. Rider*, 99 Mass. 624.

So, the rule has been laid down that physicians and surgeons of practice and experience are experts upon the question of sanity or insanity, and that it is not necessary that they should have made the particular disease involved in the inquiry a specialty to render their testimony admissible as that of an expert. *Hathaway v. National L. Ins. Co.* 48 Vt. 336.

Upon the other hand, however, it has been held that to render an opinion admissible on the question of sanity or insanity, it is essential that the witness should be an expert on the general subject under consideration, and that no acquaintance with cognate pursuits will suffice; unless the matter inquired about is common to both. *Russell v. State*, 53 Miss. 367.

And the opinion of a witness called as an expert upon the question of sanity or insanity may be excluded where he testifies that he has not made diseases of the mind a special study, but only as a general practitioner. *Hutchins v. Ford*, 82 Me. 363, 19 Atl. 832.

g. Cross-examination; contradiction.—An expert witness upon an issue of mental soundness who has expressed an opinion based upon facts assumed by the party calling him to have been proved or upon a hypothetical case put by such party may be cross-examined by taking his opinion based on any other state of facts assumed by the cross-examiner to have been proved

upon a hypothetical case.¹ And the proponents of a will are not confined to the use of the same hypothetical questions which the contestant had used.² So, expert witnesses on the question of sanity may be cross-examined on purely imaginary and abstract questions assuming facts and theories which have or have not foundation in evidence.³ But an expert witness in a proceeding to set aside a deed whose testimony on direct examination was confined to a contradiction of the theory of another expert called by the other side cannot be asked on cross-examination a hypothetical question in all respects similar to the questions propounded by the cross-examination to his own witnesses.⁴ And a medical book stated by an expert upon the question of sanity to be an authority cannot be read in evidence for the purpose of contradicting the evidence of an expert witness given upon cross-examination.⁵

¹ *Davis v. State*, 35 Ind. 496, 9 Am. Rep. 760; *Grubb v. State*, 117 Ind. 277, 20 N. E. 257, 725; *People v. Lake*, 12 N. Y. 358.

² *Foster v. Dickerson*, 64 Vt. 233, 24 Atl. 253.

³ *Bever v. Spangler*, 93 Iowa, 576, 61 N. W. 1072; *People v. Augsbury*, 97 N. Y. 501.

⁴ *Gridley v. Boggs*, 62 Cal. 190.

⁵ *MacFarland's Trial*, 8 Abb. Pr. N. S. 57.

h. Weight.—(1). *In general.*—While the opinions of medical experts upon an issue of sanity or insanity should be considered by the jury in connection with all the other evidence of the case, they are not bound to act upon them to the exclusion of the other testimony.¹ They stand substantially on the same footing as any other witness as to credibility.² The opinions of professional men on the question of insanity, however, are frequently entitled to great weight,³ particularly where they had special opportunities for observation,⁴ or where they attended him or were with him constantly during the time the weakness of mind was charged.⁵

¹ *Guetig v. State*, 66 Ind. 94, 32 Am. Rep. 99; *McAllister v. State*, 17 Ala. 434, 52 Am. Dec. 180; *Williams v. State*, 50 Ark. 511, 9 S. W. 5; *Choice v. State*, 31 Ga. 424.

Thus, the opinions of medical experts are not conclusive in a will contest on the ground of mental incapacity, but must be weighed as any

other evidence. *Chandler v. Barrett*, 21 La. Ann. 58, 99 Am. Dec. 701; *Re Kiedaisch*, 2 Connoly, 438, 13 N. Y. Supp. 255.

So, the court will not be controlled by the opinions of experts in passing upon the question of mental capacity in an action for interdiction, but will give to them a respectful consideration and also give legitimate weight to every act bearing on the issue, and form its decree from its own conclusions. *Francke v. His Wife*, 29 La. Ann. 302.

And the opinion of medical men who gave certificates upon which a party to a contract was confined as an insane person at or about the time of the making of the contract is evidence only upon the question of his insanity at that time, but is not conclusive, and the jury must judge of the grounds upon which such opinion is formed. *Lovatt v. Tribe*, 3 Fost. & F. 9.

² *Eggers v. Eggers*, 57 Ind. 461.

³ *Com. v. Rogers*, 7 Met. 500, 41 Am. Dec. 458; *Pannell v. Com.* 86 Pa. 260; *Nicholas v. Kershner*, 20 W. Va. 251.

⁴ *Cheatham v. Hatcher*, 30 Gratt. 56, 32 Am. Rep. 650; *Montague v. Allan*, 78 Va. 592, 49 Am. Rep. 384.

⁵ *Jarrett v. Jarrett*, 11 W. Va. 584.

(2) *As affected by facts and opportunity to observe.*—The reliance to be placed upon the opinion of an expert witness on a question of sanity or insanity depends upon the means of judging of the true mental condition of a person and the facts upon which his opinion is based.¹ His opinion can be of no value when the facts upon which it is predicated are not established.² And an opinion of an expert based upon a hypothesis wholly incorrect or incorrect in its material facts to such an extent as to impair the value of the opinion is of little or no weight.³ So, the abstract opinions of witnesses, whether professional or otherwise, will not justify a decision against the capacity of a testator to make a will, since opinions of witnesses must be brought to the test of facts that the court may judge what weight the opinion is entitled to.⁴

¹ *People v. Lake*, 2 Park. Crim. Rep. 215; *Gay v. Union Mut. L. Ins. Co.* 9 Blatchf. 142, Fed. Cas. No. 5,282.

² *First Nat. Bank v. Wirebach*, 106 Pa. 37.

³ *Guetig v. State*, 66 Ind. 94, 32 Am. Rep. 99.

⁴ *Stackhouse v. Horton*, 15 N. J. Eq. 202.

Where the mental capacity of a testator is thoroughly established by the evidence, other than hypothetical reasoning of experts, their mere speculation on the subject would be entitled to little weight. *Rankin v. Rankin*, 61 Mo. 295.

And a will will not be declared invalid against strong affirmative testimony in its favor on the bare opinion of medical men that there was want of testamentary capacity at the time it was made, based upon the argument that the testator's disease was one that more or less affects the brain. *Palmer's Estate*, 5 W. N. C. 542.

So, the court in a will contest is not bound by the opinion of an expert as to the mental capacity of the testatrix, where such opinion is based on reasons which are absurd or are not well founded. *Crockett v. Davis*, 81 Md. 134, 31 Atl. 710.

(3) *As affected by character, bias, and nature of the question.*—Where opinions of witnesses are received on the question of sanity or insanity from the necessity of the case their weight will not depend so much upon the number as upon the intelligence of the witnesses, and their capacity to form correct opinions, their means of information, the unprejudiced state of their minds, and the nature of the facts testified to in support of their opinions.¹ Thus, while medical witnesses may testify as to the effect of disease on the mind and give their opinions on the question of testamentary capacity, and their opinions are usually entitled to consideration and respect, the value of such testimony depends upon the professional character, integrity, skill, and standing of the witness.² So, the jury in a will contest upon the ground of mental incapacity should consider whether the testimony of expert witnesses is partisan in its character or biased by any leanings for or against any of the parties.³

¹ *Clark v. Fisher*, 1 Paige, 171, 19 Am. Dec. 402.

² *Jamison v. Jamison*, 3 Houst. (Del.) 108; *Gay v. Union Mut. L. Ins. Co.* 9 Blatchf. 142, Fed. Cas. No. 5,282.

³ *Rush v. Megee*, 36 Ind. 69.

(4) *As compared with other expert opinions.*—The opinion of a physician who attended a testator during his last illness is entitled to more weight on the question of testamentary capacity than the opinions of physicians who had not this advantage.¹ And the opinion of a medical expert that a testator was insane and incompetent to make a will and had been so for some time will not be held to invalidate the will, though he was an expert of high authority, where his opinion seemed

to be that any insanity would be sufficient to invalidate it, and the testator's family physician who visited him many times during such period saw no indication of unsoundness of mind or mental disorder, and the testator attended to his own affairs then and afterwards in an intelligent manner.²

¹ *Harrison v. Rowan*, 3 Wash. C. C. 580, Fed. Cas. No. 6,141; *Kirkwood v. Gordon*, 7 Rich. L. 474, 62 Am. Dec. 418; *Whelpley v. Loder*, 1 Dem. 368.

It was held in *Bever v. Spangler*, 93 Iowa, 576, 61 N. W. 1072, however, that the evidence of experts in a will contest who knew the testator and had treated him cannot be said to be entitled to greater weight, as a matter of law, than that of experts who founded their opinions simply upon hypothetical questions.

² *Re Blakely*, 48 Wis. 294, 4 N. W. 337.

(5) *As compared with nonexpert opinions.*—The rule has been laid down that on questions of sanity or insanity proof made by expert witnesses who have devoted their time and attention to cases of mental derangement is of much greater value than that of other persons who have no scientific or experimental knowledge of the subject and who can only speak from observation from outward signs and appearances,¹ and that in marshaling evidence of insanity, the greater weight should be given to the judgment of medical experts and those closely associated with the party claimed to be insane, rather than to other witnesses.² And professional opinions, in the absence of overruling facts, are entitled to credence on the question of capacity to make a testamentary disposition as against mere opinions of nonexperts unsupported by concurrent facts which have any legitimate weight.³ Jurors are not bound, however, to give more weight to the testimony of medical experts than to that of nonexpert witnesses who state facts within their own knowledge, and it is not for the court to pronounce, as a matter of law, which of the two classes shall receive greater weight.⁴

¹ *State v. Reidell*, 9 Houst. (Del.) 470, 14 Atl. 550; *Watson v. Anderson*, 13 Ala. 203.

² *Com. ex rel. Helmbold v. Kirkbride*, 11 Phila. 427.

³ *Hendrix v. Money*, 1 Bush, 306.

⁴ *Sanders v. State*, 94 Ind. 147.

(6) *As a question for the jury.*—The opinion of an expert witness as to the sanity of another is a fact bearing upon that question, the proper weight of which falls within the province of the jury to determine.¹ And to charge that expert witnesses speaking merely as to matters of opinion and basing their opinions upon hypothetical questions are entitled to more credit than witnesses who had knowledge of facts gathered from personal observation and who based their opinions on actual facts, would be an invasion of the province of the jury.² So, a jury in a will contest in which the question of sanity is at issue should not be told that common experience has shown that opinions of professional witnesses upon the question of insanity have become of little practical value from the almost universal conflict between those called upon the different sides as compared with testimony consisting of acts and sayings of the testator.³

¹ *Kempsey v. McGinnis*, 21 Mich. 123; *Davis v. State*, 35 Ind. 496, 9 Am. Rep. 760; *Gay v. Union Mut. L. Ins. Co.* 9 Blatchf. 142, Fed. Cas. No. 5,282; *Flynt v. Bodenhamer*. 80 N. C. 205.

² *Goodwin v. State*, 96 Ind. 550. And see *Brown v. Riffin*, 94 Ill. 560; *Carpenter v. Calvert*, 83 Ill. 62.

³ *Burney v. Torrey*, 100 Ala. 157, 46 Am. St. Rep. 33, 14 So. 685; *Eggers v. Eggers*, 57 Ind. 461.

For a more extended treatment of the question as to expert opinions as to sanity or insanity, with a full review of the authorities, see note in 39 L.R.A. 305.

8. Nonexpert opinions generally.

a. General rules.—The rule is laid down generally that opinions of nonexpert witnesses on the question of sanity or insanity are admissible in evidence where they state the facts and circumstances upon which the opinions expressed by them are predicated.¹ Thus, the opinions of witnesses as to the sanity of the grantor may be given in evidence in an action involving the validity of his deed where the facts upon which they are founded are also given.² So, nonexpert witnesses in a will contest may give their opinions as to the capacity or incapacity of the testator where the facts or circumstances upon which they are founded are disclosed.³ And the opinions of nonexpert witnesses as to the mental condition of the assured in an action upon an in-

surance policy at the time of committing suicide are admissible in connection with the statement of the facts and circumstances.⁴ But a nonexpert witness, other than a subscribing witness to a will,⁵ will not be permitted to give an opinion as to the mental condition of another without first stating the facts upon which the opinion is based.⁶

The ground upon which the opinions of nonexpert witnesses are admitted is that, from the nature of the subject to be investigated, it cannot be so described in language as to enable persons not eyewitnesses to form a correct judgment in regard to it.⁷

A different rule has been adopted in some states, in which it is held that ordinary witnesses, whatever their opportunities for observation may have been, cannot give mere opinions as to the mental condition of another.⁸

¹ *Burney v. Torrey*, 100 Ala. 157, 46 Am. St. Rep. 33, 14 So. 685; *People v. Sanford*, 43 Cal. 29; *Grant v. Thompson*, 4 Conn. 203, 10 Am. Dec. 119; *Maxwell v. Harrison*, 8 Ga. 67, 52 Am. Dec. 385; *Hutchinson v. Hutchinson*, 50 Ill. App. 87; *Mills v. Winter*, 94 Ind. 329; *Parsons v. Parsons*, 66 Iowa, 754, 21 N. W. 570, 24 N. W. 564; *Baughman v. Baughman*, 32 Kan. 538, 4 Pac. 1003; *Stewart v. Redditt*, 3 Md. 67; *Cannady v. Lynch*, 27 Minn. 435, 8 N. W. 164; *Farrell v. Brennan*, 32 Mo. 328, 82 Am. Dec. 137; *Hay v. Miller*, 48 Neb. 156, 66 N. W. 1115; *Carpenter v. Hatch*, 64 N. H. 573, 15 Atl. 219; *De Witt v. Barly*, 17 N. Y. 340; *Price v. Richmond & D. R. Co.* 38 S. C. 199, 17 S. E. 732; *Cockrill v. Cox*, 65 Tex. 669; *Morse v. Crawford*, 17 Vt. 502, 44 Am. Dec. 349.

² *Doe ex dem. Sutton v. Reagan*, 5 Blackf. 217, 33 Am. Dec. 466; *Frizzell v. Reed*, 77 Ga. 724; *Stumph v. Miller*, 142 Ind. 442, 41 N. E. 812; *Woodcock v. Johnson*, 36 Minn. 217, 30 N. W. 894; *Culver v. Haslan*, 7 Barb. 314; *Barker v. Pope*, 91 N. C. 165; *Elcesser v. Elcesser*, 146 Pa. 359, 23 Atl. 230.

³ *Abraham v. Wilkins*, 17 Ark. 292; *Re Brooks*, 54 Cal. 471; *Shanley's Appeal*, 62 Conn. 325, 25 Atl. 245; *Walker v. Walker*, 14 Ga. 242; *Roe v. Taylor*, 45 Ill. 485; *Leach v. Prebster*, 39 Ind. 492; *Re Norman*, 72 Iowa, 84, 33 N. W. 374; *Wise v. Foote*, 81 Ky. 10; *Williams v. Lee*, 47 Md. 321; *Carpenter v. Hatch*, 64 N. H. 573, 15 Atl. 219; *Bost v. Bost*, 87 N. C. 477; *Shaver v. McCarthy*, 110 Pa. 339, 5 Atl. 614; *Jamison v. Jamison*, 3 Houst. (Del.) 108; *Garrison v. Blanton*, 48 Tex. 299; *Fishburne v. Ferguson*, 84 Va. 87, 4 S. E. 575.

⁴ *Connecticut Mut. L. Ins. Co. v. Lathrop*, 111 U. S. 612, 28 L. ed. 536,

4 Sup. Ct. Rep. 533; *Mutual L. Ins. Co. v. Leubrie*, 38 U. S. App. 37, 18 C. C. A. 332, 71 Fed. 843; *Charter Oak L. Ins. Co. v. Rodell*, 95 U. S. 235, 24 L. ed. 433.

⁵ See § 9 a, *infra*, and cases cited under note 3 therein.

⁶ *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401, 28 N. E. 860; *State v. Pennyman*, 68 Iowa, 216, 26 N. W. 82; *Rarick v. Ulmer*, 144 Ind. 25, 42 N. E. 1099; *Roberts v. Trawick*, 13 Ala. 68; *Sheehan v. Kearney*, 82 Miss. 688, 35 L.R.A. 102, 21 So. 41; *Dickinson v. Dickinson*, 61 Pa. 401; *Whisner v. Whisner*, 122 Md. 195, 89 Atl. 393. See also note in 12 Mich. L. Rev. 505.

⁷ *Culver v. Haslam*, 7 Barb. 314; *Clifton v. Clifton*, 47 N. J. Eq. 227, 21 Atl. 333; *Pelamourges v. Clark*, 9 Iowa, 1; *Appleby v. Brock*, 76 Mo. 314.

⁸ *Massachusetts*.—*Williams v. Spencer*, 150 Mass. 346, 5 L.R.A. 790, 15 Am. St. Rep. 206, 23 N. E. 105; *Cowles v. Merchants*, 140 Mass. 377, 5 N. E. 288; *Com. v. Wilson*, 1 Gray, 337.

Maine.—*Hewett v. Hurley*, 88 Me. 431, 34 Atl. 274; *Wyman v. Gould*, 47 Me. 159.

New York.—*Brady v. Smith*, 8 Misc. 465, 28 N. Y. Supp. 776; *Re Folts*, 71 Hun, 492, 24 N. Y. Supp. 1052; *Hewlett v. Wood*, 55 N. Y. 634; *Clapp v. Fullerton*, 34 N. Y. 190, 90 Am. Dec. 681; *Johnson v. Cochran*, 91 Hun, 165, 36 N. Y. Supp. 283.

Nonexpert witnesses may, however, testify to facts, declarations, and incidents in relation to the person tending to show unsoundness or soundness of mind and as to whether the acts and declarations testified to impressed them as rational or irrational. *Paine v. Aldrich*, 133 N. Y. 544, 30 N. E. 725; *Holcomb v. Holcomb*, 95 N. Y. 316; *Rider v. Miller*, 86 N. Y. 507; *Howell v. Taylor*, 11 Hun, 214; *White v. Davis*, 42 N. Y. S. R. 901, 17 N. Y. Supp. 548.

b. Who may give.—The general rule is that any one who had an opportunity of knowing and observing a person whose sanity is impeached may give an opinion as to his mental capacity whether he was an attesting witness or not.¹ This rule applies to persons who were parties to the suit where parties are permitted to testify.² And a legatee under a will is a competent witness in an action to set aside a will, as to mental condition of the testator.³ So, the contestants of a will are competent.⁴ And an opinion may be expressed by a caveatrix as to the sanity of testatrix,⁵ or by the guardian of a testatrix.⁶ A brother,⁷ or a daughter,⁸ of a testator may give an opinion as to his mental capacity. So, a wife may testify as to the mental condition of her husband and give an opinion as to his sanity when accompanied by a statement of the facts upon

which it is based.⁹ It has been held, however, that one who would inherit a part of a testator's property but for his will is incompetent to give his opinion as to his capacity to make it.¹⁰ And the daughters of a testator are not competent witnesses on their own behalf to prove the insanity of their father upon a bill in equity to contest the validity of his will.¹¹

¹ Doe ex dem. McDougald v. McLean, 60 N. C. (1 Winst. L.) 120.

² Severin v. Zack, 55 Iowa, 28, 7 N. W. 404.

³ Staser v. Hogan, 120 Ind. 227, 21 N. E. 911, 22 N. E. 990; Denning v. Butcher, 91 Iowa, 425, 59 N. W. 69.

⁴ Williams v. Williams, 90 Ky. 28, 13 S. W. 250.

⁵ Dennis v. Weekes, 51 Ga. 24.

⁶ Howard v. Coke, 7 B. Mon. 655.

⁷ Weems v. Weems, 19 Md. 334.

⁸ Moore v. Moore, 67 Mo. 192.

⁹ Haney v. Clark, 65 Tex. 93; Denning v. Butcher, 91 Iowa, 425, 59 N. W. 69.

¹⁰ Kerr v. Lunsford, 31 W. Va. 680, 2 L.R.A. 668, 8 S. E. 493.

¹¹ Brace v. Black, 125 Ill. 33, 17 N. E. 66.

c. Acquaintance necessary.—It is impossible to lay down any precise rule as to the length or character of an acquaintance which will render the opinion of a witness admissible on the issue of sanity or insanity.¹ It is generally stated that nonexpert witnesses may testify as to their opinions upon the sanity or insanity of another where there has been long and intimate acquaintance to enable them to form a correct judgment as to the mental condition of such person.² Within this rule, a nonexpert who is well acquainted with another may give his opinion as to whether or not he was a person of feeble mind.³ And he may be asked his opinion from the facts stated by him as to the health and mental condition of the party.⁴ So, the rule has been stated that nonexperts having favorable opportunities for ascertaining by observation the facts may testify as to their opinion respecting the sanity of another.⁵ But a nonexpert cannot give his opinion as to the sanity of another based on actual observation where he has no particular acquaintance with him,⁶ or but a mere passing acquaintance,⁷ or where he appeared to have had no opportunities for forming an opinion.⁸

The question whether the opinions of nonexperts as to the sanity of another were based upon sufficient observation to entitle them to testify is addressed to the discretion of the trial

judge.⁹ And the determination as to whether a witness called to testify to the mental condition of a person had a sufficiently intimate acquaintance with him to render his opinion admissible will not be interfered with on appeal where there was no abuse.¹⁰

¹ Powell v. State, 25 Ala. 21.

² Burney v. Torrey, 100 Ala. 157, 46 Am. St. Rep. 33, 14 So. 685; Fountain v. Brown, 38 Ala. 72; Polin v. State, 14 Neb. 540, 16 N. W. 898; Culver v. Haslam, 7 Barb. 314.

³ Mills v. Winter, 94 Ind. 329.

⁴ Price v. Richmond & D. R. Co. 38 S. C. 199, 17 S. E. 732.

⁵ State v. Bryant, 93 Mo. 273, 6 S. W. 102; Keithley v. Stafford, 126 Ill. 507, 18 N. E. 740; Woodcock v. Johnson, 36 Minn. 217, 30 N. W. 894; Clary v. Clary, 24 N. C. (2 Ired. L.) 78; Com. v. Gerade, 145 Pa. 289, 27 Am. St. Rep. 689, 22 Atl. 464.

Within the rule as thus stated, witnesses in a will contest who had known the testatrix personally and had opportunities to observe her frequently may be asked to state what they would say as to her soundness of mind. Shanley's Appeal, 62 Conn. 325, 25 Atl. 245; Wise v. Foote, 81 Ky. 10; State v. Potts, 100 N. C. 457, 6 S. E. 657.

⁶ State v. Crisp, 126 Mo. 605, 29 S. W. 699.

⁷ Grand Lodge, I. O. M. A. v. Wieting, 168 Ill. 408, 61 Am. St. Rep. 123, 48 N. E. 59.

⁸ Holcomb v. State, 41 Tex. 125.

⁹ Hite v. Com. 14 Ky. L. Rep. 308, 20 S. W. 217; First Nat. Bank v. Wirebach, 12 W. N. C. 150; Grand Lodge, I. O. M. A. v. Wieting, 168 Ill. 408, 61 Am. St. Rep. 123, 48 N. E. 59; Wheelock v. Godfrey, 100 Cal. 578, 35 Pac. 317.

¹⁰ Re Wax, 106 Cal. 343, 39 Pac. 624; Wheelock v. Godfrey, 100 Cal. 578, 35 Pac. 317; State v. Hansen, 25 Or. 391, 35 Pac. 976, 36 Pac. 296.

d. Time to which opinion relates.—Nonexperts cannot give their opinions that another was insane without designating any particular time when in their judgment such insanity existed.¹ So, the opinion of a witness as to the sanity of a testator must relate to the time of his examination, and he cannot be required to give his opinion as to capacity previous to that time.² So, nonexperts cannot give their opinion as to the mental condition of the testator on the day of the execution of the will when they did not see him on that day.³

¹ Moors v. Sanford, 2 Kan. App. 243, 41 Pac. 1064; Denning v. Butcher, 91 Iowa, 425, 59 N. W. 69.

² Runyan v. Price, 15 Ohio St. 1, 86 Am. Dec. 459.

³ Blake v. Rourke, 74 Iowa, 519, 38 N. W. 392.

e. Cross-examination, rebuttal, and impeachment.—The fact that hypothetical questions based on facts not within the knowledge of a witness, who was not an expert, were asked on cross-examination does not render them admissible in a will contest upon the question of testamentary capacity.¹ And witnesses in a will contest who had given an opinion as to the capacity of the testator founded on facts known to them and conduct within their own observation cannot be called upon to say on cross-examination what their opinions would be in a different state of affairs.² It is within the discretion of the court in a will contest, however, to permit the cross-examination of a witness before allowing his opinion as to the testator's mental capacity to be given.³ So, a nonexpert may be asked on cross-examination whether from his observation and acquaintance he thought the testatrix was mentally incapable of transacting ordinary business for the purpose of fathoming the extent of his knowledge of her business capacity.⁴ And when he bases his opinion in part upon a contract, he may be asked whether he regarded it as reasonable or unreasonable.⁵ And one who had given the opinion that the testator was of sound mind may be asked upon cross-examination by way of impeachment if he had stated out of court that the testator was childish and was going crazy.⁶ And what a witness testifies in a will contest that the will was duly executed by a competent testator, a statement made by him in another action that the instrument was worthless is admissible in evidence for the purpose of impeachment.⁷

¹ *Pittard v. Foster*, 12 Ill. App. 132; *Dunham's Appeal*, 27 Conn. 192.

² *Rambler v. Tryon*, 7 Serg. & R. 90, 10 Am. Dec. 444.

³ *O'Connor v. Madison*, 98 Mich. 183, 57 N. W. 105; *First Nat. Bank v. Wirebach*, 12 W. N. C. 150.

⁴ *Gardiner v. Gardiner*, 34 N. Y. 155.

⁵ *Pence v. Waugh*, 135 Ind. 143, 34 N. E. 860.

⁶ *Staser v. Hogan*, 120 Ind. 227, 21 N. E. 911, 22 N. E. 990.

⁷ *Beaubien v. Cicotte*, 12 Mich. 459.

f. Weight.—The weight to be given the opinions of non-expert witnesses as to the sanity of a person depends upon a consideration of all the circumstances under which it was

formed,¹ and upon the extent and character of the impairment of the mind,² and upon the witness's capacity to judge and his opportunity to observe;³ and also upon the intelligence and honesty of the witness,⁴ and his freedom from interest and bias.⁵ It has been said that the opinions of ordinary witnesses as to the sanity of an insured who committed suicide are not of great weight,⁶ and that little or no weight can be given to opinions of nonexpert witnesses as to the mental condition of the defendant in an action for his interdiction.⁷ Evidence of witnesses present at the execution of a deed,⁸ or of a will,⁹ is entitled to particular weight upon the question of competency. So, evidence of notaries who took a grantor's acknowledgment to his deed is entitled to great weight.¹⁰ The opinions of such witnesses are to be weighed by the facts upon which they are based,¹¹ such facts being of more importance than the opinions.¹² Such opinions are entitled to little or no regard unless supported by good reason founded on facts which warrant them in the opinion of the jury.¹³ And the weight and effect which shall be given to the opinion of a nonexpert witness on a question as to mental soundness is also a question of fact for the jury.¹⁴

¹ Moore v. Moore, 67 Mo. 192.

² Burney v. Torrey, 100 Ala. 157, 46 Am. St. Rep. 33, 14 So. 685.

³ Burton v. Scott, 3 Rand. (Va.) 399; Burney v. Torrey, 100 Ala. 157, 46 Am. St. Rep. 33, 14 So. 685; Armstrong v. State, 30 Fla. 170, 17 L.R.A. 484, 11 So. 618; Re Merriman, 108 Mich. 454, 66 N. W. 372; Sharp v. Kansas City Cable R. Co. 114 Mo. 94, 20 S. W. 93; Clifton v. Clifton, 47 N. J. Eq. 227, 21 Atl. 333; Culver v. Haslam, 7 Barb. 314.

⁴ Clifton v. Clifton, 47 N. J. Eq. 227, 21 Atl. 333.

⁵ Culver v. Haslam, 7 Barb. 314.

⁶ Charter Oak L. Ins. Co. v. Rodell, 95 U. S. 235, 24 L. ed. 433.

⁷ Eloi v. Eloi, 36 La. Ann. 563.

⁸ Jarrett v. Jarrett, 11 W. Va. 584.

⁹ Nicholas v. Kershner, 20 W. Va. 251; Kerr v. Lunsford, 31 W. Va. 680, 2 L.R.A. 668, 8 S. E. 493.

¹⁰ Buckey v. Buckey, 38 W. Va. 168.

¹¹ Fiscus v. Turner, 125 Ind. 46, 24 N. E. 662; Ex parte Schneider, 21 D. C. 433; Clarke v. Sawyer, 3 Sandf. Ch. 351; Kinleside v. Harrison, 2 Phillim. Eccl. Rep. 449.

¹² Clarke v. Sawyer, 3 Sandf. Ch. 351; M'Daniel's Will, 2 J. J. Marsh. 331.

- ¹³ *Harrison v. Rowan*, 3 Wash. C. C. 580, Fed. Cas. No. 6,141; *Kinne v. Kinne*, 9 Conn. 102, 21 Am. Dec. 732; *Jamison v. Jamison*, 3 Houst. (Del.) 108; *Jones v. Perkins*, 5 B. Mon. 222; *Chase v. Winans*, 59 Md. 475; *Clifton v. Clifton*, 47 N. J. Eq. 227, 21 Atl. 333; *Doran v. McConlogue*, 150 Pa. 98, 24 Atl. 357; *Kerr v. Lunsford*, 31 W. Va. 680, 2 L.R.A. 668, 8 S. E. 493.
- ¹⁴ *Colee v. State*, 75 Ind. 513; *Newhard v. Yundt*, 132 Pa. 324, 19 Atl. 288; *Foster v. Dickerson*, 64 Vt. 233, 24 Atl. 253; *State v. Hayden*, 51 Vt. 296; *Gray v. Obear*, 59 Ga. 675; *Nexsen v. Nexsen*, 2 Keyes, 232.

9. Opinion of subscribing witnesses as to sanity or insanity.

a. Admissibility generally.—The law places subscribing witnesses to a will around the testator to try, judge, and determine as to his competency to execute it.¹ And they are permitted to testify as to the opinion they form at the time as to the condition of his mind, whether sound or unsound.² So, the general rule is that subscribing witnesses may give their opinions as to testamentary capacity of the testator without giving the facts upon which they are founded,³ and without assigning cause or reason,⁴ and without stating the grounds upon which they are formed.⁵

- ¹ *Poole v. Richardson*, 3 Mass. 330; *McDaniel v. Crosby*, 19 Ark. 533; *Ethridge v. Bennett*, 9 Houst. (Del.) 295, 31 Atl. 813; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329; *Field's Appeal*, 36 Conn. 277.
- ² *Jamison v. Jamison*, 3 Houst. (Del.) 108; *Walker v. Walker*, 34 Ala. 469; *Kelly v. McGuire*, 15 Ark. 600; *Call v. Byram*, 39 Ind. 499; *Harper's Will*, 4 Bibb. 244; *Hastings v. Rider*, 99 Mass. 623; *Martin v. Perkins*, 56 Miss. 204; *DeWitt v. Barley*, 9 N. Y. 371; *Clapp v. Fullerton*, 34 N. Y. 190, 90 Am. Dec. 681; *Crowell v. Kirk*, 14 N. C. (3 Dev. L.) 355; *Gibson v. Gibson*, 9 Yerg. 329; *Pidcock v. Potter*, 68 Pa. 343, 8 Am. Rep. 181; *Parsons v. Parsons*, 66 Iowa, 754, 21 N. W. 570, 24 N. W. 564.
- ³ *Titlow v. Titlow*, 54 Pa. 216, 93 Am. Dec. 691; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329; *Robinson v. Adams*, 62 Me. 369, 16 Am. Rep. 473; *Williams v. Lee*, 47 Md. 321; *Crowell v. Kirk*, 14 N. C. (3 Dev. L.) 355; *Van Hus v. Rainbolt*, 2 Coldw. 139; *First Nat. Bank v. Wirebach*, 12 W. N. C. 150; *Hertrich v. Hertrich*, 114 Iowa, 643, 89 Am. St. Rep. 389, 87 N. W. 689; *Berry Will Case*, 93 Md. 560, 49 Atl. 401; *Robinson v. Adams*, 62 Me. 369, 16 Am. Rep. 473; *Williams v. Spencer*, 150 Mass. 348, 5 L.R.A. 790, 15 Am. St. Rep. 206, 23 N. E. 105, even though in Massachusetts the opinion of other nonexpert witnesses is entirely excluded.

⁴ *Gibson v. Gibson*, 9 Yerg. 329; *Puryear v. Reese*, 6 Coldw. 21.

⁵ *Lodge v. Lodge*, 2 Houst. (Del.) 419.

b. Necessity of giving.—Since witnesses to a will are placed around a testator to ascertain and judge of his capacity, the heir has a right to insist that the testimony of all such witnesses be given to the jury, and they must all be produced if living and under the power of the court.¹ It is not necessary to the establishment of a will, however, that the subscribing witnesses should have stated their opinions as to his mental capacity as such opinions are necessarily mere inferences drawn by them from the facts observed.² And the inability of a subscribing witness who had been introduced to the testator for that purpose to testify to his capacity does not invalidate the will, but goes only to the credibility of such witness in case he is called upon to testify as to sanity or mental capacity.³ While a will is required to be attested by two witnesses, it may be proved by one of them who testifies to the attestation by the other and to the competency of the testator, though the other does not testify.⁴ And where any of the witnesses are dead or in such a situation that their testimony cannot be obtained, proof of their signatures is received as secondary evidence of the facts to which they have attested by subscribing the will as witnesses thereto.⁵ And where there is a failure to prove testamentary capacity of a testator by the subscribing witnesses to a will, the executor or proponent is not precluded from establishing his sanity by other testimony.⁶ The fact that a party attested the execution of a will affords *prima facie* evidence that he considered the testator sane.⁷ But it has also been held that the fact that a person attested a will does not furnish evidence of any opinion on his part as to the sanity of the testator;⁸ and that when the attesting witnesses to a will are dead, there is no presumption that if living they would testify that the testator was of sound mind at the time of making his will.⁹

¹ *Chase v. Lincoln*, 3 Mass. 236; *Field's Appeal*, 36 Conn. 277; *Jauncey v. Thorne*, 2 Barb. Ch. 40, 45 Am. Dec. 424; *Bootle v. Blundell*, 19 Ves. Jr. 494, 34 Eng. Reprint, 600, *Cooper Ch.* 136, 15 Revised Rep. 93.

² *Cilley v. Cilley*, 34 Me. 162; *Mays v. Mays*, 114 Mo. 536, 21 S. W. 921.

³ *Huff v. Huff*, 41 Ga. 696.

⁴ *Cheatham v. Hatcher*, 30 Gratt. 56, 32 Am. Rep. 650.

⁵ *Jauncey v. Thorne*, 2 Barb. Ch. 40, 45 Am. Dec. 424.

⁶ *Frear v. Williams*, 7 Baxt. 550.

⁷ *Williams v. Lee*, 47 Md. 321; *Egbert v. Egbert*, 78 Pa. 326.

⁸ *Baxter v. Abbott*, 7 Gray, 71.

⁹ *Boardman v. Woodman*, 47 N. H. 120.

c. Contradiction; weight.—The opinions of subscribing witnesses to a will as to the sanity or insanity of the testator are not conclusive.¹ A will may be established against the testimony of subscribing witnesses who testify against the testator's capacity.² So, the party calling a subscribing witness to a will who declares his belief that the testator was incompetent at the time he made the will may contradict him by reading his evidence taken on a former trial and by proof of declarations previously made.³ And declarations of an attesting witness to a will who has since died, made on the same day that the will was executed, that he did not believe that the testator was sane and that he signed as witness merely to gratify him, are properly admissible in evidence in a proceeding to contest the will.⁴ And where subscribing witnesses do not agree in opinion as to capacity of the testator or as to facts upon which they found their opinions, either side may show either by collateral circumstances or direct proof that one of them is more credible than the other or that one of them is mistaken in his facts.⁵

But the opinions of attesting witnesses to a will and facts stated by them as occurring at the time of its execution are entitled to great weight on the question of testamentary capacity,⁶ though they are not necessarily the best to prove the sanity of the testator.⁷ And since a witness to a will by his act of attestation solemnly testifies to the sanity of the testator, if he afterwards attempts to impeach the validity of the will his evidence, though not to be positively rejected, is to be received with the most scrupulous jealousy,⁸ especially where he assigns no satisfactory reasons for his opinion.⁹

¹ *Howard's Will*, 5 T. B. Mon. 199, 17 Am. Dec. 60.

² *Cheatham v. Hatcher*, 30 Gratt. 56, 32 Am. Rep. 650; *Rigg v. Wilton*, 13 Ill. 15, 54 Am. Dec. 419; *Sechrest v. Edwards*, 4 Met. (Ky.) 163; *Jenkins's Will*, 43 Wis. 610; *Higgins v. Carlton*, 28 Md. 115, 92 Am. Dec. 666; *Le Breton v. Fletcher*, 2 Hagg. Eccl. Rep. 558, 162 Eng. Reprint, 956; *Re Shapter*, 35 Colo. 578, 6 L.R.A. (N.S.) 575, 117 Am. St. Rep. 216, 85 Pac. 688.

See also cases in note in 6 L.R.A. (N.S.) 575.

³ *Harden v. Hays*, 9 Pa. 151.

⁴ *Townsend v. Townsend*, 9 Gill, 506.

But the rule has been adopted by some of the cases that the declarations of a deceased subscribing witness tending to show that he thought the testator to be insane are not admissible in evidence in a proceeding to contest a will. *Boardman v. Woodman*, 47 N. H. 120; *Sellars v. Sellars*, 2 Heisk. 430.

For note on the question of admissibility of declarations of deceased subscribing witness unfavorable to testator's competency, see 27 L.R.A. (N.S.) 294.

⁵ *Bell v. Clark*, 31 N. C. (9 Ired. L.) 239.

⁶ *Whitenack v. Stryker*, 2 N. J. Eq. 8; *Jamison v. Jamison*, 3 Houst. (Del.) 108; *Kelly v. Perault*, 5 Idaho, 221, 48 Pac. 45; *Cornelius v. Cornelius*, 52 N. C. (7 Jones L.) 593; *Martin v. Thayer*, 37 W. Va. 38, 16 S. E. 489; *Kerr v. Lunsford*, 31 W. Va. 680, 2 L.R.A. 668, 8 S. E. 493; *Harrison v. Rowan*, 3 Wash. C. C. 580, Fed. Cas. No. 6,141; *Field's Appeal*, 36 Conn. 277.

⁷ *McTaggart v. Thompson*, 14 Pa. 149.

⁸ *Young v. Barner*, 27 Gratt. 96; *Gwin v. Gwin*, 5 Idaho, 271, 48 Pac. 295; *Hoerth v. Zable*, 92 Ky. 202, 17 S. W. 360; *Stevens v. Vancleve*, 4 Wash. C. C. 262, Fed. Cas. No. 13,412; *Bootle v. Blundell*, 19 Ves. Jr. 494, 34 Eng. Reprint, 600, *Cooper Ch.* 136, 15 Revised Rep. 93; *Cook's Estate*, 16 Phila. 322; *McMeekin v. McMeekin*, 2 Bush. 79.

⁹ *Jones v. Goodrich*, 5 Moore, P. C. C. 16, 13 Eng. Reprint, 394.

For other cases as to opinion of subscribing witness as to sanity or insanity, see note in 39 L.R.A. 715.

III. MISCELLANEOUS.

10. Photographs.

A photograph of the testator, even though shown to fairly represent him, is not competent on the question of his testamentary capacity.¹

¹ *Varner v. Varner*, 16 Ohio C. C. 386.

11. Declarations.

Declarations of a person whose mental condition is in question, whether made before or after the time at which the condition is to be established, are competent so far as they tend to show his condition at the time in question.¹

¹ Hill v. Bahrns, 158 Ill. 314, 41 N. E. 912; Re Goldthorp, 94 Iowa. 336, 62 N. W. 845; Cogswell v. Com. 17 Ky. L. Rep. 822, 32 S. W. 935; Peery v. Peery, 94 Tenn. 328, 29 S. W. 1; Bower v. Bower, 142 Ind. 194, 41 N. E. 523; Re Jones, 166 Cal. 108, 135 Pac. 288, where declarations made twenty-six days after execution of the will were held competent. The fact that a testator was suffering senile decay does not render incompetent testimony of his acts and declarations subsequent to the making of his will. Haines v. Hayden, 95 Mich. 332, 54 N. W. 911.

12. General reputation.

Insanity cannot be proved by general reputation or neighborhood rumors.¹

¹ Ellis v. State, 33 Tex. Crim. Rep. 86, 24 S. W. 894; State v. Coley, 114 N. C. 879, 19 S. E. 705; Thompson v. Ish, 99 Mo. 160, 12 S. W. 510; Cotrell v. Com. 13 Ky. L. Rep. 305, 17 S. W. 149.

13. Insanity in blood relatives.

a. Hereditary insanity.—Evidence of insanity in one's blood relatives is admissible as tending to show a hereditary taint of insanity in such person.¹

¹ Prewitt v. State, 106 Miss. 82, 6 A.L.R. 1476, 63 So. 330; James v. State, 193 Ala. 55, 69 So. 569, .Ann. Cas. 1918B, 119; Dillman v. McDanel, 222 Ill. 276, 113 Am. St. Rep. 400, 78 N. E. 591; Green v. State, 64 Ark. 523, 43 S. W. 973; Baxter v. Abbott, 7 Gray, 71; People v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162; Hagan v. State, 5 Baxt. 615; State v. Penna, 35 Mont. 535, 90 Pac. 787; People v. Pine, 2 Barb. 566; State v. Wetter, 11 Idaho. 433, 83 Pac. 341; State v. Leuth, 5 Ohio C. C. 94, 3 Ohio C. D. 48.

b. Nonhereditary insanity.—There are other cases in which it has been held, without express reference to the question whether or not the insanity under consideration was of a hereditary or transmissible type, that where there is direct testimony tending to prove that the person in question is insane, evidence

as to the insanity of his blood relatives is admissible in corroboration of such direct testimony.¹

¹ *Guiteau's Case*, 10 Fed. 161; *Russell v. State*, 201 Ala. 572, 78 So. 916; *Shaeffer v. State*, 61 Ark. 241, 32 S. W. 679; *People v. Harris*, 169 Cal. 53, 145 Pac. 520; *Coughlin v. Poulson*, 2 MacArth. 308; *Taylor v. State*, 105 Ga. 746, 31 S. E. 764; *Ross v. McQuiston*, 45 Iowa, 145; *Wright v. Com.* 24 Ky. L. Rep. 1838, 72 S. W. 340; *St. George v. Biddeford*, 76 Me. 593; *Watts v. State*, 99 Md. 30, 57 Atl. 542; *Com. v. Johnson*, 188 Mass. 382, 74 N. E. 939; *State v. Baker*, 246 Mo. 357, 152 S. W. 46; *State v. Spencer*, 21 N. J. L. 197; *People v. Sprague*, 2 Park. Crim. Rep. 43; *Wheeler v. State*, 34 Ohio St. 394, 32 Am. Rep. 372; *McLeod v. State*, 31 Tex. Crim. Rep. 331, 20 S. W. 749; *State v. Warner*, 91 Vt. 391, 101 Atl. 149. For citation and discussion of additional authorities, see note in 6 A.L.R. 1491.

14. Presence of defendant in lunacy proceedings.

A statute requiring that the defendant in proceedings to have him declared of unsound mind shall be present in court is to give him an opportunity to confront witnesses, and not to permit the jury to make up their verdict upon his appearance and conduct.¹

¹ *Fiscus v. Turner*, 125 Ind. 46, 24 N. E. 662 (Ind. Rev. Stat. 1881, § 2547). This statute has now been amended to provide that either side may produce witnesses at an insanity hearing. See *Burns' Ann. Stats. of Indiana*, 1914, § 7879, p. 936.

15. Conduct and circumstances.

Evidence of the acts and conduct, occurrences and other circumstances, whether prior or subsequent to the time at which the mental condition of a person is to be established, which tend to shed light on the state of his mental faculties, is generally receivable for the purpose of showing what his mental condition was at the time in question.¹

¹ *Von De Veld v. Judy*, 143 Mo. 348, 44 S. W. 1117; *Lane v. Moore*, 151 Mass. 87, 23 N. E. 828 (so holding if sufficiently near the time); *Prentiss v. Bates*, 93 Mich. 234, 17 L.R.A. 494, 53 N. W. 153 (that testatrix was erratic, eccentric, rambling and disconnected in conversation, flighty in notions, unsettled; that her manner was excitable; that she could not comprehend connected conversations; that she ran about the house screaming, with her dress open in front, etc.); *Bower v. Bower*, 142 Ind. 194, 41 N. E. 523 (that testator for several years before his

death did not make out his own tax lists, but that they were made out and sworn to by his son); *Titus v. Gage*, 70 Vt. 14, 39 Atl. 246 (that testatrix at one time released part of a debt securing by mortgage, and took unsecured note for the amount released; and that the only property the maker had was exempt); *Green v. State*, 64 Ark. 523, 43 S. W. 973 (that defendant charged with murder seemed from the time of her arrest very unconcerned, and to think that she had done right, and to be unconscious of her condition, and have no apprehension or fear of punishment, and that she frequently laughed and sang, is admissible, in connection with evidence of her disordered mental condition before and at the time of committing the crime).

The admissibility of such evidence depends upon the question of intervening time, the character of the manifestations, and the circumstances under which they are observed. *State v. Leehman*, 2 S. D. 171, 49 N. W. 3.

Suicide, while not raising a presumption of insanity, may be considered in connection with the circumstances attending it, upon the question of sanity or insanity. *Grand Lodge I. O. M. A. v. Wieting*, 168 Ill. 408, 48 N. E. 59, and cases cited; *Bachmeyer v. Mutual Reserve Fund Life Assn.* 87 Wis. 325, 58 N. W. 399; *Re Card*, 28 N. Y. S. R. 528, 8 N. Y. Supp. 297.

It is proper to show the consistency of the will with the natural inclinations and previously declared intentions of the testator. *Hammond v. Dike*, 42 Minn. 273, 44 N. W. 61.

Kindly relations between the testator and members of his family disinherited by him. *Re Burns*, 121 N. C. 336, 28 S. E. 519. See also *Gurley v. Park*, 135 Ind. 440, 35 N. E. 279 (evidence that testatrix disinherited her only child, and that he is needy, with a large family on his hands, competent); *Manatt v. Scott*, 106 Iowa, 203, 76 N. W. 717 (ill-will of decedent toward one with whom she had previously been on friendly terms); *Re Burns*, 121 N. C. 336, 28 S. E. 519 (that testator disinherited some of his children; and it may be properly commented upon by counsel in argument). Compare *McGovern's Estate*, 185 Pa. 203, 39 Atl. 816 (that shortly before making her will the feelings of testatrix towards one of the objects of her bounty underwent a marked change, and that she became distrustful of her, and attributed every attention received from her to mercenary motives, is insufficient to show that a provision of the will excluding her from participation therein resulted from an insane delusion).

16. Belief in spiritualism, witchcraft, etc.

A belief in spiritualism is not in itself evidence of insanity.¹ Nor will a belief in witchcraft,² or the belief that the souls of men after death pass into animals,³ invalidate a will.

¹ *Lewis v. Arbuckle*, 85 Iowa, 335, 16 L.R.A. 677, 52 N. W. 237; *Re Smith*.

- 52 Wis. 548, 36 Am. Rep. 426, note, 8 N. W. 616, 9 N. W. 665; Otto v. Doty, 61 Iowa, 23, 15 N. W. 578; Re Keeler, 12 N. Y. S. R. 157; O'Dell v. Goff, 149 Mich. 152, 10 L.R.A.(N.S.) 989, 119 Am. St. Rep. 662, 112 N. W. 736; Turner v. Hand, 3 Wall. Jr. 88, Fed. Cas. No. 14,257; Chafin's Will, 32 Wis. 560. Note in 15 L.R.A.(N.S.) 674.
- ² Re Vedder, 6 Dem. 92; Re Forman, 54 Barb. 297; Van Guysling v. Van Kuren, 35 N. Y. 70; Lee v. Lee, 15 S. C. L. (4 M'Cord) 183, 17 Am. Dec. 722; Kelly v. Miller, 39 Miss. 19; Addington v. Wilson, 5 Ind. 137, 61 Am. Dec. 81.
- ³ Bonard's Will, 16 Abb. Pr. N. S. 128.

INSOLVENCY, SOLVENCY, AND FINANCIAL CONDITION.

1. Direct testimony.
2. Accounts.
3. Relevant facts.
4. Hearsay and general reputation.
5. Presumption and burden of proof.

For kindred topics, see ABILITY; ABSTRACTS; ACCOUNTS; INDEBTEDNESS.

1. Direct testimony.

A witness may testify directly to any fact within his knowledge, relevant to the question of the financial means of another person,¹ including the fact whether the person in question was able to pay his debts.²

But it is not competent to ask his opinion as to financial ability,³ responsibility,⁴ solvency, or insolvency,⁵ when the fact is directly involved in the issue.

¹ State v. Cadwell, 79 Iowa, 432, 44 N. W. 700; Pacific Postal Teleg. Cable Co. v. Fleischer, 14 C. C. A. 166, 29 U. S. App. 227, 66 Fed. 899; Swan v. Gilbert, 67 Ill. App. 236; Watterson v. Fuellhart, 169 Pa. 612, 32 Atl. 597 (to the further effect that the witness is not limited in his testimony of what the person owned or what he owed, leaving the inference of solvency or insolvency to be drawn by the jury).

Otherwise, where he knows nothing except by general reputation. *Hall v. Ballou*, 58 Iowa, 585, 12 N. W. 475.

And according to *Martin v. Mayer*, 112 Ala. 620, 20 So. 963, the records of the courts are not the only evidence of a previous insolvency, but a person who knows the fact may testify that another's indebtedness exceeds the value of his assets, and that in fact the person is insolvent.

² *Thompson v. Hall*, 45 Barb. 214, 216; *Lacy v. Kossuth County*, 106 Iowa, 16, 75 N. W. 689.

What degree of knowledge of a person's solvency or pecuniary circumstances and credit will qualify to testify concerning them. *Iselin v. Peck*, 2 Robt. 629.

³ *Dictum*, in *Thompson v. Hall*, 45 Barb. 214, 216.

⁴ *Denman v. Campbell*, 7 Hun, 88 (error to allow question, Is C. a man of responsibility?).

⁵ *York v. People*, 31 Hun, 446 (error to allow question, What in your opinion was his financial standing, in? etc.); *Hahn v. Penney*, 60 Minn. 487, 62 N. W. 1129; *Agnew v. United States*, 165 U. S. 36, 41 L. ed. 624, 17 Sup. Ct. Rep. 235.

2. Accounts.

The accounts of a party are evidence against him to show his financial condition.¹

They are not alone evidence in his favor;² but may be made competent by proof that they were accurately kept, and showed correctly his condition at the time in question.³

¹ *Kells v. McClure*, 69 Minn. 60, 71 N. W. 827.

They may be put in evidence in some cases against his grantee. *Loos v. Wilkinson*, 110 N. Y. 195, 205, 1 L.R.A. 250, 18 N. E. 99.

² *Smith v. Vincent*, 15 Conn. 1, 38 Am. Dec. 52.

³ *Rochester Printing Co. v. Loomis*, 45 Hun, 93 (admitting schedules made from such accounts; there being no objection to the nonproduction of the accounts). Compare *Pringle v. Leverich*, 97 N. Y. 181, 49 Am. Rep. 522.

3. Relevant facts.

Facts which are the usual concomitants or consequences of pecuniary ability, or the contrary, are competent.¹

¹ Thus, judgment and execution are evidence of insolvency; as also are assignment, and continued suspension of business, or other notorious indications. *Terry v. Tubman*, 92 U. S. 160, 23 L. ed. 537; *State v. Beach*, 147 Ind. 74, 36 L.R.A. 179, 46 N. E. 145; *Spaulding v. American Wood Board Co.* 58 App. Div. 314, 68 N. Y. Supp. 945.

- Sheriff's return of *nulla bona*. Reynolds v. Pharr, 9 Ala. 560; Yates v. Hoffman, 5 Hun, 113; Baines v. Babcock, 95 Cal. 581, 27 Pac. 674, 30 Pac. 776; Hood v. French, 37 Fla. 117, 19 So. 165.
- Dishonor of bank check. Brown v. Montgomery, 20 N. Y. 287, 75 Am. Dec. 404; Hudson v. Bauer Grocery Co. 105 Ala. 200, 16 So. 693.
- Protest of note. Rex Buggy Co. v. Ross, 80 Ark. 388, 97 S. W. 291.
- Assignment, reciting inability to pay in full. Cunningham v. Morton, 125 U. S. 77, 31 L. ed. 624, 8 Sup. Ct. Rep. 804. Compare Wills v. Claffin, 92 U. S. 135, 23 L. ed. 490 (holding an adjudication of bankruptcy inadmissible under an allegation that a suit would have been unavailing).
- Appraisement of insolvent banker made as required by statute, and filed by the trustee, in the preparation of which the banker aided. State v. Beach, 147 Ind. 74, 36 L.R.A. 179, 46 N. E. 145.
- The oath which an insolvent debtor is required to make upon applying for his discharge. Re Harris, 81 Cal. 350, 22 Pac. 867.
- But the record of the proceedings before the justices on an application to take the poor debtor's oath is not admissible in a suit involving the validity of a prior sale of personal property by the debtor, between the vendee, who was not a party to the poor debtor proceedings, and an attaching creditor. Lord v. Locke, 62 N. H. 566.

4. Hearsay and general reputation.

Mere hearsay is incompetent to prove the fact of solvency or insolvency,¹ and this rule has been applied in some cases to exclude evidence of general reputation;² but in the greater number of jurisdictions an exception to the rule is made in favor of general reputation, which is held competent evidence on the question of financial responsibility where it is not sought to establish insolvency as a legal status.³ And when the question is as to the knowledge or good faith of a third person, general reputation is competent as tending to show reasonable grounds for belief or suspicion.⁴

¹ Walker v. Forbes, 25 Ala. 139, 60 Am. Dec. 498.

² Stewart v. McMurray, 82 Ala. 269, 3 So. 47; Branch Bank v. Parker, 5 Ala. 731; Ward v. Herndon, 5 Port. (Ala.) 382; Wolfson v. Allen Bros. Co. 120 Iowa, 455, 94 N. W. 910; Coleman v. Lewis, 183 Mass. 485, 68 L.R.A. 482, 97 Am. St. Rep. 450, 67 N. E. 603; Bliss v. Johnson, 162 Mass. 323, 38 N. E. 446; Sheldon v. Root, 16 Pick. 567, 28 Am. Dec. 266.

And in Holten v. Lake County, 55 Ind. 194, the court refused to permit testimony as to the reputation of a party for solvency or insolvency

as tending to show that he had or had not paid a debt for which another party was surety.

² Wigmore, Ev. § 1623, p. 1972; Angell v. Rosenbury, 12 Mich. 241; Hayes v. Wells, 34 Md. 518; Nininger v. Knox, 8 Minn. 140, Gil. 110; Burr v. Willson, 22 Minn. 206; West v. St. Paul Nat. Bank, 54 Minn. 466, 56 N. W. 54; Hahn v. Penney, 60 Minn. 487, 62 N. W. 1129; Garrett v. Weinberg, 59 S. C. 162, 37 S. E. 51, 225; Hard v. Brown, 18 Vt. 88; Bank of Middlebury v. Rutland, 33 Vt. 414; Ellis v. State, 138 Wis. 513, 20 L.R.A.(N.S.) 444, 131 Am. St. Rep. 1022, 119 N. W. 1110.

⁴ Gordon v. Ritenour, 87 Mo. 54, and cases cited; Lee v. Kilburn, 3 Gray, 594 (competent in creditor's action, to charge preferred creditor); Slingerland v. Bennett, 6 Thomp. & C. 446 (reputation of third person for wealth, admissible on the question of the falsity of the representations by defendant, as to his solvency. Modified only on question of damages, in 66 N. Y. 611); Barrett v. Western, 66 Barb. 205 (reputation competent in connection with defendant's belief); Hahn v. Penney, 60 Minn. 487, 62 N. W. 1129; Martin v. Mayer, 112 Ala. 620, 20 So. 963; Price v. Mazange, 31 Ala. 701; Ward v. Herndon, 5 Port. (Ala.) 382; Branch Bank v. Parker, 5 Ala. 731; Brooks v. Thomas, 8 Md. 367; Larkin v. Hapgood, 56 Vt. 597.

5. Presumption and burden of proof.

In the absence of evidence, solvency is presumed.¹

And solvency or insolvency at a given time having been shown, it is presumed to continue within reasonable limits of time.⁴

But insolvency at a particular time raises no presumption of insolvency at any considerable time anterior thereto,³ or at a subsequent time.⁴

And the party alleging insolvency must establish it like any other affirmative fact.⁵

¹ Hart v. Hoffman, 44 How. Pr. 168 (solvency of purchaser procured by broker, presumed, in support of broker's action for compensation); Hackley v. Draper, 4 Thomp. & C. 614, affirmed in 60 N. Y. 88; Grosse v. Cooley, 43 Minn. 188, 45 N. W. 15; White v. Clasby, 101 Mo. 162, 14 S. W. 180.

² Wait, Insolv. Corp. 42, citing Walrod v. Ball, 9 Barb. 271; Donahue v. Coleman, 49 Conn. 464; Mullen v. Pryor, 12 Mo. 307; Body v. Jewsen, 33 Wis. 402; Ellis v. State, 138 Wis. 513, 20 L.R.A.(N.S.) 444, 131 Am. St. Rep. 1022, 119 N. W. 1110; Redding v. Godwin, 44 Minn. 355, 46 N. W. 563; Cleage v. Laidley, 79 C. C. A. 284, 149 Fed. 346.

But it is not presumed to continue for any particular length of time. Hohle v. Randrup, 39 Minn. 334, 79 N. Y. Supp. 870.

- ³ *Windhaus v. Bootz*, 92 Cal. 617, 28 Pac. 557; *Ellis v. State*, 138 Wis. 513, 20 L.R.A.(N.S.) 444, 131 Am. St. Rep. 1022, 119 N. W. 1110.
- ⁴ *German Secur. Bank v. Columbia Finance & Trust Co.* 27 Ky. L. Rep. 581, 85 S. W. 761.
- ⁵ *Doxsee v. Waddick*, 122 Iowa, 599, 98 N. W. 483; *Howell v. Anderson*, 66 Neb. 575, 61 L.R.A. 313, 92 N. W. 760.

INTENT.

1. Right of person to testify as to his own intent.
 - a. General rule.
 - b. Test of admissibility.
 - c. Exceptions and limitations.
 - d. Application of rule.
 - e. Weight and conclusiveness.
2. Right to testify as to intent of other person.
 - a. In general.
 - b. Manifested by demeanor.
3. Declarations; *res gestæ*.
4. Intent as to law.
5. Other acts of same nature.
6. Concurrence of intent.
7. Constructive intent.
8. Presumptions and burden of proof.
 - a. Intention as to consequences of act.
 - b. Intent of testator.
 - c. To evade law.
 - d. To create monopoly.
9. Parol or extrinsic evidence to show.
 - a. As to writings generally.
 - b. Competency to show writing intended as a sham.
 - c. As to wills generally.
 - d. To show intent of testator in respect to disinheriting an after-born child.
 - e. To show intent that real property should be charged with payment of legacies where will is silent on that point.
 - f. May beneficiary be put to his selection by extrinsic evidence of testator's intention.
 - g. To show intent of maker, as to whether an instrument in the form of a deed was intended to operate as a deed or as a will.
 - h. To show that instrument on its face a will was not intended as such.

- i. To show that a will did not express true intent of testator because of undue influence.

10. Rebutting.

For kindred topics, see **ADMISSIONS; BELIEF; CONVERSATIONS; CORROBORATION; GOOD FAITH; KNOWLEDGE; NOTICE.**

1. Right of person to testify as to his own intent.

a. General rule.—Previous to the enactment of statutes making parties to an action competent witnesses therein, the intent of a party could be shown only by the acts of the party and the circumstances which occurred, from which it might be inferred;¹ and Alabama still clings to the common-law doctrine, the rule in that state being that an uncommunicated belief, motive, or intention cannot be testified to by a party to a civil suit when examined as a witness,² motive or intention being an inferential fact, to be drawn by the jury from the facts and circumstances in evidence.³ The general rule, however, is that when parties to a suit and parties interested in the transactions are permitted by statute to testify, they may testify what their intentions were, where intent is a material issue.⁴

¹ *Zimmerman v. Marchland*, 23 Ind. 474.

² *Burke v. State*, 71 Ala. 377; *Herring v. Skaggs*, 62 Ala. 180, 34 Am. Rep. 4; *Alabama Fertilizer Co. v. Reynolds*, 79 Ala. 497; *Barnewell v. Stephens*, 142 Ala. 609, 38 So. 662; *Oxford Iron Co. v. Spradley*, 51 Ala. 171.

An exception to this rule exists where the accused in a criminal case testifies in his own behalf to a particular act of his, relevant to the issue, in which case it is permissible to ask him on cross-examination what motive prompted him to the act, or what intention actuated him, or why he did it. *Williams v. State*, 123 Ala. 39, 26 So. 521; *Hurst v. State*, 133 Ala. 96, 31 So. 933; *Linnehan v. State*, 120 Ala. 293, 25 So. 6.

³ *Alexander v. Alexander*, 71 Ala. 295; *Wheless v. Rhodes*, 70 Ala. 419; *Whizenant v. State*, 71 Ala. 383; *McCormick v. Joseph*, 77 Ala. 236; *Stewart v. State*, 78 Ala. 436; *Baldwin v. Walker*, 91 Ala. 428, 8 So. 364.

⁴ *Barnhart v. Fulkerth*, 93 Cal. 497, 29 Pac. 50; *Fleet v. Tichenor*, 156 Cal. 343, 34 L.R.A.(N.S.) 323, 104 Pac. 458; *Fulkerson v. Stiles*, 156 Cal. 703, 26 L.R.A.(N.S.) 181, 105 Pac. 966; *Lane v. State*, 44 Fla. 105, 32 So. 896; *Germania F. Ins. Co. v. Stone*, 21 Fla. 555; *Hale v. Robertson*, 100 Ga. 168, 27 S. E. 937; *Wohlford v. People*, 148 Ill. 296, 36 N. E. 107; *Odin Coal Co. v. Denman*, 84 Ill. App. 190, affirmed

in 185 Ill. 413, 76 Am. St. Rep. 45, 57 N. E. 192; Ross v. State, 116 Ind. 495, 19 N. E. 451; Heap v. Parrish, 104 Ind. 36, 3 N. E. 549; Chew v. O'Hara, 110 Iowa, 81, 81 N. W. 157; Baker v. Missouri, K. & T. R. Co. 85 Kan. 263, 35 L.R.A.(N.S.) 822, 116 Pac. 816; State v. Wright, 40 La. Ann. 589, 4 So. 486; Jarrell v. Young. Smyth, Field Co. 105 Md. 280, 23 L.R.A.(N.S.) 367, 66 Atl. 50, 12 Ann. Cas. 1; Wheelden v. Wilson, 44 Me. 18; Faxon v. Jones, 176 Mass. 206, 57 N. E. 359; Spalding v. Lowe, 56 Mich. 366, 23 N. W. 46; Berkey v. Judd, 22 Minn. 287; State v. Banks, 73 Mo. 592; Hackney v. Raymond Bros. Clarke Co. 68 Neb. 624, 94 N. W. 822; Hale v. Taylor, 45 N. H. 405; Fiedler v. Darrin, 50 N. Y. 437; Thurston v. Cornell, 38 N. Y. 281; People v. Gardner, 73 Hun, 66, 25 N. Y. Supp. 1072; Nixon v. McKinney, 105 N. C. 23, 11 S. E. 154; State v. Johnson, 17 N. D. 554, 118 N. W. 230; Ohio Coal Co. v. Davenport, 37 Ohio St. 194; Juniata Bldg. & L. Asso. v. Hetzel, 103 Pa. 507; McDaniels v. Robinson, 26 Vt. 316, 62 Am. Dec. 574; Jackson v. Com. 96 Va. 107, 30 S. E. 452; Brown v. State, 127 Wis. 193, 106 N. W. 536, 7 Ann. Cas. 258; Wade v. Odle, 21 Tex. Civ. App. 656, 54 S. W. 786.

When present intent is relevant, as, where an injunction is sought, the party testifying as a witness may be required to answer whether he intends to do the act in question. Heilbron v. Last Chance W. D. Co. 2 Cal. Unrep. 633, 9 Pac. 456.

b. Test of admissibility.—The test of admissibility of evidence of the motive or intent with which an act was done is the materiality of the motive or intent in giving character to the act;¹ and where the intention of a party is not an issue in the case, his testimony in regard thereto is incompetent.²

¹ State v. King, 86 N. C. 603.

² Leland v. Converse, 181 Mass. 487, 63 N. E. 939; Hankins v. Watkins, 77 Hun, 360, 28 N. Y. Supp. 867; Weis v. Morris Bros. 102 Iowa, 327, 71 N. W. 208; Penobscot R. Co. v. White, 41 Me. 512, 66 Am. Dec. 257.

c. Exceptions and limitations.—The rule that a party will be allowed to testify to his intent, either in civil or criminal cases, whenever his intent is material, is subject to the exception that, in civil cases, such evidence is not admissible to vary the terms of a written instrument by which he is bound.¹ In criminal prosecutions where intent is material, the defendant may testify to a parol agreement varying the terms of a written instrument as evidence of his intent.² And where the acts of one filing an addition to a municipality manifest an intent to dedicate to public use streets shown on the plat, he will not be permitted to

testify that he did not intend to make the dedication.³ Nor is it competent to take the opinion of a witness on questions involving a conclusion of law,⁴ nor to permit him to testify as to mental operations and intentions depending upon nonexistent or suppositious circumstances.⁵ And the mere intention of a party, not manifested by or accompanying any act or declaration, is as a general rule, not admissible to affect the rights of another.⁶ And when, by law, certain consequences must necessarily follow an act done, the presumption that such consequences were intended is ordinarily conclusive, and cannot be rebutted by any evidence of a want of such intention.⁷

¹ *Nixon v. McKinney*, 105 N. C. 23, 11 S. E. 154; *Russell v. Halton*, 76 Ark. 506, 89 S. W. 471; *Green v. Akers*, 55 Ga. 159; *Merriman v. Pine City Lumber Co.* 23 Minn. 314; *Raymond v. Richmond*, 88 N. Y. 671; *Cornelius v. Atchison, T. & S. F. R. Co.* 74 Kan. 599, 87 Pac. 751; *Zimmerman v. Brannon*, 103 Iowa, 144, 72 N. W. 439; *Haywood v. Foster*, 16 Ohio, 88.

² *State v. Newman*, 74 N. H. 10, 64 Atl. 761; *Walker v. State*, 117 Ala. 42, 23 So. 149. See also note in 34 Harvard L. Rev. 790.

³ *Los Angeles v. McCollum*, 156 Cal. 148, 23 L.R.A.(N.S.) 378, 103 Pac. 914.

⁴ *Ohio Coal Co. v. Davenport*, 37 Ohio St. 194; *Gimbel v. Gomprecht*, — Tex. Civ. App. —, 36 S. W. 781; *Budlingame v. Rowland*, 77 Cal. 315, 1 L.R.A. 829, 19 Pac. 526.

⁵ *Cook v. People*, 2 Thomp. & C. 404; *Learned v. Ryder*, 61 Barb. 552; *State v. Ferguson*, 71 Conn. 227, 41 Atl. 769; *Palmer v. Pinkham*, 33 Me. 32.

⁶ *Hale v. Taylor*, 45 N. H. 405; *Gale v. Belknap County Ins. Co.* 41 N. H. 170; *Dunbar v. Armstrong*, 115 Ill. App. 549; *Phoenix Mills v. Miller*, 25 N. Y. Week. Dig. 290, 4 N. Y. S. R. 787; *Shrader v. Bonker*, 65 Barb. 608; *Cullmans v. Lindsay*, 114 Pa. 166, 6 Atl. 332; *Law v. Payson*, 32 Me. 521; *Colborn v. Fry*, 23 Ind. App. 485, 55 N. E. 621.

⁷ *Ecker v. McAllister*, 45 Md. 290; *Phelps v. George's Creek & C. R. Co.* 60 Md. 536; *Seymour v. Wilson*, 14 N. Y. 567; *Brown v. J. I. Case Plow Works*, 9 Kan. App. 685, 59 Pac. 601; *Cowley v. Smyth*, 46 N. J. L. 380, 50 Am. Rep. 432; *Cheatham v. Hawkins*, 80 N. C. 161.

d. Application of rule.—The rule that a party may be asked the direct question what his intent was at a particular time or with respect to a particular act, when the intent is a material issue in the case, applies both in criminal and civil suits.¹ It is applicable in libel and slander cases,² in actions for malicious prosecutions,³ and in cases involving the question of usury,⁴ or

fraud.⁵ So, a person may testify as to his intent to make a place his domicil, or to change his domicil,⁶ or to abandon his homestead.⁷ On an issue as to whether purchases or commodities on margins were bona fide or simulated, the defendant may testify as to his intention not to receive or deliver any of the commodities, such evidence constituting a link in the chain necessary to show the real intention of the parties to the transaction.⁸ And an employee suing his employer for personal injuries caused by defective appliances may testify that he continued to work in reliance upon a promise to repair.⁹

But the question whether a person intends to make a dedication of land to the public must be determined from his acts and declarations explanatory thereof, and not from what he may subsequently testify to in relation to his real intention.¹⁰

¹ *Dunbar v. Armstrong*, 115 Ill. App. 549; *Shockey v. Mills*, 71 Ind. 288, 36 Am. Rep. 196.

² *Lally v. Emery*, 54 Hun, 517, 8 N. Y. Supp. 135; *Wilson v. Noonan*, 35 Wis. 321; *Dorn v. Cooper*, 139 Iowa, 742, 117 N. W. 1, 118 N. W. 35, 16 Ann. Cas. 744, overruling *Barr v. Hack*, 46 Iowa, 308; *Arnott v. Standard Asso.* 57 Conn. 86, 3 L.R.A. 69, 17 Atl. 361.

³ *Flickinger v. Wagner*, 46 Md. 580; *Coleman v. Heurich*, 2 Mackey, 189; *Heap v. Parrish*, 104 Ind. 36, 3 N. E. 549; *Leake v. Carlisle*, 75 N. Y. Supp. 382; *George v. Johnson*, 25 App. Div. 125, 49 N. Y. Supp. 203; *Autry v. Floyd*, 127 N. C. 186, 37 S. E. 208; *Spalding v. Lowe*, 56 Mich. 366, 23 N. W. 46.

⁴ *Peightal v. Cotton States Bldg. Co.* 25 Tex. Civ. App. 390, 61 S. W. 428; *Black v. Ryder*, 5 Daly, 304; *More v. Deyoe*, 22 Hun, 208.

⁵ *Babcock v. People*, 15 Hun, 347; *Hubbell v. Alden*, 4 Lans. 214; *Pope v. Hart*, 35 Barb. 630; *Seymour v. Wilson*, 14 N. Y. 567; *Commercial Bank v. Firemen's Ins. Co.* 87 Wis. 297, 58 N. W. 391.

Thus, testimony by the parties as to what was believed and intended is admissible in an action for false representations (*Boddy v. Henry*, 113 Iowa, 462, 53 L.R.A. 769, 85 N. W. 771; *Brown v. Lessing*, 70 Tex. 546, 7 S. W. 783; *Beddell v. Chase*, 34 N. Y. 386; *Standard Oil Co. v. Meyer Bros. Drug Co.* 74 Mo. App. 446); on an issue of fact as to whether an assignment or transfer of property was made with intent to hinder, delay, or defraud creditors (*Seymour v. Wilson*, 14 N. Y. 567; *Vilas Nat. Bank v. Newton*, 25 App. Div. 62, 48 N. Y. Supp. 1009; *Love v. Tomlinson*, 1 Colo. App. 516, 29 Pac. 666; *Selz v. Belden*, 48 Iowa, 451; *Gardom v. Woodward*, 44 Kan. 758, 21 Am. St. Rep. 314, 25 Pac. 199; *Campbell v. Holland*, 22 Neb. 587, 35 N. W. 871; *Pierce v. White*, 10 Ohio Dec. Reprint, 552; *Robertson v. Gourley*, 84 Tex. 575, 19 S. W. 1006).

- ⁶ *Hulett v. Hulett*, 37 Vt. 586; *Reeder v. Holcomb*, 105 Mass. 94; *Hope v. Flentge*, 140 Mo. 390, 47 L.R.A. 806, 41 S. W. 1002; *Fisk v. Chester*, 8 Gray, 506; *Albion v. Maple Lake*, 71 Minn. 503, 74 N. W. 282; *Foster v. Cronkhite*, 35 N. Y. 139; *Kennedy v. Ryall*, 67 N. Y. 379.
- ⁷ *Glasscock v. Stringer*, — Tex. Civ. App. —, 32 S. W. 920; *Aultman v. Allen*, 12 Tex. Civ. App. 227, 33 S. W. 679.
- ⁸ *Waite v. Frank*, 14 S. D. 628, 86 N. W. 645; *Pope v. Hanke*, 155 Ill. 618, 28 L.R.A. 568, 40 N. E. 839; *Counselman v. Reichart*, 103 Iowa, 430, 72 N. W. 490; *Kenyon v. Luther*, 19 N. Y. S. R. 32, 4 N. Y. Supp. 498, s. c. subsequent appeal, 10 N. Y. Supp. 951.
- ⁹ *Yerkes v. Northern P. R. Co.* 112 Wis. 184, 88 Am. St. Rep. 961, 88 N. W. 33; *Toledo Stove Co. v. Reep*, 18 Ohio C. C. 58, 9 Ohio C. D. 467.
- ¹⁰ *Fossion v. Landry*, 123 Ind. 136, 24 N. E. 96; *Columbus v. Dahn*, 36 Ind. 330; *Elizabethtown, L. & B. S. R. Co. v. Combs*, 10 Bush, 382, 19 Am. Rep. 67; *Lamar County v. Clements*, 49 Tex. 347; *Indianapolis v. Kingsbury*, 101 Ind. 200, 51 Am. Rep. 749; *Pittsburgh, C. C. & St. L. R. Co. v. Noftsgar*, 148 Ind. 101, 47 N. E. 332.

e. Weight and conclusiveness.—The testimony of a party as to his intent is not conclusive, but is to be weighed and considered by the jury with the other evidence in the case, in passing upon the question of actual intent.¹

- ¹ *Thurston v. Cornell*, 38 N. Y. 281; *Germania F. Ins. Co. v. Stone*, 21 Fla. 555; *Juniata Bldg. & L. Asso. v. Hetzel*, 103 Pa. 507; *Larson v. Thoma*, 143 Iowa, 338, 121 N. W. 1059; *McKown v. Hunter*, 30 N. Y. 625; *Wohlford v. People*, 148 Ill. 296, 36 N. E. 107; *State v. Dillon*, 48 La. Ann. 1365, 20 So. 913, *McGhee v. Wells*, 57 S. C. 280, 76 Am. St. Rep. 567, 35 S. E. 529; *Wade v. Odle*, 21 Tex. Civ. App. 656, 54 S. W. 786; *Royce v. Gazan*, 76 Ga. 79; *Fanning v. Green*, 156 Cal. 279, 104 Pac. 308.

For an extended discussion of the question of the right of a person to testify as to his intent, with a review of all the authorities, see notes in 23 L.R.A.(N.S.) 367, and 34 L.R.A.(N.S.) 323.

2. Right to testify as to intent of other person

a. In general.—A witness may not testify as to the motive or intent of another person, but that is to be shown by circumstances, and the declarations of such other person,¹ or by his own testimony. Thus, an officer or agent of a corporation cannot testify directly to the intent of the whole corporation;² nor can an attorney be allowed to testify as to his client's intention in bringing suit.³ But officers of a corporation, whose acts of malicious

intention would be acts of the corporation, may testify, in an action of libel against the corporation, that they had not, and, to their knowledge, no officer or employee had, any malicious intention toward the plaintiff in the publication of the libel.⁴ So, where an assignment for creditors by an insolvent corporation is attacked for fraud, the directors may testify to their good motives in making the assignment.⁵ And where the intent of a defendant to defraud is an issue, his testimony as to the absence of such intent is admissible on behalf of codefendants.⁶ And where a husband and wife are in accord, evidence of the intention of the wife in regard to the selection of a homestead is admissible as pointing to the intention of the husband.⁷

¹ *Manufacturers' & T. Bank v. Koch*, 105 N. Y. 630, 12 N. E. 9, more fully, 8 N. Y. S. R. 37; *Cihak v. Klekr*, 117 Ill. 643, 7 N. E. 111, 114 (husband cannot testify what was his wife's intention as to reservation or dedication of land); *Maier v. Evansville Bd. of Public Works*, 151 Ind. 197, 51 N. E. 233; *Irwin v. Nolde*, 164 Pa. 205, 30 Atl. 246; *Garves v. Campbell*, 74 Tex. 576, 12 S. W. 238; *Rindskopf v. Myers*, 77 Wis. 649, 46 N. W. 818; *McCosker v. Banks*, 84 Md. 292, 35 Atl. 935; *Odin Coal Co. v. Denman*, 84 Ill. App. 190, affirmed in 185 Ill. 413, 76 Am. St. Rep. 45, 57 N. E. 192.

A witness cannot be asked if he knew of any unfair act done by a trustee to procure a sale to himself. *Red Jacket Tribe v. Gibson*, 70 Cal. 128, 12 Pac. 127.

² *Odin Coal Co. v. Denman*, 84 Ill. App. 190, affirmed in 185 Ill. 413, 76 Am. St. Rep. 45, 57 N. E. 192.

³ *Winsor v. Clark*, 39 Me. 428.

⁴ *Brown v. Massachusetts Title Ins. Co.* 151 Mass. 127, 23 N. E. 733.

⁵ *Covert v. Rogers*, 38 Mich. 363, 31 Am. Rep. 319, and an officer of a corporation may testify to the intent with which its transactions under his official cognizance were done. *Hamilton Buggy Co. v. Iowa Buggy Co.* 88 Iowa, 364, 55 N. W. 496; *Fred Miller Brewing Co. v. De France*, 90 Iowa, 395, 57 N. W. 959 (allowing an agent to so testify), s. p., *National Bank of the Metropolis v. Kennedy*, 17 Wall. 19, 29, 21 L. ed. 554, 557.

So, under an indictment for burning a building "erected for the manufacturing of woolen goods," it appearing that the building was unfinished, the purpose of its erection may be proved by the president. *McGarry v. People*, 2 Lans. 227.

⁶ *Hubbell v. Alden*, 4 Lans. 214.

⁷ *Gunn v. Wynne*, — Tex. Civ. App. —, 43 S. W. 290.

b. Manifested by demeanor.—A witness may testify to his impression that one combatant in a struggle he witnessed was not choking the other, but it was a friendly grasp.¹

¹ Blake v. People, 73 N. Y. 586. See also FEELINGS.

As to the competency of the understanding of a witness as to significance of expressions, gestures, and intonations, see BELIEF; SIGNS AND SIGNALS; and Criminal Trial Brief.

Opinion of witness as to object of transaction with third person, inadmissible. People v. Sharp, 107 N. Y. 427, 14 N. E. 319, reversing 45 Hun, 460.

3. Declarations, *res gestæ*.

For the conflict of authority as to whether one person's declarations of intent are competent against another person, merely because part of the *res gestæ* of an act of the former in the absence of the latter, see ¹—

¹ Criminal Trial Brief; 21 Alb. L. J. 484, 504; 22 Alb. L. J. 4; Nowell v. New York, 20 Jones & S. 382; Wilcox v. Green, 23 Barb. 639, 643. note; Kyd v. Cook, 56 Neb. 71, 76 N. W. 524; Lehmann v. Chapel, 70 Minn. 496, 73 N. W. 402; Vyn v. Keppel, 108 Mich. 244, 65 N. W. 966; McLemore v. Powell, 32 S. C. 582, 10 S. E. 550, 827; Klein v. Hoffheimer, 132 U. S. 367, 33 L. ed. 373, 10 Sup. Ct. Rep. 130; Unangst v. Goodyear Rubber Co. 141 Pa. 127, 21 Atl. 499; Garrison v. Goodale, 23 Or. 307, 31 Pac. 709; Ross v. Wellman, 102 Cal. 1, 36 Pac. 402; Ferbrache v. Martin, 3 Idaho, 573, 32 Pac. 252; H. B. Claflin Co. v. Rodenberg, 101 Ala. 213, 13 So. 272; O'Hare v. Duck-worth, 4 Wash. 470, 30 Pac. 724; Neuffer v. Moehn, 96 Iowa, 731, 65 N. W. 334; Harton v. Lyons, 97 Tenn. 180, 36 S. W. 851.

4. Intent as to law.

In a contract involving matters in several jurisdictions, if there is no express declaration which law shall control, the fact that the contract will be valid by the law of one jurisdiction and invalid by the law of another, is sufficient evidence of intent that that law shall control, which will sustain the contract.¹

¹ New England Mortg. Secur. Co. v. Vader, 28 Fed. 265. And see Brown v. American Finance Co. 19 Abb. N. C. 305. Compare Liverpool & G. W. Steam Co. v. Phenix Ins. Co. 129 U. S. 397, 448, 32 L. ed. 788, 794, 9 Sup. Ct. Rep. 469, for the general rule.

5. Other acts of same nature.

Other acts of the same nature may be competent to show intent both in civil¹ and in criminal² cases. Other crimes are properly admitted to prove intent even though prosecution and punishment for them are barred by the Statute of Limitations.³

¹ *Mutual L. Ins. Co. v. Armstrong*, 117 U. S. 591, 29 L. ed. 997, 6 Sup. Ct. Rep. 877; *Brown v. Greenfield Life Asso.* 172 Mass. 498, 53 N. E. 129; *Whitmore v. Supreme Lodge*, K. L. H. 100 Mo. 36, 13 S. E. 495; *Smith v. National Ben. Soc.* 123 N. Y. 85, 9 L.R.A. 616, 25 N. E. 197; *Eames v. Kaiser*, 142 U. S. 488, 35 L. ed. 1091, 12 Sup. Ct. Rep. 302; *McCasker v. Enright*, 64 Vt. 488, 24 Atl. 249; *Gardner v. Meeker*, 169 Ill. 40, 48 N. E. 307; *Nelms v. Steiner Bros.* 113 Ala. 562, 22 So. 435; *Piedmont Bank v. Hatcher*, 94 Va. 229, 26 S. E. 505; *Raby v. Frank*, 12 Tex. Civ. App. 125, 34 S. W. 777; *Davis v. Vories*, 141 Mo. 234, 42 S. W. 707.

On a question whether a constable's charges for mileage, fees, etc., were made in good faith, other claims presented by the officer were admissible as bearing on that issue. *McGuire v. Iowa County*, 133 Iowa, 636, 111 N. W. 34.

So, on an issue as to the fraudulent representations of a life insurance agent in procuring an application for a policy and a premium note, evidence was admitted to show other similar transactions by the same agent in the vicinity. *Hartford L. Ins. Co. v. Hope*, 40 Ind. App. 354, 81 N. E. 595, 1088.

The test of competency is whether they show the existence of the same motive actuating connected conduct, in which case they are competent, or only the same disposition manifesting itself under other circumstances, in which case they are not competent, to show intent, although sometimes may be to negative accident, or to show character or habit. See ACCIDENT; CHARACTER; HABIT.

But the inference to be drawn is not a legal one; the evidence simply raises a presumption of fact which may be rebutted by other evidence. *Spaulding v. Keyes*, 125 N. Y. 113, 26 N. E. 15.

For cases admitting evidence of other assaults at about the time of the one for which damages are sought see note in 44 L.R.A.(N.S.) 1173.

² *Com. v. Coyne*, 228 Mass. 269, 3 A.L.R. 1209, 117 N. E. 337, admitting evidence of possession of jewelry similar to that stolen; *People v. Katz*, 209 N. Y. 311, 103 N. E. 305, Ann. Cas. 1915A, 501; *People v. Jennings*, 252 Ill. 534, 43 L.R.A.(N.S.) 1206, 96 N. E. 1077; *Carpenter v. State*, — Ind. —, 131 N. E. 375.

For elaborate note in question of other crimes to show intent in a criminal case, see 62 L.R.A. 193; see also notes in 26 Harvard L. Rev. 656, 31 Harvard L. Rev. 656, and 18 Columbia L. Rev. 175.

For evidence of other similar crimes in trials for embezzlement, see **topic EMBEZZLEMENT** herein.

For presumption that criminal intent continues, see **CRIMINAL TRIAL BRIEF**.

³ *State v. Williams*, — Vt. —, 111 Atl. 701; *Rex v. Shellaker*, [1914] 1 K. B. 414, 83 L. J. K. B. N. S. 413, 110 L. T. N. S. 351, 78 J. P. 159, 30 Times L. R. 194. See also note in 34 Harvard L. Rev. 787.

6. Concurrence of intent.

Where the concurrence in intent of two parties is material to be proved, evidence of the intent of one alone cannot avail, but this will not necessarily render it improper to prove the intent of each.¹

¹ *Hale v. Taylor*, 45 N. H. 405; *Yerkes v. Salomon*, 11 Hun, 471.

The intent of the one is not presumed from the testimony of the other. *Bangs v. Hornick*, 30 Fed. 97.

7. Constructive intent.

The law may in some cases impute to parties to a contract an intent which it is clear never in fact existed.¹

¹ *Dillenbeck v. Dygert*, 97 N. Y. 303, 312 (holding, in support of an assignment, that it transferred a different claim than the one the parties had in mind). *s. p.*, *Lowman v. Lowman*, 118 Ill. 582, 9 N. E. 245.

8. Presumptions and burden of proof.

a. Intention as to consequences of act.—Persons of sound mind and discretion must, in general, be understood to intend, in the ordinary transactions of life, that which is the necessary and unavoidable consequence of their acts.¹ But this presumption may be rebutted.²

¹ *Van Pelt v. McGraw*, 4 N. Y. 110; *First Nat. Bank v. Jones*, 21 Wall. 325, 22 L. ed. 542; *Wilson v. City Bank*, 17 Wall. 473, 21 L. ed. 723; *United States v. Boyd*, 45 Fed. 851; *State v. Levelle*, 34 S. C. 120, 13 S. E. 319; *Allison v. Chandler*, 11 Mich. 542; *State Sav. Bank v. Buck*, 123 Mo. 141, 27 S. W. 341; *Atlanta & W. Butter & Cheese Asso. v. Smith*, 141 Wis. 377, 32 L.R.A.(N.S.) 137, 135 Am. St. Rep. 42, 123 N. W. 106.

There is no presumption of law in criminal cases that a person intended the ordinary consequences of his acts. Such presumption is, in such cases, merely a rule to assist the jury in reaching a conclusion upon

a question of fact. *People v. Flack*, 125 N. Y. 324, 11 L.R.A. 807, 26 N. E. 267.

² *Filkins v. People*, 69 N. Y. 101, 25 Am. Rep. 143, reversing *People v. Filkins*, Sheldon, 504.

So, the presumption that a contract not to be performed in the place in which it was entered into was intended to be governed by the law of the place where the contract was made is not conclusive, and may be rebutted by evidence that the parties intended otherwise. *Commercial Bank v. Auze*, 74 Miss. 609, 21 So. 754.

b. Intent of testator.—A testator is presumed to have destroyed a will *animo revocandi*, where it is shown to have been made and left in his custody, and after his death it cannot be found;¹ but this presumption may be overcome by evidence, circumstantial or otherwise, to the contrary.² And the presumption that a testator who destroyed one copy of a will executed in duplicate did so with the intention of revoking the will is an inference of fact, and not a conclusion of law.³ When a will produced from the testator's custody is mutilated and the signature destroyed, the burden is on proponents to account for the mutilation, and not on the caveators to show that the mutilation was purposely done.⁴ The use of a pencil in writing or making alterations in a will otherwise duly executed raises no presumption that the testator was only deliberating, and that the will is not final; the use of such instrument is as indicative of a final and conclusive intent on the part of the testator as any other.⁵

¹ *Williams v. Miles*, 68 Neb. 463, 62 L.R.A. 383, 110 Am. St. Rep. 431, 94 N. W. 705, 96 N. W. 151, 4 Ann. Cas. 306; *Cheever v. North*, 106 Mich. 390, 37 L.R.A. 561, 58 Am. St. Rep. 499, 64 N. W. 455.

² *Williams v. Miles*, 68 Neb. 463, 62 L.R.A. 383, 110 Am. St. Rep. 431, 94 N. W. 705, 96 N. W. 151, 4 Ann. Cas. 306.

³ *Managle v. Parker*, 75 N. H. 139, 24 L.R.A. (N.S.) 180, 71 Atl. 647, Ann. Cas. 1912A, 269.

⁴ *Cutler v. Cutler*, 130 N. C. 1, 57 L.R.A. 209, 89 Am. St. Rep. 854, 40 S. E. 689.

⁵ *La Rue v. Lee*, 63 W. Va. 388, 14 L.R.A. (N.S.) 968, 129 Am. St. Rep. 978, 60 S. E. 388.

c. To evade law.—An intent to evade the laws of a state in which a divorce was granted, making remarriage of the di-

forced person unlawful, will not be assumed from the mere fact of his contracting marriage in another state immediately before returning to that where the divorce was granted.¹ And a presumption of an intent to make a gaming contract under the guise of a sale of stock for future delivery does not arise from the mere fact that the seller did not at the time own the stock.² But the intention to evade the local exemptions laws is necessarily presumed where a creditor resorts to the courts of another state to collect a debt from a debtor residing in the same city with himself, by attachment of his wages, where the employer also has an office and is doing business in the same city, and the local courts are open and accessible.³

In case of failure to stamp an instrument required by statute to be stamped, the weight of authority places the burden of proving an intent to evade the statute upon the party objecting to the admissibility of the instrument in evidence or questioning its validity,⁴ though in a few cases it has been expressly held that the burden is upon the party offering an unstamped instrument in evidence or asserting its validity, to negative an intent to evade the statute.⁵

¹ *Newman v. Kimbrough*, — Tenn. —, 52 L.R.A. 668, 59 S. W. 1061.

² *Clews v. Jamieson*, 182 U. S. 461, 45 L. ed. 1183, 21 Sup. Ct. Rep. 845.

³ *Wierse v. Thomas*, 145 N. C. 261, 15 L.R.A. (N.S.) 1008, 122 Am. St. Rep. 446, 59 S. E. 58.

⁴ *Perryman v. Greenville*, 51 Ala. 507; *Mitchell v. Home Ins. Co.* 32 Iowa, 421; *Trowbridge v. Addoms*, 23 Colo. 518, 48 Pac. 535; *Hallock v. Jaudin*, 34 Cal. 167; *Sawyer v. Parker*, 57 Me. 39; *Black v. Woodrow*, 39 Md. 194; *Morris v. McMorris*, 44 Miss. 441, 7 Am. Rep. 695; *New Haven & N. Co. v. Quintard*, 37 How. Pr. 29; *Cagger v. Lansing*, 57 Barb. 421; *Smith v. Scott*, 31 Wis. 437; *Cassidy v. St. Germain*, 22 R. I. 53, 46 Atl. 35; *McGovern v. Hoesback*, 53 Pa. 176; *Grant v. Connecticut Mut. L. Ins. Co.* 29 Wis. 125.

⁵ *Howe v. Carpenter*, 53 Barb. 382; *Beebe v. Hutton*, 47 Barb. 187; *Davy v. Morgan*, 56 Barb. 218; *Baird v. Pridmore*, 31 How. Pr. 359.

d. To create monopoly.—The unification of power and control over the oil industry, which results from combining in the hands of a holding company the capital stock of the various corporations trading in petroleum and its products, raises a presumption of an intent to exclude others from the trade, and

thus centralize in the combination a perpetual control of the movement of these commodities in the channels of interstate and foreign commerce, in violation of the prohibitions of the act of July 2, 1890, §§ 1, 2, against combinations in restraint of interstate or foreign trade or commerce, or monopolization or attempt to monopolize any part of such trade or commerce.¹

¹Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A. (N.S.) 834, 31 Sup. Ct. Rep. 502.

9. Parol or extrinsic evidence to show.

a. As to writings generally.—Where an instrument is unambiguous, parol evidence is not admissible to show that the secret intent of the parties was other than that expressed in the instrument.¹ But where an instrument is ambiguous and capable of more than one interpretation, the true intent of the parties may be shown by parol.² So, the rule that oral evidence is inadmissible to vary the terms of written instruments is generally applied only in suits between parties to the instrument.³

¹Tyler v. Waddingham, 58 Conn. 375, 8 L.R.A. 657, 20 Atl. 395; Home Ins. Co. v. Harrington, 95 Ga. 759, 22 S. E. 666; Swain v. Grangers' Union, 69 Cal. 186, 10 Pac. 404; Hawley v. Kafitz, 148 Cal. 393, 3 L.R.A. (N.S.) 741, 113 Am. St. Rep. 282, 83 Pac. 248; Duggan v. Uppendahl, 197 Ill. 179, 64 N. E. 289; Morris v. Robinson, 80 Ala. 291; American Surety Co. v. Thurber, 121 N. Y. 655, 23 N. E. 1129; Baker v. Baird, 79 Mich. 255, 44 N. W. 604; Phenix Ins. Co. v. Wilcox & G. Guano Co. 13 C. C. A. 88, 25 U. S. App. 201, 65 Fed. 724; Cream City Glass Co. v. Friedlander, 84 Wis. 53, 21 L.R.A. 135, 36 Am. St. Rep. 895, 54 N. W. 28; Conrad v. Fisher, 37 Mo. App. 352, 8 L.R.A. 147; Hill v. Hill, 74 N. H. 288, 12 L.R.A. (N.S.) 848, 124 Am. St. Rep. 966, 67 Atl. 406; State Security Bank v. Hoskins, 130 Iowa, 339, 8 L.R.A. (N.S.) 376, 106 N. W. 764.

The purchaser in a contract for the sale of machinery which shall be satisfactory to him cannot be shown by parol to have believed that the seller understood by its terms that the machinery would be satisfactory if it did certain work, even under a statute providing that, when the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail, against either party, in which he had reason to suppose the other understood it. Inman Mfg Co. v. American Cereal Co. 133 Iowa, 71, 110 N. W. 287, 12 Ann. Cas. 387. With this case, in 8 L.R.A. (N.S.) 1140, is a note reviewing the authorities on rule that when terms of agreement have been intended in a different sense, that sense is to prevail, against either

party, in which he had reason to suppose the other party understood it.

A deed delivered to the grantee with the intention on the part of the grantor that it shall be subject to a future condition, but with no express provision for recall by the grantor, and requiring for its validity no additional act on the part of the grantor or any third person, cannot be defeated by parol proof of such condition. *Wipfler v. Wipfler*, 153 Mich. 18, 16 L.R.A.(N.S.) 941, 116 N. W. 544.

Parol evidence is inadmissible to show that the parties to a contract for the sale of a stock of goods, by which the purchaser agreed to assume and pay the "outstanding and open account" held by a certain creditor, intended to include in such account promissory notes held by the creditor. *Kramer v. Gardner*, 104 Minn. 370, 22 L.R.A.(N.S.) 492, 116 N. W. 925.

A policy of fire insurance made payable to a first mortgagee in the standard mortgage clause cannot be altered by extrinsic testimony in a suit at law by the second mortgagee to recover thereon, for the purpose of establishing that the intention of the parties to the contract was to include the second mortgagee as a party to the contract. *Kupferschmidt v. Agricultural Ins. Co.* (N. J. Err. & App.) 80 N. J. L. 441, 34 L.R.A.(N.S.) 503, 78 Atl. 225.

Parol evidence is not admissible to show what obligation the sureties on a contractor's bond intended to assume, under a contract to erect a building for a county and pay all claims for labor performed and materials furnished, and give bond to that effect, the bond being conditioned that, if the contractor shall pay all claims for labor performed and materials furnished, then the obligation shall be void. *United States Gypsum Co. v. Gleason*, 135 Wis. 539, 17 L.R.A.(N.S.) 906, 116 N. W. 238.

² *Hall v. The Barnstable*, 84 Fed. 895; *Foster v. Woods*, 16 Mass. 116; *Bowery Bank v. Hart*, 37 Misc. 412, 75 N. Y. Supp. 781; *Mansfield v. New York C. & H. R. R. Co.* 102 N. Y. 205, 6 N. E. 386; *Walker v. McDonald*, 49 Tex. 458; *Sandford v. Newark & H. R. Co.* 37 N. J. L. 1; *Balfour v. Fresno Canal & Irrig. Co.* 109 Cal. 221, 41 Pac. 876; *Smith Bros. & Co. v. New Orleans & N. E. R. Co.* 106 La. 11, 54 L.R.A. 923, 87 Am. St. Rep. 285, 30 So. 265; *Schuster v. Snawder*, 31 Ky. L. Rep. 254, 101 S. W. 1194; *Lamb v. Morrow*, 140 Iowa, 89, 18 L.R.A. (N.S.) 226, 117 N. W. 1118; *Clayton v. County Ct.* 58 W. Va. 253, 2 L.R.A.(N.S.) 598, 52 S. E. 103; *Pritchard v. Lewis*, 125 Wis. 604, 1 L.R.A.(N.S.) 565, 110 Am. St. Rep. 873, 104 N. W. 989.

It is competent for the sureties upon a school district treasurer's bond which purported to be the bond of one as principal and of others as sureties, to testify that, in signing the bond and leaving it with the school officer, it was not their intention to deliver the bond without the principal's signature. *School Dist. No. 80 v. Lapping*, 100 Minn. 139, 12 L.R.A.(N.S.) 1105, 110 N. W. 849.

³ 1 Greenl. Ev. 16th ed. § 279; *Fitzgerald v. Union Stock Yards Co.* 89 Neb. 393, 33 L.R.A.(N.S.) 983, 131 N. W. 612.

Thus, in case a settlement with one of several joint tort feasons is in writing, oral evidence is competent to show the intention of the parties thereto, in an action against one not a party to the settlement. *Fitzgerald v. Union Stock Yards Co.* supra. The other authorities on the question of right to show by extrinsic evidence that payment of judgment against, or consideration for release of, an alleged joint tort feason, was not a satisfaction of the claim, are gathered in notes in 14 L.R.A.(N.S.) 329, and 33 L.R.A.(N.S.) 983.

So, against tax officers, the parties to a contract which on its face purports to be a sale of real estate may testify that it was intended to be a mere option. *Re Shields Bros.* 134 Iowa. 559, 10 L.R.A.(N.S.) 1061, 111 N. W. 963.

b. Competency to show writing intended as a sham.—Evidence tending to show that a writing was not intended to affect or create legal relation, but was executed as a sham, shades almost imperceptibly into evidence of other character, for example, evidence that a written agreement was delivered upon condition,¹ or with the understanding that the obligor was not to be held liable.² Again a writing may be executed with the understanding that it does not embody the final agreement,³ but is to be rewritten, or is to be delivered up if not satisfactory to one of the parties upon re-reading. It may be sought to show by parol evidence that a writing which purported to be a contract was not so intended, but was intended as a receipt or evidence of an advancement.⁴ The majority of decisions passing upon the point hold that parol evidence is admissible to show that the writing was not intended to create any legal obligation, but was executed as a sham.⁵

¹ *Beach v. Nevins*, 18 L.R.A.(N.S.) 288; *Gandy v. Weckerly*, 18 L.R.A.(N.S.) 434, note.

² *Humphrey v. Timken Carriage Co.* 12 Okla. 413, 75 Pac. 528; *Coffman v. Malone*, 98 Neb. 819, L.R.A.1917B, 258, 154 N. W. 726.

³ *Colonial Park Estates v. Massart*, 112 Md. 648, 77 Atl. 275.

⁴ *Norman v. Norman*, 11 Ind. 288; *Brook v. Latimer*, 44 Kan. 431, 11 L.R.A. 805, 21 Am. St. Rep. 202, 24 Pac. 946; *Atwood v. Gillett*, 2 Dougl. (Mich.) 206; *Davis v. Sterns*, 85 Neb. 121, 122 N. W. 672.

⁵ *Fleming v. Morrison*, 187 Mass. 120, 105 Am. St. Rep. 386, 72 N. E. 499; *Robinson v. Nessel*, 86 Ill. App. 212; *Southern Street R. Advertising Co. v. Metropole Shoe Mfg. Co.* 91 Md. 61, 46 Atl. 513; *Grierson v. Mason*, 60 N. Y. 394. For additional authorities and full discussion see note in L.R.A.1917B, 263.

c. As to wills generally.—Where the language employed in the will is clear and of well-defined force and meaning, extrinsic evidence of what was intended in fact cannot be adduced to qualify, explain, enlarge, or contradict this language, but the will must stand as it was written.¹ In expounding a will the court is to ascertain not what the testator actually intended, but what is the meaning of the words he used.² The very purpose of putting a will in writing is to declare and express the testator's settled intentions in respect to his property, to establish the certain evidence of such intentions, and such evidence must prevail, no matter what he may have said before or after its execution. The will is made the evidence—the sole and the best evidence—of the testator's intentions.³ Where, however, in applying a will to the objects or subjects therein referred to, extrinsic facts appear which produce or develop an ambiguity not apparent upon the face of the will itself, since the ambiguity is disclosed by the introduction of extrinsic facts, the court may inquire into every other material extrinsic fact or circumstance to which the will certainly refers, as well as to the relation occupied by the testator to those facts, to the end that a correct interpretation of the language actually employed by the testator may be arrived at.⁴ In order to determine the object of a testator's bounty, or the subject of disposition, where the description in the will of the person or thing intended is applicable with legal certainty to each of several subjects, extrinsic evidence may be received to enable the court to identify the person or thing intended,⁵ and for this purpose evidence of testator's declarations and of the instructions given for his will is admissible.⁶ So, extrinsic evidence is admissible to identify a legatee described by an erroneous name in a will.⁷ But if the description of the person or thing is wholly inapplicable to the subject intended, or said to be intended, evidence is not admissible to prove whom or what the testator really intended

to describe.⁸ There is some conflict of authority as to the right to introduce extrinsic evidence to show the testator's intent, where he did not own the land he described and devised in his will, yet did own other land almost perfectly answering to the description.⁹ The general rule governing such cases seems to be that, if the will contains a complete, accurate description of a tract of land not owned by the testator, and no language whatever pointing in any wise to an intention to devise another tract which he did own, the devise fails; it cannot be made to apply to a different parcel by extrinsic evidence; but if anywhere in the will there can be discovered words connecting the devise under consideration with the tract of land owned by the testator, the courts will take advantage of such words to make effectual the testator's intended devise.¹⁰

¹ Schouler, Wills, 3d ed. § 568; 1 Greenl. Ev. 16th ed. § 289; Wilkins v. Allen, 18 How. 385, 15 L. ed. 396; Den ex dem. Weatherhead v. Baskerville, 11 How. 328, 13 L. ed. 717; Canfield v. Bostwick, 21 Conn. 550; Brown v. Saltonstall, 3 Met. 426; Jackson ex dem. Van Vechten v. Sill, 11 Johns. 201; Wootton v. Redd, 12 Gratt. 196; Judy v. Gilbert, 77 Ind. 96, 40 Am. Rep. 289; Moran v. Moran, 104 Iowa, 216, 39 L.R.A. 204, 65 Am. St. Rep. 443, 73 N. W. 617; Defreese v. Lake, 109 Mich. 415, 32 L.R.A. 744, 63 Am. St. Rep. 584, 67 N. W. 505; Young v. McKinnie, 5 Fla. 542.

² Doe ex dem. Gwillim v. Gwillim, 5 Barn. & Ad. 122, 110 Eng. Reprint, 787, Parke, J.; Avery v. Chappel, 6 Conn. 270, 16 Am. Dec. 53; Burke v. Lee, 76 Va. 386; Couch v. Eastham, 29 W. Va. 784, 3 S. E. 23; Vandiver v. Vandiver, 115 Ala. 328, 22 So. 154; Tucker v. Seaman's Aid Soc. 7 Met. 188; Kerr v. Bryan, 32 Hun, 51; Bingham's Appeal, 64 Pa. 349; Bingel v. Voltz, 142 Ill. 214, 16 L.R.A. 321, 34 Am. St. Rep. 64, 31 N. E. 13.

³ Patterson v. Wilson, 101 N. C. 594, 8 S. E. 341.

A party seeking to maintain a devise must show it by a will in writing, and it would be wholly inconsistent with this rule, where a testator has failed to make a perfect and explicit disclosure of his scheme of disposition in his will, to permit its deficiencies to be supplied by parol proofs of declarations of the testator, or other similar evidence of actual intention. The inquiry is not what the testator meant to express, but what the words which he has used do express; and to such an inquiry evidence of instructions given by the testator for his will, or of his declarations as to what were his intentions in the disposition which he had made, or as to the disposition which he intended to

make of his property, is obviously inapplicable. *Wootton v. Redd*, 12 Gratt. 196.

- ⁴ *Miller v. Travers*, 8 Bing. 244, 131 Eng. Reprint, 395; *Doe ex dem. Hiscocks v. Hiscocks*, 5 Mees. & W. 363, 151 Eng. Reprint, 154, 9 L. J. Exch. N. S. 27, 2 Eng. Rul. Cas. 718; *Patch v. White*, 117 U. S. 210, 29 L. ed. 860, 6 Sup. Ct. Rep. 617, 710; *Skinner v. Harrison Twp.* 116 Ind. 139, 2 L.R.A. 137, 18 N. E. 529; *Daugherty v. Rogers*, 119 Ind. 254, 3 L.R.A. 847, 20 N. E. 779; *Whitcomb v. Rodman*, 156 Ill. 116, 28 L.R.A. 149, 47 Am. St. Rep. 181, 40 N. E. 553; *General Assembly v. Guthrie*, 86 Va. 125, 6 L.R.A. 321, 10 S. E. 318.

In order to discover the intention of a testator, the court may put itself in the place of the party, and then see how the terms of the will affect the property or subject-matter; and for this purpose, evidence outside the will is admissible to show the nature and extent of his property. *Hawkins v. Young*, 52 N. J. Eq. 508, 28 Atl. 511; *Billingslea v. Moore*, 14 Ga. 370; *Hammond v. Hammond*, 55 Md. 575; *Moreland v. Brady*, 8 Or. 303, 34 Am. Rep. 581; *Perry v. Hunter*, 2 R. I. 80.

- ⁵ *Skinner v. Harrison Twp.* 116 Ind. 139, 2 L.R.A. 137, 18 N. E. 529; *Tilton v. American Bible Soc.* 60 N. H. 377, 49 Am. Rep. 321; *Reynolds v. Whelan*, 16 L. J. Ch. N. S. 434; *Gilmer v. Stone*, 120 U. S. 586, 30 L. ed. 734, 7 Sup. Ct. Rep. 689; *Bodman v. American Tract Soc.* 9 Allen, 447.

- ⁶ *Jones v. Newman*, 1 W. Bl. 60, 96 Eng. Reprint, 32; *Hampshire v. Peirce*, 2 Ves. Sr. 216, 28 Eng. Reprint, 140; *Doe ex dem. Hiscocks v. Hiscocks*, 5 Mees. & W. 363, 151 Eng. Reprint, 154; 9 L. J. Exch. N. S. 27, 2 Eng. Rul. Cas. 718; *Doe ex dem. Gord v. Needs*, 2 Mees. & W. 129, 150 Eng. Reprint, 698, 6 L. J. Exch. N. S. 59, 2 Eng. Rul. Cas. 726.

- ⁷ *Re Paulson*, 127 Wis. 612, 5 L.R.A.(N.S.) 804, 107 N. W. 484, 7 Ann. Cas. 652; *Powell v. Biddle*, 2 Dall, 70, 1 L. ed. 293, 1 Am. Dec. 263.

- ⁸ 1 Greenl. Ev. 16th ed. § 290; *Miller v. Travers*, 8 Bing. 244, 131 Eng. Reprint, 395; *Nichols v. Turney*, 15 Conn. 101; *Griscom v. Evens*, 40 N. J. L. 402, 29 Am. Rep. 251; *Charter v. Otis*, 41 Barb. 525.

- ⁹ *Barber v. Wood*, L. R. 4 Ch. Div. 885, 46 L. J. Ch. N. S. 728, 36 L. T. N. S. 373; *Re Lynch*, 142 Cal. 373, 75 Pac. 1086; *Kurtz v. Hibner*, 55 Ill. 514, 8 Am. Rep. 665; *Bingel v. Volz*, 142 Ill. 214, 16 L.R.A. 321, 34 Am. St. Rep. 64, 31 N. E. 13; *Lomax v. Lomax*, 218 Ill. 629, 6 L.R.A. (N.S.) 942, 75 N. E. 1076; *Whitcomb v. Rodman*, 156 Ill. 116, 28 L.R.A. 149, 47 Am. St. Rep. 181, 40 N. E. 553; *Huffman v. Young*, 170 Ill. 290, 49 N. E. 570; *Judy v. Gilbert*, 77 Ind. 96, 40 Am. Rep. 289; *Sturgis v. Work*, 122 Ind. 134, 17 Am. St. Rep. 349, 22 N. E. 996; *Cleveland v. Spilman*, 25 Ind. 95; *Rook v. Wilson*, 142 Ind. 24, 51 Am. St. Rep. 163, 41 N. E. 311; *McGovern v. McGovern*, 75 Minn. 314, 74 Am. St. Rep. 489, 77 N. W. 970; *Sherwood v. Sherwood*, 45 Wis. 357, 30 Am. Rep. 757; *Rogers v. Rogers*, 78 Ga. 688, 3 S. E. 451; *Riggs v. Myers*, 20 Mo. 239; *Merrick v. Merrick*, 37 Ohio St. 126, 41 Am. Rep.

493; *Eckford v. Eckford*, — Iowa, —, 53 N. W. 345, and 91 Iowa, 54, 26 L.R.A. 370, 58 N. W. 1093; *Stewart v. Stewart*, 96 Iowa, 620, 65 N. W. 976; *Patch v. White*, 117 U. S. 210, 29 L. ed. 860, 6 Sup. Ct. Rep. 617, 710, reversing 1 Mackey, 468; *Govin v. Metz*, 79 Hun, 461, 29 N. Y. Supp. 988; *Peters v. Porter*, 60 How. Pr. 422; *Summers v. Summers*, 5 Ont. Rep. 110; *Hickey v. Stover*, 11 Ont. Rep. 106.

¹⁰ See notes in 6 L.R.A. (N.S.) 942, and L.R.A. 1915E, 1098, reviewing all the authorities on correction of misdescription of land in will.

d. To show intent of testator in respect to disinheriting an afterborn child.—There is considerable difference of opinion upon this question. None of the cases goes to the extent of holding that the testator's declarations will be admitted for the purpose of showing what his intentions were, but some do hold that extrinsic evidence may be admitted for this purpose,¹ while other cases hold to the contrary.²

¹ *Sandon v. Sandon*, 123 Wis. 603, 101 N. W. 1089; *Peters v. Siders*, 126 Mass. 135, 30 Am. Rep. 671; *Re Donges*, 103 Wis. 497, 74 Am. St. Rep. 885, 79 N. W. 786; *Peet v. Peet*, 229 Ill. 341, 13 L.R.A. (N.S.) 780, 82 N. E. 376, 11 Ann. Cas. 492; *Hawhe v. Chicago & W. I. R. Co.* 165 Ill. 561, 46 N. E. 240.

² *Chicago, B. & Q. R. Co. v. Wasserman*, 22 Fed. 872; *Chace v. Chace*, 6 R. I. 407, 78 Am. Dec. 446; *Burns v. Allen*, 93 Tenn. 149, 23 S. W. 111.

e. To show intent that real property should be charged with payment of legacies where will is silent on that point.—The general rule seems to be that the mere fact that a will gives legacies in excess of testator's personalty will not admit evidence that testator intended that the legacies should be a charge upon the real estate.¹

¹ *Fries v. Osborn*, 190 N. Y. 35, 19 L.R.A. (N.S.) 457, 82 N. E. 716; *Heslop v. Gatton*, 71 Ill. 528; *Wentworth v. Read*, 166 Ill. 139, 46 N. E. 777; *McGough v. Hughes*, 18 R. I. 768, 30 Atl. 851; *Okeson's Appeal*, 59 Pa. 99; *Duvall's Estate*, 146 Pa. 176, 23 Atl. 231.

And in *Golder v. Chandler*, 87 Me. 63, 32 Atl. 784, where a will made no mention of life insurance, and no expression of it afforded any evidence that the testator intended to change the direction which the law gives to such insurance money, but it appeared that the personal estate was insufficient to pay the debts and bequests in the will, it was held that parol evidence was not admissible, upon the ground of latent ambiguity in the will, to show an alleged intention on the part of the testator that such life insurance should be considered as part of his personal estate.

Such evidence has, however, been admitted in some cases. *Leigh v. Savidge*, 14 N. J. Eq. 124; *Stuart v. Robinson*, 80 Miss. 290, 92 Am. St. Rep. 603, 31 So. 903; *Theobald v. Fugman*, 64 Ohio St. 473, 60 N. E. 606.

f. May beneficiary be put to his election by extrinsic evidence of testator's intention.—It seems to be settled in this country that, while extrinsic evidence is admissible to show the condition of the subject-matter and the surrounding circumstances, so as to place the court in the position of the testator, his purpose to put the beneficiary to his election must appear from the will itself, and that extrinsic evidence is inadmissible to establish the intention of the testator to dispose of property belonging to the beneficiary.¹ And in both England and the United States, parol evidence is inadmissible to show that a testamentary provision for testator's wife was intended to be in lieu of dower.²

¹ *Fitzhugh v. Hubbard*, 41 Ark. 64; *McDonald v. Shaw*, 92 Ark. 15, 28 L.R.A. (N.S.) 657, 121 S. W. 935; *Waters v. Howard*, 1 Md. Ch. 112; *Sherman v. Lewis*, 44 Minn. 107, 46 N. W. 318; *Casey v. McGowan*, 50 Misc. 426, 100 N. Y. Supp. 538; *Havens v. Sackett*, 15 N. Y. 365; *Re Hayden*, 1 Connoly, 454, 5 N. Y. Supp. 845; *Jones v. Jones*, 8 Gill. 198; *McLaughlin v. Barnum*, 31 Md. 425; *Huston v. Cone*, 24 Ohio St. 11; *Charch v. Charch*, 57 Ohio St. 561, 49 N. E. 408; *McLean v. Miller*, 17 Ohio S. & C. P. Dec. 637; *Cameron v. Parish*, 155 Ind. 329, 57 N. E. 547; *Pennsylvania Ins. Co. v. Stokes*, 2 Brewst. (Pa.) 597; *Pennsylvania Co. v. Stokes*, 61 Pa. 136; *Gray v. Williams*, 130 N. C. 53, 40 S. E. 843; *Young v. McKinnie*, 5 Fla. 543.

While there are some *dicta* and a decision or two to the contrary, it may fairly be said that the English cases also deny that extrinsic evidence may be admitted to show that the testator intended to bequeath property not belonging to him, and thus raise a case of election. *Clementson v. Gandy*, 1 Keen, 309, 48 Eng. Reprint, 325, 5 L. J. Ch. N. S. 260; *Gibson v. Gibson*, 1 Drew. 42, 61 Eng. Reprint, 367, 22 L. J. Ch. N. S. 346; *Dixon v. Samson*, 2 Younge & C. Exch. 566, 160 Eng. Reprint, 521, 1 Jur. 495; *Stratton v. Best*, 1 Ves. Jr. 285, 30 Eng. Reprint, 346, 2 Revised Rep. 106.

² *Tinney v. Tinney*, 3 Atk. 8; *French v. Davies*, 2 Ves. Jr. 580, 30 Eng. Reprint, 786; *Birmingham v. Kirwan*, 2 Sch. & Lef. 452; *Warbutton v. Warbutton*, 2 Smale & G. 163, 65 Eng. Reprint, 349, 23 L. J. Ch. N. S. 467, 18 Jur. 415, 2 Eq. Rep. 414, 2 Week. Rep. 300; *Fairweather v. Archibald*, 15 Grant, Ch. (U. C.) 255; *Cowdrey v. Cowdrey*, 72 N. J. Eq. 951, 12 L.R.A. (N.S.) 1176, 67 Atl. 111; *Hall v. Hall*, 42 S. C. L. (8 Rich.) 407, 64 Am. Dec. 758.

An early Virginia statute authorized the admission of parol evidence to

show that a provision in favor of the wife was intended to be in lieu of dower. *Ambler v. Norton*, 4 Hen. & M. 23. And the same seems to have been true in West Virginia. *Tracey v. Shumate*, 22 W. Va. 474; *Atkinson v. Sutton*, 23 W. Va. 197. For present Va. Stat. see Code of Va. 1919, § 5120, vol. 2, p. 2117.

g. To show intent of maker, as to whether an instrument in the form of a deed was intended to operate as a deed or as a will.—It is a rule everywhere recognized that in construing an instrument in the form of a deed containing a provision postponing its taking effect until after the death of the grantor, the intent of the grantor is controlling as to the interest which he intends to pass—whether a present irrevocable one, in which case the instrument is held to be a deed, or an ambulatory one to take effect after the maker's death, in which case it is held to be a will.¹ Where there is an ambiguity on the face of the instrument, so that from the language used by the grantor it is not clearly apparent what interest he intended should pass, parol evidence is admissible to aid in determining his intentions.² Accordingly proof that the instrument is in the form of a deed³ or is designated on its face to be a deed⁴ is proper but not conclusive evidence of intent. So the manner of execution may be shown as some evidence as to whether the instrument was intended as a deed or as a will.⁵ Likewise, present delivery,⁶ recording,⁷ or acknowledgment,⁸ of the deed, is proper evidence as tending to show the grantor intended it to operate as a deed. Similarly the attestation of the deed, or failure to attest, is evidence of intent.⁹ Where the instrument is not properly executed as a will the court will endeavor to construe it as a deed,¹⁰ and where not properly executed or effective as a deed an effort will be made to construe the instrument as a will,¹¹ always providing the intent of the grantor as deducted from the language used in the instrument is doubtful. Instructions given to the one who drew the instrument are admissible as showing intent.¹²

¹ *Shaull v. Shaull*, 182 Iowa, 770, 11 A.L.R. 15, 166 N. W. 301; *Craft v. Moon*, 201 Ala. 11, 75 So. 302. See also note in 11 A.L.R. 41 and cases there cited.

² *Scay v. Huggins*, 194 Ala. 496, 70 So. 113. An unambiguous deed of bargain and sale cannot be converted into a will by parol evidence tending to show an animus testandi in the maker. *Noble v. Fickes*, 230 Ill. 594, 13 L.R.A. (N.S.) 1203, 82 N. E. 950, 12 Ann. Cas. 282; *Clay*

v. Layton, 134 Mich. 317, 96 N. W. 458; **Dodson v. Dodson**, 142 Mich. 586, 105 N. W. 1110.

³ **Fellbush v. Fellbush**, 216 Pa. 141, 65 Atl. 28; **Shaul v. Shaul**, *supra*.

⁴ **Trumbauer v. Rust**, 36 S. D. 301, 11 A.L.R. 10, 154 N. W. 801; **Price v. Gross**, 148 Ga. 137, 96 S. E. 4.

⁵ **Re Lautenshlager**, 80 Mich. 285, 45 N. W. 147.

⁶ **Collier v. Carter**, 146 Ga. 476, 11 A.L.R. 1; 91 S. E. 551.

⁷ **Pentico v. Hays**, 75 Kan. 76, 9 L.R.A. (N.S.) 224, 88 Pac. 738.

⁸ **Saunders v. Saunders**, 115 Iowa, 275, 88 N. W. 329.

⁹ **Isler v. Griffin**, 134 Ga. 192, 67 S. E. 854.

So an indorsement, properly attested, on a note providing that it could not be sold transferred or collected during lifetime of assignor was held properly admitted to probate as a will. **Morrison v. Bartlett**, 148 Ky. 833, 41 L.R.A. (N.S.) 39, 147 S. W. 761.

¹⁰ **Hunt v. Hunt**, 119 Ky. 39, 68 L.R.A. 180, 82 S. W. 998, 7 Ann. Cas. 788; **Thomas v. Williams**, 105 Minn. 88, 117 N. W. 155; **Jones v. Caird**, 153 Wis. 384, 141 N. W. 228, Ann. Cas. 1914A, 88.

¹¹ **Lauck v. Logan**, 45 W. Va. 251, 31 S. E. 986; **Trumbauer v. Rust**, *supra*.

¹² **Sharp v. Hall**, 86 Ala. 110, 11 Am. St. Rep. 28, 5 So. 497; **Phifer v. Mullis**, 167 N. C. 405, 83 S. E. 582.

See also generally on this subject note in 11 A.L.R. 41, and Article on Testamentary Deeds, by Henry W. Ballantine, 18 Mich. L. Rev. 470.

See also a general note on the admissibility of extrinsic evidence to establish an instrument as a will, in 15 Columbia L. Rev. 258, and note in 41 L.R.A. (N.S.) 39, and L.R.A. 1917C, 1011.

h. To show that instrument on its face a will was not intended as such.—There is very little authority as to the admissibility of extrinsic evidence to show that an instrument, on its face a will, was not intended as such, and the few cases which have considered the question are not in harmony. In several cases it has been held that such evidence is not admissible.¹ while in other cases it has been decided that a will may be shown by extrinsic evidence not to have been written with a testamentary intention.²

¹ **Re Kennedy**, 159 Mich. 548, 28 L.R.A. (N.S.) 417, 134 Am. St. Rep. 743, 124 N. W. 516, 18 Ann. Cas. 892; **Heaston v. Krieg**, 167 Ind. 101, 119 Am. St. Rep. 475, 77 N. E. 805; **Barnewall v. Murrell**, 108 Ala. 366, 18 So. 831; **Shaw v. Shaw**, 1 Dem. 21.

And in **Sewell v. Slingluff**, 57 Md. 537, it was held that parol evidence is not admissible to prove that a paper in form a valid will was in fact intended to be used and probated only in the event of the testatrix dying without issue, and that, in the contingency of her dying leaving

issue, it should be wholly inoperative and her estate should pass as if it had never been executed.

- ² *Lister v. Smith*, 3 Swabey & T. 282, 164 Eng. Reprint, 1282, 33 L. J. Prob. N. S. 29, 10 Jur. N. S. 107, 9 L. T. N. S. 578, 12 Week. Rep. 319; *Nichols v. Nichols*, 2 Phillim. Eccl. Rep. 180, 161 Eng. Reprint, 1113; *Fleming v. Morrison*, 187 Mass. 120, 105 Am. St. Rep. 386, 72 N. E. 499.

i. To show that a will did not express true intent of testator because of undue influence.—Undue influence may always be shown by parol as substituting an external for an internal volition.¹ The question ordinarily arises where the undue influence relates to the terms of the will and the beneficiaries.² Where the undue influence relates merely to the making of a will of some kind the courts hold it is not sufficient to invalidate the will.³

- ¹ *Gavitt v. Moulton*, 119 Wis. 35, 43, 96 N. W. 395; *Yorty v. Webster*, 205 Ill. 630, 68 N. E. 1068.

- ² *Becker v. Becker*, 238 Mass. 362, 130 N. E. 843.

- ³ *Re Loewe*, 180 N. C. 140, 104 S. E. 143; *Struth v. Decker*, 100 Md. 368, 59 Atl. 727; *Re Seagrist*, 1 App. Div. 615, 37 N. Y. Supp. 496, affirmed in 153 N. Y. 682, 48 N. E. 1107.

But see *Contra*, dissenting opinion in *Re Loewe*, *supra*, and note in 21 Columbia L. Rev. 105.

10. Rebutting.

A party to whom a wrongful intent, or one that tends to render him liable in the action, is imputed, has the right to prove the actual intent by way of contradiction, although it be otherwise irrelevant.¹

- ¹ *Tracy v. McManus*, 58 N. Y. 257 (one sought to be charged as a partner by equivocal acts may testify that his motive in doing what he did was to aid two of his relatives, who were members of the firm); *Macy v. St. Paul & D. R. Co.* 35 Minn. 200, 28 N. W. 249 (servant suing employer for injury, after a year's silence, allowed to explain his delay by testifying he was afraid he should lose his place); *Com. v. Wellington*, 146 Mass. 566, 16 N. E. 444 (reversing conviction for keeping liquor with intent to sell, because the court excluded evidence that defendant had a pending application for license, offered to negative criminal intent); *Woodruff v. Hurson*, 32 Barb. 557, 564 (Allen, J. To repel the inference of malice from evidence of threats to injure, it is competent to give evidence of friendly acts and relations); *Persse & B. Paper Works v. Willett*, 1 Robt. 131, 19 Abb. Pr. 416 (holding that the witness may state the particular reasons which induced an act al-

leged to be fraudulent as to creditors, and that he communicated those reasons to his creditors before the act).

For other illustrations, see *Criminal Trial Brief*.

INTEREST.

1. Previous understanding.
2. Parol evidence.
3. Relevancy.
4. Weight, effect, and sufficiency.

For kindred topics, see *ACCOUNTS*; *ACCOUNT STATED*; *DATE*; *USAGE*.

Presumption concerning the law of other states as to interest, see note to *Brown v. Wright*, 21 L.R.A. 467.

1. Previous understanding.

To justify a peculiar manner of computing interest in an account, it is competent to show that the party making the charge fully explained to the other his mode of making interest computations and of charging interest, as an illustration of the manner in which they proposed to conduct the business under the contract, as they were about to make the contract.¹

¹ *Manchester Paper Co. v. Moore*, 104 N. Y. 680, 10 N. E. 861. To entitle to interest on unliquidated account without promise to pay it, show either usage of the trade (*Liotard v. Graves*, 3 Caines, 226), or practice of the particular house, and previous dealings with it by the debtor. *Reab v. McAlister*, 8 Wend. 109, affirming 4 Wend. 483.

2. Parol evidence.

It is not competent to prove that a note which expressly fixes the rate of interest drew interest at a less rate.¹

¹ *Davis v. Stout*, 126 Ind. 12, 25 N. E. 862.

3. Relevancy.

In an action by a depositor to recover interest from a bank, evidence that the plaintiff had deposits in other banks upon which he was allowed interest, of which the defendant had no knowledge, is incompetent.¹

¹ *McLoghlin v. National Mohawk Valley Bank*, 139 N. Y. 514, 34 N. E. 1095.

4. Weight, effect, and sufficiency.

An indorsement on a note that from the date thereof only 6 per cent interest is to be paid does not show that a greater rate had been previously paid.¹

A finding that a debtor agreed to pay 10 per cent interest on the debt is sustained by evidence that he admitted that he owed the debt and interest, and evidence of other persons that the amount originally agreed to be paid on the debt was 10 per cent.²

Credits of interest at various rates on balances in a bank's account with a depositor extending over a certain time do not warrant a finding that there was an agreement to pay interest so long as the depositor might leave his money,—especially when there is positive evidence that the depositor was notified at a certain date that interest would no longer be paid, and that from thenceforth the deposit was left with the understanding that it should not draw interest.³

¹ Wray v. Craig, 18 Ky. L. Rep. 930, 33 S. W. 883.

² Whiteman v. McFarland, 68 Ill. App. 295.

³ McLoghlin v. National Mohawk Valley Bank, 139 N. Y. 514, 34 N. E. 1095.

INTOXICATION.

1. Direct testimony.
2. Customary manner of acting.
3. Intemperate habits.
4. Presumption, and burden of proof.
5. Weight.

See also CHARACTER; HABIT.

Admissibility of evidence of drunkenness in extenuation of crime, see note to Aszman v. State, 8 L.R.A. 33. Voluntary intoxication as defense to homicide is discussed in note in 12 A.L.R. 861.

For intoxication as evidence of negligence, see note to Kingston v. Ft. Wayne & E. R. Co. 40 L.R.A. 143.

1. Direct testimony.

A witness who had adequate opportunity of observation may testify directly whether a person whom he saw was intoxicated, or appeared to be under the influence of liquor.¹

So, where his opportunity for observation has been ample, he may state whether or not a certain person is temperate or intemperate.²

¹ *People v. Eastwood*, 14 N. Y. 562, affirming 3 Park. Crim. Rep. 25 (leading case); *Com. v. Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401 (dictum); *Bradley v. Second Ave. R. Co.* 8 Daly, 289 (action for negligence causing death. Testimony that the "deceased came staggering over to catch the horses by the heads; he seemed to me to be drunk, but I could not say positively that he was,"—held, sufficient to go to the jury).

Drunkenness may be proved by the testimony of ordinary observers. *People ex rel. Flood v. Martin*, 15 Misc. 6, 36 N. Y. Supp. 437; *People ex rel. Kelly v. MacLean*, 37 N. Y. S. R. 628, 13 N. Y. Supp. 677; *McKillop v. Duluth Street R. Co.* 53 Minn. 532, 55 N. W. 739; *State v. Ryan*, 122 La. 1095, 48 So. 537; *State v. Cather*, 121 Iowa, 106, 96 N. W. 722; *Campbell v. Fidelity & C. Co.* 109 Ky. 661, 60 S. W. 492; *Com. v. Eyler*, 217 Pa. 512, 11 L.R.A. (N.S.) 639, 66 Atl. 746, 10 Ann. Cas. 786, and cases in note to report of this last case in 11 L.R.A. (N.S.) 639.

Nonexpert witnesses who are well acquainted with a given person and familiar with her habits as to the use of morphine and its effects upon her are competent to give their opinion as to whether at a given time she was under the influence of morphine. *Burt v. Burt*, 168 Mass. 204, 46 N. E. 622.

Witnesses in a criminal trial where the defense is that the prisoner was so intoxicated as not to be responsible for his acts may not only describe his condition, conduct, or words, but may express an opinion as to whether he was drunk or sober. *People v. Gaynor*, 33 App. Div. 98, 53 N. Y. Supp. 86.

The witnesses may testify as to whether the plaintiff was intoxicated at the time he was injured, as against the objection that it is the expression of an opinion. *Edwards v. Worcester*, 172 Mass. 104, 51 N. E. 447.

Evidence of the appearance of deceased at the time of the injury causing death, in respect to intoxication, and his ability to take care of himself, is competent in an action on an insurance policy, where the issue is whether the injury was caused by intoxication or not. *Cook v. Standard Life & Acci. Ins. Co.* 84 Mich. 12, 47 N. W. 568.

Evidence that from the way plaintiff's intestate, who was killed by a collision at a crossing, walked and got into his wagon, it looked as if he

was intoxicated, is admissible. *Felska v. New York C. & H. R. R. Co.* 152 N. Y. 339, 46 N. E. 613.

² *Taylor v. Security Life & Annuity Co.* 145 N. C. 383, 15 L.R.A. (N.S.) 583, 59 S. E. 139, 13 Ann. Cas. 248; *Gallagher v. People*, 120 Ill. 179, 11 N. E. 335; *Smith v. Smith*, 11 Ky. L. Rep. 859; *Stanley v. State*, 26 Ala. 26.

But in *Batchelder v. Batchelder*, 14 N. H. 380, it was held not to be enough to prove a person to be an habitual drunkard by testifying, in strong general terms, that he was such, the court saying that the witnesses should have given the particular facts and instances of drunkenness, leaving it to the court to judge whether or not they amounted to habitual drunkenness.

So, in *Golding v. Golding*, 6 Mo. App. 602, it was said that testimony of experts and familiar acquaintances as to whether the defendant in a divorce suit was an habitual drunkard was properly excluded.

2. Customary manner of acting.

It is competent to show how a person was accustomed to act when intoxicated on other occasions, for the purpose of giving character to acts relied on as evidence of intoxication.¹

¹ *State v. Huxford*, 47 Iowa, 16; *Upstone v. People*, 109 Ill. 169 (murder, defense, insanity. It was shown on behalf of the accused that he was intoxicated at the time of the homicide. Held, proper to permit the prosecution to introduce evidence of previous intoxication as bearing on the question of intoxication at the time of the killing and of the conduct of the accused while in that state).

3. Intemperate habits.

Evidence of general intemperate habits is not, alone, competent as showing actual intoxication at a particular time,¹ but is competent, and so is an adjudication of habitual drunkenness had under the statute, as showing susceptibility to fraud or undue influence at a particular time.²

¹ *Edwards v. Worcester*, 172 Mass. 104, 51 N. E. 447; *Reens v. Mail & Exp. Pub. Co.* 10 Misc. 122, 30 N. Y. Supp. 913; *Senecal v. Thousand Island S. B. Co.* 79 Hun, 574, 29 N. Y. Supp. 884; *Lane v. Missouri P. R. Co.* 132 Mo. 4, 33 S. W. 645, 1128; *Carter v. Seattle*, 19 Wash. 597, 53 N. W. 1102.

The habits of a motorman as to the use of intoxicants prior to the day of the accident are not admissible on the question of his negligence, but it is competent to show his condition as to the use of intoxicants on

the day of the injury. *Fitzpatrick v. Bloomington City R. Co.* 73 Ill. App. 516.

Evidence as to the intoxicated condition of the defendant a few days before the commission of the alleged crime, leading up to the day of its commission, is competent as bearing upon his condition on that day, where the defense is that he was so intoxicated as not to be responsible for his acts. *People v. Gaynor*, 33 App. Div. 98, 53 N. Y. Supp. 86.

Proof that a person at some time previous had the reputation of being intemperate is not proof of the fact that he had such habit, and does not support an inference that he was intoxicated at the time of the accident. *Cosgrove v. Pitman*, 103 Cal. 268, 37 Pac. 232.

² *Stirling v. Hinckley*, 2 Sadler (Pa.) 176, 4 Atl. 358 (suit to overhaul contract).

How near the time to which the evidence relates must be to the time in issue, depends on the nature of the issue. See *State v. Hubbard*, 60 Iowa, 466, 15 N. W. 287 (holding, in criminal prosecution for selling to intoxicated person, that intoxication six hours after the sale was not enough); and *State v. Pierce*, 65 Iowa, 85, 21 N. W. 195 (holding that intoxication after leaving saloon is competent as tending to show he became intoxicated there); *People v. O'Neil*, 112 N. Y. 355, 19 N. E. 796, 800 (as part of the conduct or demeanor which is competent, the fact that one accused of arson was, at a time subsequent to the fire, and some days previous, drinking a good deal, is competent).

4. Presumption and burden of proof.

The habitual drunkenness of a testator raises no presumption that he was intoxicated when he executed his will;¹ but contestants of the will must show the testator's intoxication at the exact time of the execution of the instrument.²

¹ *Re Sutherland*, 28 Misc. 424, 59 N. Y. Supp. 989.

² *Re Woolsey*, 17 Misc. 547, 41 N. Y. Supp. 263.

5. Weight.

Testimony that the witness never saw a certain person intoxicated cannot overcome the positive testimony of those who swear that they have seen such person intoxicated.¹

But conflicting evidence as to whether or not one who had been known to be under the influence of intoxicating liquor was intemperate in its use does not require the application of

the rule that positive is of greater weight than negative testimony.²

¹ *Ætna L. Ins. v. Ward*, 140 U. S. 76, 35 L. ed. 371, 11 Sup. Ct. Rep. 720; *Ætna L. Ins. Co. v. Davey*, 40 Fed. 911.

² *Taylor v. Security Life & Annuity Co.* 145 N. C. 383, 15 L.R.A.(N.S.) 583, 59 S. E. 139, 13 Ann. Cas. 248.

JUDGE.

1. Testimony of a judge.

- a. In a trial over which he presides.
- b. In other trials.

1. Testimony of a judge.

a. *In a trial over which he presides.*—A judge is not permitted to testify in a trial where he himself is presiding.¹

¹ *Mitchell v. Justices of Croydon*, 30 Times L. R. 526 [1914] W. N. 225, 111 L. T. N. S. 632, 78 J. P. 385; *State v. De Maio*, 69 N. J. L. 590, 55 Atl. 644; *State v. Sefrit*, 82 Wash. 520, 144 Pac. 725; *Reno Mill & Lumber Co. v. Westerfield*, 26 Nev. 332, 67 Pac. 961, 69 Pac. 899. See also notes in 28 Harvard L. Rev. 115 and 17 Columbia L. Rev. 73. But see Wigmore, Ev. § 1909.

b. *In other trials.*—He can however, testify in a case where he is not sitting as to proceedings before him at another trial.¹

¹ *State v. Duffy*, 57 Conn. 525, 18 Atl. 791; *Hale v. Wyatt*, 78 N. H. 214, 98 Atl. 379; *State v. Bringgold*, 40 Wash. 12, 82 Pac. 132, 5 Ann. Cas. 716. See also note in 13 Mich. L. Rev. 422.

JUDGMENT.

A judgment as evidence in a later proceeding.

A judgment is not evidence of a fact recited in it where no question of *res judicata* is involved.¹

¹ *Illinois Steel Co. v. Industrial Commission*, 290 Ill. 594, 125 N. E. 252, where recital in decree of probate court, that plaintiff was wife of decedent was held not properly admitted to prove marriage in proceeding to recover for death under Workmen's Compensation Act.

JUDICIAL NOTICE.

I. BY COURT.

1. In general.
2. Laws.
3. Official and judicial character and acts.
4. Political, historical, and geographical matters.

II. BY JURY.

See also ABBREVIATIONS, § 1; ABILITY, § 1; ACCEPTANCE, § 1; BUSINESS, § 1; CONSTRUCTION, § 1; MAILS, § 1; NAME AND DESIGNATION, § 1; NAVIGABILITY, § 1; NECESSARIES AND NECESSITY, § 1; NEWSPAPERS, § 2; OFFICIAL CHARACTER AND ACTS, § 1; PHOTOGRAPHS, § 1; PREGNANCY, § 1; SEALS, § 2; TELEPHONES, § 1.

I. BY COURT.

1. In general.

The court will take judicial notice that its attorneys are at least twenty-one years old,¹ that a certain date or day of the month falls on Sunday,² that the term "month" in a statute means a calendar month,³ and that it is the common belief that vaccination is a preventive of smallpox.⁴ So judicial notice may be taken of the laws of mathematics,⁵ of legal holidays,⁶ of the ordinary meaning of all words in our own tongue,⁷ of common abbreviations and symbols,⁸ of mortality tables,⁹ of the height of the human body and the measurements of its several parts,¹⁰ of electricity and of its properties and common uses,¹¹ of the nature and sources of artesian wells,¹² of the spirituous, vinous, distilled malt fermented or intoxicating quality of any liquor from its name, including mixed drinks,¹³ of the contents of the Bible, and that the religious world is divided into sects, and of the general doctrines and church language maintained by each sect;¹⁴ but not of the nature and powers of the Holy Roman Catholic Church so far as its civil rights and duties are concerned.¹⁵ So many things in regard to railroad business may be judicially noticed, including the existence of Federal control of the railroads, the date when such control terminated and the existence of the Director General of Railroads and the agents

appointed by the President to represent the Government after the termination of Federal control.¹⁶ Judicial notice may also be taken that brakemen are bound to obey a conductor's orders,¹⁷ that the authority of railroad conductors does not extend to carrying passengers without payment of regular fare;¹⁸ but not that it is within the line of a brakeman's authority to put trespassers off from a freight train.¹⁹ Judicial notice may be taken that a street railway is a common carrier of passengers,²⁰ that trolley lines had not superseded horse cars at a certain date;²¹ but not that a cable car or a horse car is so constructed and operated as to require the same means of protection for operators as is required on electric cars.²² It may be judicially noticed that telegraph messages must be written,²³ that certain places constitute the chief commercial centers of the state, as well as the cotton-producing regions thereof;²⁴ but not that certain specified cotton-oil mills include all such oil mills in the state.²⁵

Judicial notice may be taken of the population of counties, towns, cities, etc.,²⁶ and of the season of the year at which a crop should mature;²⁷ also of the season for planting.²⁸

The court will take judicial notice of the computation of time and the coincidence of days of the week with days of the month.²⁹ But the courts are not bound to take judicial notice of the reasonable time necessary for transportation of express matter from one well-known city to another.³⁰

Judicial notice may be taken of usual stock in trade;³¹ of the custom in cities to construct vaults under sidewalks in front of business blocks;³² of a custom in a state to assess ordinary realty for taxation at a rate not to exceed 75 per cent of the actual value.³³

The court will take judicial notice that most men do business honestly and fairly;³⁴ that men of financial ability are asked to serve as bank directors;³⁵ that money has less purchasing power now than twenty years ago;³⁶ of the existence, duties and purposes of traffic policemen in cities;³⁷ of the nature of department stores;³⁸ of the uses made of safety deposit boxes;³⁹ and of the nature, motive power and fuel of motor trucks.⁴⁰

Judicial notice will be taken of the scientific knowledge con-

cerning the ease with which milk is infected with germ life, and the best method of Pasteurizing it for human food;⁴¹ and of various means employed by the medical profession to preserve an organ taken from a human body.⁴²

¹ Booth v. Kingsland Ave. Bldg. Asso. 18 App. Div. 407, 46 N. Y. Supp. 457.

² Ryer v. Prudential Ins. Co. 85 App. Div. 7, 82 N. Y. Supp. 971; Jordan v. Chicago & A. R. Co. 92 Mo. App. 84.

³ Oehler v. Walsh, 28 Ohio C. C. 446; Simmons v. Hanne, 50 Fla. 267, 39 So. 77, 7 Ann. Cas. 322.

⁴ Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; Re Viemeister, 179 N. Y. 235, 70 L.R.A. 796, 103 Am. St. Rep. 859, 72 N. E. 97, 1 Ann. Cas. 334; Com. v. Pear, 183 Mass. 242, 67 L.R.A. 935, 66 N. E. 719.

⁵ Falls v. United States Sav. Loan & Bldg. Co. 97 Ala. 417, 24 L.R.A. 174, 38 Am. St. Rep. 194, 13 So. 25.

⁶ People v. Ackerman, 80 Mich. 588, 45 N. W. 367; Sasscer v. Farmers' Bank, 4 Md. 409; Ellis v. Reddin, 12 Kan. 306; Rice v. Mead, 22 How. Pr. 445; State v. Minnick, 15 Iowa, 123; Salmon Falls Mfg. Co. v. The Tangier, 3 Ware, 121, Fed. Cas. No. 12,267; Brough v. Parkings, 2 Ld. Raym. 993, 92 Eng. Reprint, 161.

But judicial notice cannot be taken of the fact that on Thanksgiving Day it was the custom to cease work in loading or unloading ships. Richardson v. Goddard, 23 How. 28, 16 L. ed. 412.

⁷ Nix v. Hedden, 149 U. S. 304, 37 L. ed. 745, 13 Sup. Ct. Rep. 881; Toplitz v. Hedden, 146 U. S. 252, 36 L. ed. 961, 13 Sup. Ct. Rep. 70; Sonn v. Magone, 159 U. S. 417, 40 L. ed. 203, 16 Sup. Ct. Rep. 67; Sinnott v. Colombet, 107 Cal. 187, 28 L.R.A. 594, 40 Pac. 329.

⁸ Power v. Bowdle, 3 N. D. 107, 21 L.R.A. 328, 44 Am. St. Rep. 511, 54 N. W. 404; Vogt v. Schienebeck, 122 Wis. 491, 67 L.R.A. 756, 106 Am. St. Rep. 989, 100 N. W. 820, 2 Ann. Cas. 814. See also ABBREVIATIONS. § 1.

But the commercial designation of an article is not a matter of which courts can take judicial notice. Seeberger v. Schlesinger, 152 U. S. 581, 38 L. ed. 560, 14 Sup. Ct. Rep. 729.

⁹ Lincoln v. Power, 151 U. S. 436, 38 L. ed. 224, 14 Sup. Ct. Rep. 387; Alabama Mineral R. Co. v. Jones, 114 Ala. 519, 62 Am. St. Rep. 121, 21 So. 507, 1 Am. Neg. Rep. 551; Nelson v. Branford Lighting & Water Co. 75 Conn. 548, 54 Atl. 303, 13 Am. Neg. Rep. 490; Pittsburgh, C. C. & St. L. R. Co. v. Sudhoff, 173 Ind. 314, 90 N. E. 467; Notto v. Atlantic City R. Co. 75 N. J. L. 826, 17 L.R.A. (N.S.) 1138, 127 Am. St. Rep. 835, 69 Atl. 968; Coley v. Statesville, 121 N. C. 301, 28 S. E. 482; Rober v. Northern P. R. Co. 25 N. D. 394, 142 N. W. 22; Scheffler v.

Minneapolis & St. L. R. Co. 32 Minn. 518, 21 N. W. 711; see also L.R.A. 1918C, 1076.

¹⁰ *Hunter v. New York, O. & W. R. Co.* 116 N. Y. 615, 6 L.R.A. 246, 23 N. E. 9.

¹¹ *Alexander v. Nanticoke Light Co.* 209 Pa. 571, 67 L.R.A. 475, 58 Atl. 1068; *Crawfordsville v. Braden*, 130 Ind. 149, 14 L.R.A. 268, 30 Am. St. Rep. 214, 28 N. E. 849; *State ex rel. Laclede Gaslight Co. v. Murphy*, 130 Mo. 10, 31 L.R.A. 798, 31 S. W. 594, affirmed by the Supreme Court of the United States in 170 U. S. 78, 42 L. ed. 955. 18 Sup. Ct. Rep. 505.

¹² *Huber v. Merkel*, 117 Wis. 355, 62 L.R.A. 589, 98 Am. St. Rep. 933, 94 N. W. 354.

¹³ The courts will take judicial notice that "alcohol" is spirituous and intoxicating: *Cureton v. State*, 135 Ga. 660, 49 L.R.A. (N.S.) 182, 70 S. E. 332; *Sebastian v. State*, 44 Tex. Crim. Rep. 508, 72 S. W. 849; *Winn v. State*, 43 Ark. 151.

The courts will take judicial notice that "whisky" is an intoxicating liquor: *United States v. Ash*, 75 Fed. 651; *Purcell v. State*, 61 Fla. 43, 55 So. 847; *Benton v. State*, 9 Ga. App. 422, 71 S. E. 498; *Eagan v. State*, 53 Ind. 162; *Smith v. State*, 56 Tex. Crim. Rep. 501, 120 S. W. 881; *State v. Wills*, 154 Mo. App. 605, 136 S. W. 25.

The courts will take judicial notice that "brandy" is intoxicating: *Fenton v. State*, 100 Ind. 598; *Intoxicating-Liquor Cases*, 25 Kan. 751, 37 Am. Rep. 284; *State v. Wadsworth*, 30 Conn. 55; *Thomas v. Com.* 90 Va. 92, 17 S. E. 788.

The courts will take judicial notice that "gin" is intoxicating: *Hoagland v. Canfield*, 160 Fed. 146; *Com. v. Peckham*, 2 Gray, 514; *Com. v. White*, 10 Met. 14.

The courts will take judicial notice that "rum" is intoxicating: *State v. Munger*, 15 Vt. 290.

The courts will take judicial notice that the mixed drink known as "cocktail" is intoxicating: *United States v. Ash*, 75 Fed. 651; *Galloway v. State*, 23 Tex. App. 398, 5 S. W. 246; *State v. Pigg*, 78 Kan. 618, 19 L.R.A. (N.S.) 848, 130 Am. St. Rep. 387, 97 Pac. 859.

The courts will take judicial notice that "wine" is an intoxicating liquor: *Wolf v. State*, 59 Ark. 297, 43 Am. St. Rep. 34, 27 S. W. 77; *Caldwell v. State*, 43 Fla. 545, 30 So. 814; *Hall v. State*, 122 Ga. 142, 50 S. E. 59; *Starace v. Rossi*, 69 Vt. 303, 37 Atl. 1109; *State v. Curley*, 33 Iowa, 359; *State v. Giersch*, 98 N. C. 720, 4 S. E. 193.

The courts will take judicial notice that "hard cider" is intoxicating: *State v. McLafferty*, 47 Kan. 140, 27 Pac. 843.

The courts will take judicial notice that "Jamaica ginger" is intoxicating: *Mitchell v. Com.* 106 Ky. 602, 51 S. W. 17. For additional cases see note in 48 L.R.A. (N.S.) 302.

The courts will take judicial notice that "beer" is intoxicating. *Hoagland*

v. Canfield, 160 Fed. 146; State v. Mitchell, 134 Mo. App. 540, 114 S. W. 1113; Killip v. McKay, 13 N. Y. S. R. 5; Cox v. State, 3 Okla. Crim. Rep. 129, 104 Pac. 1074, 105 Pac. 369; State ex rel. Lyon v. City Club, 83 S. C. 509, 65 S. E. 730; State v. Church, 6 S. D. 89, 60 N. W. 143.

The court will take judicial notice that "lager beer" is intoxicating. Cripe v. State, 4 Ga. App. 832, 62 S. E. 567; Chicago v. Everleigh, 162 Ill. App. 456; People v. Adler, 169 Mich. 322, 135 N. W. 289. For additional cases, see note in 48 L.R.A. (N.S.) 309.

The court will take judicial notice of the intoxicating character of a mixed drink. United States v. Ash, 75 Fed. 651; State v. Pigg, 78 Kan. 618, 19 L.R.A. (N.S.) 848, 130 Am. St. Rep. 387, 97 Pac. 859.

¹⁴ State ex rel. Weiss v. District Board, 76 Wis. 177, 7 L.R.A. 330, 20 Am. St. Rep. 41, 44 N. W. 967; Smith v. Pedigo, 145 Ind. 392, 32 L.R.A. 838, 44 N. E. 363. Hitchcock v. Board of Home Missions, 259 Ill. 288, 102 N. E. 741, Ann. Cas. 1915B, 1, holding that the court will take judicial notice of the meaning of the phrases "home missions" and "foreign missions."

¹⁵ Baxter v. McDonnell, 155 N. Y. 83, 40 L.R.A. 670, 49 N. E. 667.

¹⁶ Cleveland C. C. & St. L. R. Co. v. Jenkins, 174 Ill. 398, 62 L.R.A. 922, 66 Am. St. Rep. 296, 51 N. E. 811; Atchison, T. & S. F. R. Co. v. Headland, 18 Colo. 477, 20 L.R.A. 822, 33 Pac. 185; Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa, 312, 12 L.R.A. 436, 3 Inters. Com. Rep. 584, 31 Am. St. Rep. 477, 48 N. W. 98; Louisville & N. R. Co. v. Boland, 96 Ala. 626, 18 L.R.A. 260, 11 So. 667; Condran v. Chicago, M. & St. P. R. Co. 28 L.R.A. 749, 14 C. C. A. 506, 32 U. S. App. 182, 67 Fed. 522 (railroad business generally).

Judicial notice taken of the existence of Federal control of railroads: Houston, E. & W. T. R. Co. v. Tanner, — Tex. Civ. App. —, 227 S. W. 713.

Judicial notice also taken of the termination of Federal control of railroads on March 1, 1920; Crawshaw v. Corbett, 264 Fed. 962.

Of the Director General of Railroads and of the agent appointed to represent the government after the termination of Federal control: Moon v. Hines, 205 Ala. 355, 13 A.L.R. 1020, 87 So. 603.

¹⁷ Mason v. Richmond & D. R. Co. 111 N. C. 482, 18 L.R.A. 845, 32 Am. St. Rep. 814, 16 S. E. 698.

¹⁸ Condran v. Chicago, M. & St. P. R. Co. 28 L.R.A. 749, 14 C. C. A. 506, 32 U. S. App. 182, 67 Fed. 522.

¹⁹ Farber v. Missouri P. R. Co. 116 Mo. 81, 20 L.R.A. 350, 22 S. W. 631.

²⁰ Donovan v. Hartford Street R. Co. 65 Conn. 201, 29 L.R.A. 297, 32 Atl. 350.

²¹ Meyer v. Krauter, 56 N. J. L. 696, 24 L.R.A. 575, 29 Atl. 426.

²² State v. Nelson, 52 Ohio St. 88, 26 L.R.A. 317, 39 N. E. 22.

²³ People ex rel. Cairo Teleph. Co. v. Western U. Teleg. Co. 166 Ill. 15, 36 L.R.A. 637, 46 N. E. 731.

²⁴ *Texas Standard Cotton Oil Co. v. Adoue*, 83 Tex. 650, 15 L.R.A. 298, 29 Am. St. Rep. 690, 19 S. W. 274.

²⁵ *Ibid.*

²⁶ *Farley v. McConnell*, 7 Lans. 428, affirmed without opinion in 52 N. Y. 630; *State ex rel. Atty. Gen. v. Dolan*, 93 Mo. 467, 6 S. W. 366; *Bennett v. Marion*, 106 Iowa, 628, 76 N. W. 844, and cases cited; *Brown v. Lutz*, 36 Neb. 527, 54 N. W. 860; *Mertz v. Brooklyn*, 33 N. Y. S. R. 577, 11 N. Y. Supp. 778; *Denney v. State ex rel. Basler*, 144 Ind. 503, 31 L.R.A. 726, 42 N. E. 929. See also note to *Olive v. State*, 4 L.R.A. 33; *Ferrell v. Ellis*, 129 Iowa, 614, 105 N. W. 993; *Whitley County v. Garty*, 161 Ind. 464, 68 N. E. 1012.

The supreme court of Missouri took judicial notice of the fact that St. Louis was the one city in the state with a population exceeding 300,000. *State v. Anslinger*, 171 Mo. 600, 71 S. W. 1041. See also *State ex rel. Crow v. Page*, 107 Mo. App. 213, 80 S. W. 912; *Schweirman v. Highland Park*, 130 Ky. 537, 113 S. W. 507.

²⁷ *Floyd v. Ricks*, 14 Ark. 286, 58 Am. Dec. 374 (*dictum*); *Haines v. Snedigar*, 110 Cal. 18, 42 Pac. 462; *Plano Mfg. Co. v. Cunningham*, 73 Mo. App. 376; *Payne v. McCormick Harvesting Mach. Co.* 11 Okla. 318, 66 Pac. 287.

Or that on a certain date crops have been planted, have come up, and are growing, but are not matured. *Naftel v. Osborn*, 96 Ala. 623, 12 So. 182.

Contra, where the time varies. *Culverhouse v. Worts*, 32 Mo. App. 419. Or of crops in another county. *Dixon v. Niccolls*, 39 Ill. 372, 89 Am. Dec. 312. And of the time when the pasturing season closes. *Gove v. Downer*, 59 Vt. 139, 7 N. E. 463.

²⁸ *Burwell v. Brodie*, 134 N. C. 540, 47 S. E. 47.

²⁹ *Brown v. Piper*, 91 U. S. 37, 23 L. ed. 200; *Schmidt v. Manchester*, 92 Conn. 551, 103 Atl. 654; *Charleston & W. C. R. Co. v. Cottonseed Oil Co.* 22 Ga. App. 337, 96 S. E. 586; *Stellhorn v. Allen County*, 60 Ind. App. 14, 110 N. E. 89; *Smith v. Mathis*, 174 Mich. 262, 140 N. W. 548; *Singer v. First Criminal Ct.* 79 N. J. L. 386, 75 Atl. 433; *Canafax v. Bank of Commerce*, 76 Okla. 289, 8 A.L.R. 59, 184 Pac. 1014; *Crisp v. Gochnour*, 34 S. D. 364, 148 N. W. 624; *Sentinel Co. v. A. D. Meiselbach Motor Wagon Co.* 144 Wis. 224, 32 L.R.A.(N.S.) 436, 140 Am. St. Rep. 1007, 128 N. W. 861. For additional cases and full discussion see note in 8 A.L.R. 63.

³⁰ *Rice v. Montgomery*, 4 Biss. 75, Fed. Cas. No. 11,753. Compare *Central Vermont R. Co. v. Soper*, 8 C. C. A. 341, 21 U. S. App. 24, 59 Fed. 879 (notice taken that on bills of lading for shipment of grain from Chicago to Boston, with the right to hold at Ogdensburg for orders, the entire transit may not unreasonably consume the whole of thirty days); *St. Clair v. Chicago, B. & Q. R. Co.* 89 Iowa, 304, 45 N. W. 570 (common knowledge that freight ought ordinarily to be transported a distance of 64 miles in less than four days, in support of

charge of negligence, where there is no evidence of the number of necessary transfers of the cars); *United States v. Thornton*, 160 U. S. 654, 40 L. ed. 570, 16 Sup. Ct. Rep. 415 (notice taken that time consumed in going from Mare island, California, to Washington, D. C., and return, would exceed four days). Otherwise of the mails. See **MAILS**.

³¹ *Steinbach v. Lafayette F. Ins. Co.* 54 N. Y. 90. *Contra*, *Whitmarsh v. Charter Oak F. Ins. Co.* 2 Allen, 581.

Not taken of local custom in municipal affairs. *Re Walter*, 75 N. Y. 354. The court will apply a general custom without proof, but a local usage must be proved. *Todd v. Howell*, 47 Ind. App. 665, 95 N. E. 279.

³² *Baffage v. Powers*, 130 N. Y. 281, 14 L.R.A. 398, 29 N. E. 132.

³³ *Railroad & Teleph. Cos. v. Board of Equalizers*, 85 Fed. 302.

³⁴ *Kahan v. Alaska Junk Co.* 111 Wash. 39, 10 A.L.R. 151, 189 Pac. 262.

³⁵ *Chicago Title & T. Co. v. Munday*, 297 Ill. 555, 131 N. E. 103, where the court apparently used the phrase "common knowledge" as the equivalent of "taking judicial notice."

³⁶ *Hurst v. Chicago, B. & Q. R. Co.* 280 Mo. 566, 10 A.L.R. 174, 219 S. W. 566.

Notes in 10 A.L.R. 179, and 3 A.L.R. 610.

³⁷ *Aaronson v. New Haven*, 94 Conn. 690, 12 A.L.R. 328, 110 Atl. 872.

³⁸ Judicial notice will be taken of the fact that in the large cities are department stores in which a customer can buy almost anything from a nut cracker to a threshing machine, from a doll carriage to an automobile. *Boice v. Finance & Guaranty Corp.* 127 Va. 563, 10 A.L.R. 654, 102 S. E. 591.

³⁹ *West Cache Sugar Co. v. Hendrickson*, — Utah, —, 11 A.L.R. 216, 190 Pac. 946.

⁴⁰ Courts will take judicial notice of the fact that motor trucks are operated or propelled by gasoline engines or motors, which by the use of gasoline, produce their own energy or motive power. *Haddad v. Commercial Motor Truck Co.* 146 La. 897, 9 A.L.R. 1380, 84 So. 197.

⁴¹ *Pfeffer v. City of Milwaukee*, — Wis. —, 10 A.L.R. 128, 177 N. W. 850.

⁴² *State v. Pierce*, 87 Vt. 144, 88 Atl. 740.

2. Laws.

All courts take notice of the Constitution of the United States,¹ of acts of Congress,² of treaties of the United States,³ and of all public laws of the state where they are exercising their functions.⁴ And Federal courts ordinarily take judicial notice of all public statutes of the several states, as well as all regulations promulgated by the several Federal and state governmental departments,⁵ but the Supreme Court of the United States, on review of a judgment of a state, cannot take judicial notice of the laws of another state, except where the court below

takes judicial notice of them by the local law.⁶ Most courts will take judicial notice of entries in legislative journals.⁷ And where countries have been acquired by the United States, its courts take judicial notice of the laws which prevailed up to the time of such acquisition.⁸ But judicial notice will not be taken of municipal ordinances,⁹ nor of foreign laws,¹⁰ nor of the laws of a sister state,¹¹ except where so provided by state statute.¹² However, the rule that courts of one state or country will not take judicial cognizance of the laws of another merely means that they will not take notice of the specific law of a foreign jurisdiction on a particular subject, and does not preclude the courts of one jurisdiction from taking judicial notice of the system of law which is the basis of the jurisprudence of another jurisdiction.¹³

¹ *Furman v. Nichol*, 8 Wall. 44, 19 L. ed. 370; *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60.

² *Hall v. Chicago, R. I. & P. R. Co.* 149 Fed. 565; *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134; *Spokane Falls & N. R. Co. v. Ziegler*, 167 U. S. 65, 42 L. ed. 79, 17 Sup. Ct. Rep. 728; *Rowlands v. Chicago & N. W. R. Co.* 149 Wis. 51, 135 N. W. 156, Ann. Cas. 1916E, 714; *McDonald v. Railway Transfer Co.* 121 Minn. 273, 141 N. W. 177; *Lemon v. Louisville & N. R. Co.* 137 Ky. 276, 125 S. W. 701; *Benner v. Atlantic Dredging Co.* 134 N. Y. 156, 17 L.R.A. 220, 30 Am. St. Rep. 649, 31 N. E. 328.

See notes in 47 L.R.A. (N.S.) 75, and L.R.A. 1915C, 78.

So judicial notice is taken by the courts of the inauguration and existence of Federal control of public utilities. *Western U. Teleg. Co. v. Condit* — Tex. Civ. App. —, 223 S. W. 234; *Western U. Teleg. Co. v. Glover*, — Ala. App. —, 86 So. 154; *Dessery v. Western U. Teleg. Co.* 107 Kan. 526, 192 Pac. 728; *Kersten v. Hines*, 283 Mo. 623, 223 S. W. 586; *Wood v. Clyde S. S. Co.* 257 Fed. 879. For additional cases see notes in 10 A.L.R. 976, and 14 A.L.R. 236. See also cases cited § 1, note 16 *supra*.

³ *United States v. Rauscher*, 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234, 6 Am. Crim. Rep. 222; *Ex parte McCabe*, 12 L.R.A. 589, 46 Fed. 363.

And that treaties of the United States with Indian tribes are judicially noticed, see *Gay v. Thomas*, 5 Okla. 1, 46 Pac. 578.

While the courts of the United States take judicial notice of its treaties with other countries, the burden is upon the party asserting a treaty relied upon by him to inform the court, when in fact without knowledge of the subject, of its existence and terms. *Richter v. Reynolds*, 8 C. C. A. 220, 17 U. S. App. 427, 59 Fed. 577.

⁴ *Gardner v. The Collector* (*Gardner v. Barney*), 6 Wall. 499, 18 L. ed. 890; *Mullan v. State*, 114 Cal. 578, 34 L.R.A. 262, 46 Pac. 670; *People use of Peoria County v. Hill*, 163 Ill. 186, 36 L.R.A. 634, 46 N. E. 796; *Conlin v. San Francisco*, 99 Cal. 17, 21 L.R.A. 474, 37 Am. St. Rep. 17, 33 Pac. 753; *King County v. Ferry*, 5 Wash. 536, 19 L.R.A. 500, 34 Am. St. Rep. 880, 32 Pac. 538; *Depue v. Banschbach*, 273 Ill. 574, 113 N. E. 156; *Stanley v. Stanley*, — Ind. —, 131 N. E. 35, taking judicial notice of the time of beginning and ending terms of a lower court, where provided by state statute.

⁵ *Furman v. Nichol*, 8 Wall. 44, 19 L. ed. 370; *Mutual L. Ins. Co. v. Hill*, 49 L.R.A. 127, 38 C. C. A. 159, 97 Fed. 263; *Mutual L. Ins. Co. v. Dingley*, 49 L.R.A. 132, 40 C. C. A. 459, 100 Fed. 408; *Trowbridge v. Spinning*, 23 Wash. 48, 54 L.R.A. 204, 83 Am. St. Rep. 806, 62 Pac. 125; *Owings v. Hull*, 9 Pet. 607, 9 L. ed. 246; *Lamar v. Micou*, 112 U. S. 452, 28 L. ed. 751, 5 Sup. Ct. Rep. 221.

The courts of the United States take judicial notice, not only of the public acts of Congress and of the legislature of the several states, but also of the rules and regulations prescribed by the several departments for the transaction of the public business; of the territorial extent of the jurisdiction exercised by the government whose laws they execute; of the acts of the executive branch of the government in the enforcement of the treaties or public laws of the country; of all matters of general history or public notoriety; and of the official character of the persons appointed by the President or heads of the departments or of the bureaus therein for the performance of duties created by acts of Congress. *United States v. Flournoy Live-Stock & Real Estate Co.* 71 Fed. 576.

And a proclamation by the governor of a state, after personal investigation, declaring the existence of unlawful combinations of men jeopardizing property, terrorizing the people, and setting the laws at naught, made part of the record, may be considered by a Federal court on an application to enjoin a combination of workmen from further unlawful acts against employers. *Cœur d'Alene Consol. & Min. Co. v. Miners' Union*, 19 L.R.A. 382, 51 Fed. 260.

So a Federal court will take judicial notice of the regulations promulgated by the Secretary of War under the Selective Service Act. *United States v. Casey*, 247 Fed. 362. See also note in L.R.A.1918E, 1018.

⁶ Therefore the United States Supreme Court on error to a state court of last resort can notice only laws which that state court might notice. *Hanley v. Donoghue*, 116 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242; *Lloyd v. Matthews*, 155 U. S. 222, 39 L. ed. 128, 15 Sup. Ct. Rep. 70, s. p., *Beaty v. Knowler*, 4 Pet. 152, 7 L. ed. 813; *Covington Drawbridge Co. v. Shepherd*, 20 How. 227, 15 L. ed. 896; *Junction R. Co. v. Bank of Ashland*, 12 Wall. 226, 20 L. ed. 385.

But in a state in which the state courts are required to notice a private or local law, the United States courts must do the same. *Beaty v. Knowler*, 4 Pet. 152, 7 L. ed. 813.

⁷The weight of authority sustains the rule that where an enrolled bill is not considered conclusive, but open to attack, judicial notice will be taken of the existence and contents of the legislative journals pertaining to the passage thereof. *State ex rel. Crenshaw v. Joseph*, 175 Ala. 579, 57 So. 942, Ann. Cas. 1914D, 248; *Jobe v. Urquhart*, 102 Ark. 470, 143 S. W. 121, Ann. Cas. 1914A, 331; *State ex rel. Holt v. Denny*, 118 Ind. 449, 4 L.R.A. 65, 21 N. E. 274; *Stelling v. Kansas City*, 85 Kan. 397, 116 Pac. 511; *Brown v. Broussard*, 43 La. Ann. 962, 9 So. 911; *People ex rel. Hart v. McElroy*, 72 Mich. 453, 2 L.R.A. 609, 40 N. W. 750; *Miesen v. Canfield*, 64 Minn. 514, 67 N. W. 632; *State v. Wray*, 109 Mo. 594, 19 S. W. 86; *State ex rel. Douglas County v. Frank*, 61 Neb. 679, 85 N. W. 956; *Gray v. Taylor*, 15 N. M. 742, 113 Pac. 588; *State ex rel. Herron v. Smith*, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829; *Portland v. Yick*, 44 Or. 439, 102 Am. St. Rep. 633, 75 Pac. 706; *Somers v. State*, 5 S. D. 321, 58 N. W. 804; *State v. Swiggart*, 118 Tenn. 556, 102 S. W. 75; *Ritchie v. Richards*, 14 Utah, 345, 47 Pac. 370; *Dane County v. Reindahl*, 104 Wis. 302, 80 N. W. 438; *State ex rel. Sullivan v. Schnitger*, 16 Wyo. 479, 95 Pac. 698; *Portland Gold Min. Co. v. Duke*, 90 C. C. A. 166, 164 Fed. 180; *South Ottawa v. Perkins*, 94 U. S. 260, 24 L. ed. 154.

But the contrary has been held in a few jurisdictions. *Zang v. Wyant*, 25 Colo. 557, 71 Am. St. Rep. 145, 56 Pac. 565; *Worthy v. Bush*, 262 Ill. 560, 104 N. E. 904; *Erford v. Peoria*, 229 Ill. 546, 82 N. E. 374; *Evans v. Browne*, 30 Ind. 514, 95 Am. Dec. 710; *Burt v. Winona & St. P. R. Co.* 31 Minn. 472, 18 N. W. 285, 289; *Green v. Weller*, 32 Miss. 650; *State v. Wray*, 109 Mo. 594, 19 S. W. 86; *State v. Brown*, 33 S. C. 151, 11 S. E. 641. For additional cases *pro* and *contra* see note in 40 L.R.A. (N. S.) 38.

⁸*United States v. Perot*, 98 U. S. 428, 25 L. ed. 251; *United States v. Turner*, 11 How. 663, 13 L. ed. 857; *Fremont v. United States*, 17 How. 542, 15 L. ed. 241.

The California courts will take judicial notice of the laws of Spain and Mexico in force in California prior to the conquest, in adjudicating upon rights originating thereunder, in the same manner and to the same extent as they will take notice of the common law. *Ohm v. San Francisco*, 92 Cal. 437, 28 Pac. 580.

So, also, will judicial notice of the laws and regulations of Mexico pertaining to grants made prior to the cession of New Mexico be taken in an action to establish a Mexican grant in that territory. *United States v. Chaves*, 159 U. S. 452, 40 L. ed. 215, 16 Sup. Ct. Rep. 57.

And, according to *Crespin v. United States*, 168 U. S. 208, 42 L. ed. 438, 18 Sup. Ct. Rep. 53, judicial notice of the laws of Mexico as they existed at the time of an alleged grant of lands must be taken by the

Supreme Court of the United States in determining the validity of such grant.

- ⁹ *Shanfelter v. Baltimore*, 80 Md. 483, 27 L.R.A. 648, 31 Atl. 439; *St. Louis v. Liessing*, 190 Mo. 464, 1 L.R.A.(N.S.) 918, 109 Am. St. Rep. 774, 89 S. W. 611, 4 Ann. Cas. 112; *People v. Tait*, 261 Ill. 197, 103 N. E. 750.

See also cases cited under topic Ordinances *infra* herein.

- ¹⁰ *Armstrong v. Lear*, 8 Pet. 52, 8 L. ed. 863; *Ennis v. Smith*, 14 How. 400, 14 L. ed. 472; *Church v. Hubbart*, 2 Cranch, 187, 2 L. ed. 249; *Strother v. Lucas*, 6 Pet. 763, 8 L. ed. 573; *Dainese v. Hale*, 91 U. S. 13, 23 L. ed. 190; *Liverpool & G. W. S. B. Co. v. Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469; *Southern Illinois & M. Bridge Co. v. Stone*, 174 Mo. 1, 63 L.R.A. 301, 73 S. W. 453; *Electric Welding Co. v. Prince*, 200 Mass. 386, 128 Am. St. Rep. 434, 86 N. E. 947.

An American court cannot take judicial notice of the law of a foreign nation (*Dainese v. Hale*, 91 U. S. 13, 23 L. ed. 190, reversing judgment on demurrer, for failure to plead such law; *Shannon v. Wolf*, 173 Ill. 253, 50 N. E. 682; see also note to *Olive v. State* [Ala.] 4 L.R.A. 33, 41), unless it has been recognized and promulgated by our own government (*Talbot v. Seeman*, 1 Cranch, 1, 2 L. ed. 15, allowing courts of admiralty to notice public laws on a subject of common concern to all nations, when so promulgated).

- ¹¹ *Chicago & A. R. Co. v. Wiggins Ferry Co.* 119 U. S. 615, 30 L. ed. 519, 7 Sup. Ct. Rep. 398; *Eastern Bldg. & L. Asso. v. Ebaugh*, 185 U. S. 114, 46 L. ed. 830, 22 Sup. Ct. Rep. 566; *Hanley v. Donoghue*, 116 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242; *Conrad v. Fisher*, 37 Mo. App. 352, 8 L.R.A. 147; *Adams Exp. Co. v. Walker*, 119 Ky. 121, 67 L.R.A. 412, 83 S. W. 106; *Smith v. Aultman*, 120 Mo. App. 462, 96 S. W. 1034; *App v. App*, 106 Va. 253, 55 S. E. 672; *Hanna v. Lichtenhein*, 225 N. Y. 579, 122 N. E. 625. See also notes in 19 *Columbia L. Rev.* 246, and in 20 *Columbia L. Rev.* 476.

Some of the courts have held that the courts of one state cannot judicially notice the laws of a sister state. For example, see *St. Louis & S. F. R. Co. v. Weaver*, 35 Kan. 412, 57 Am. Rep. 176, 11 Pac. 408 (refusing to take judicial notice of a peculiar common-law rule prevailing in Arkansas; and saying that the court cannot do so); *Trebilcox v. McAlpine*, 46 Hun, 469; *Witascheck v. Glass*, 46 Mo. App. 209; *Scroggin v. McClelland*, 37 Neb. 644, 22 L.R.A. 110, 56 N. W. 208; *Hancock Nat. Bank v. Ellis*, 166 Mass. 414, 44 N. E. 349; *Jackson v. Jackson*, 80 Md. 176, 30 Atl. 752; *Duke v. Taylor*, 37 Fla. 64, 31 L.R.A. 484, 19 So. 172. Others, that they will not do so. *Schultz v. Howard*, 63 Minn. 196, 65 N. W. 363; *McDaniel v. Pressler*, 3 Wash. 636, 29 Pac. 209; *Bollinger v. Gallagher*, 144 Pa. 205, 22 Atl. 815. Others, that they are not bound so to do. *Osborn v. Blackburn*, 78 Wis. 209, 10 L.R.A. 367, 47 N. W. 175.

But that the courts of Illinois will take notice of the laws of another state, where the validity of a judgment or decree of such state is in question, so far as may be necessary to ascertain the faith and credit to be given to such judgment or decree under the Constitution and laws of the United States, see *Knowlton v. Knowlton*, 51 Ill. App. 71.

See also cases in notes in 67 L.R.A. 33, 34 L.R.A. (N.S.) 261 and 38 L.R.A. (N.S.) 40.

¹² By express statutory provision in West Virginia the court may so do, and in so doing may consult any book purporting to state or explain the same, and consider any testimony, information, or argument offered on the subject. *Wilson v. Phoenix Powder Mfg. Co.* 40 W. Va. 413, 21 S. E. 1035.

See also W. Va. Barnes Anno. Code 1918, chap. 13, § 4; Ark. Kirby's Dig. 1916, § 9751; Miss. Hemmingway's Anno. Code 1917, § 735.

In some states the language of the statute is permissive: Connecticut Gen. Stat. 1918, § 5727; *Eva v. Gough*, 93 Conn. 46, 104 Atl. 238; New Jersey, Comp. Stat. 1910, p. 2229, § 26; *Corryell v. Buffalo Union Furnace Co.* 88 N. J. L. 291, 96 Atl. 55, holding question of a Pennsylvania law to be one for the jury.

See also note in 20 Columbia L. Rev. 476.

¹³ *Copley v. Sanford*, 2 La. Ann. 335, 46 Am. Dec. 548; *Rush v. Landers*, 107 La. 549, 57 L.R.A. 353, 32 So. 95; *Banco De Sonora v. Bankers' Mut. Casualty Co.* — Iowa, —, 95 N. W. 232.

For note on question of judicial cognizance of foreign law, see 67 L.R.A. 33.

3. Official and judicial character and acts.

[A court will not take notice, in deciding one case, of what may appear from its own record in another and distinct case, unless it is brought to the attention of the court by being made a part of the record of the case under consideration,¹ even though the other action is between the same parties.²] There are some exceptions to the general rule, which, however, do not conflict with, but fall outside, the general rule because of their peculiar facts.³ But the court may take judicial notice of a decree in proceedings to punish a violation of the same as contempt;⁴ and for this reason it is not necessary to set out an injunction decree in the complaint, affidavit, or petition to punish for contempt in violating it.⁵ And courts will not take judicial notice of the decisions of courts of another state.⁶

Judicial notice is taken of facts shown by public archives,⁷ and of official proclamations and messages of the Executive.⁸ Courts will take judicial notice of the census taken under the

authority of the state or of the United States.⁹ Similarly judicial notice is taken of reports by railroad companies filed as required by state statute with a state railroad commission.¹⁰ But state courts will not take judicial notice of decisions of the Interstate Commerce Commission.¹¹

- ¹ *Bank of Montreal v. Taylor*, 86 Ill. App. 388; *National Bank v. Bryant*, 13 Bush, 419; *Anderson v. Cecil*, 86 Md. 490, 38 Atl. 1074; *Gibson v. Buckner*, 65 Ark. 84, 44 S. W. 1034; *Hall v. Cole*, 71 Ark. 601, 76 S. W. 1076; *Enix v. Miller*, 54 Iowa, 551, 6 N. W. 722; *Bond v. White*, 24 Kan. 45; *Stanley v. McElrath*, 86 Cal. 449, 10 L.R.A. 545, 25 Pac. 16; *Lake Merced Water Co. v. Cowles*, 31 Cal. 215; *Ralphs v. Hensler*, 97 Cal. 296, 32 Pac. 243; *Banks v. Burnam*, 61 Mo. 76; *Grace v. Ballou*, 4 S. D. 333, 56 N. W. 1075; *Ollschlager's Estate*, 50 Or. 55, 89 Pac. 1049; *Lownsdale v. Grays Harbor Boom Co.* 54 Wash. 542, 103 Pac. 833; *Wellman v. Hoge*, 66 W. Va. 234, 66 S. E. 357; *Pickens v. Coal River Boom Co.* 66 W. Va. 10, 24 L.R.A. (N.S.) 354, 65 S. E. 865; *Matthews v. Matthews*, 112 Md. 582, 29 L.R.A. (N.S.) 905, 77 Atl. 249.
- ² *Watkins v. Martin*, 69 Ark. 311, 65 S. W. 103, 425; *Murphy v. Citizens' Bank*, 82 Ark. 131, 11 L.R.A. (N.S.) 616, 100 S. W. 894, 12 Ann. Cas. 535; *Streeter v. Streeter*, 43 Ill. 155; *McCormick v. Herndon*, 67 Wis. 648, 31 N. W. 303; *Spurlock v. Missouri P. R. Co.* 76 Mo. 67.
- ³ See *Minor v. Stone*, 1 La. Ann. 283; *Farrar v. Bates*, 55 Tex. 193; *Baze v. Island City Mfg. Co.* — Tex. Civ. App. —, 94 S. W. 460; *Gay v. Gay*, 146 Cal. 237, 79 Pac. 885; *Butler v. Eaton*, 141 U. S. 240, 35 L. ed. 713, 11 Sup. Ct. Rep. 985; *Avocato v. Dell'Ara*, — Tex. Civ. App. —, 84 S. W. 444; *Louisville Trust Co. v. Cincinnati*, 22 C. C. A. 334, 47 U. S. App. 36, 76 Fed. 296; *Story v. Ulman*, 88 Md. 244, 41 Atl. 120; *Re Transfer Penalty Cases*, 46 Misc. 579, 92 N. Y. Supp. 322; *Chittenden v. Whitbeck*, 50 Mich. 401, 15 N. W. 526.
- ⁴ *Wilson v. Calculagraph Co.* 83 C. C. A. 77, 153 Fed. 961; *Hake v. People*, 230 Ill. 174, 82 N. E. 561; *Bunting v. Powers*, 144 Iowa, 65, 120 N. W. 679; *Ochampaugh v. Powers*, — Iowa, —, 120 N. W. 680; *Haaren v. Mould*, 144 Iowa, 296, 24 L.R.A. (N.S.) 404, 122 N. W. 921; *Ex parte Ah Men*, 77 Cal. 198, 11 Am. St. Rep. 263, 19 Pac. 380.
- ⁵ *Silvers v. Traverse*, 82 Iowa, 52, 11 L.R.A. 804, 47 N. W. 888; *Sweeny v. Traverse*, 82 Iowa, 720, 47 N. W. 889; *State v. Walker*, 78 Kan. 680, 97 Pac. 862.
- ⁶ *Southern Exp. Co. v. Owens*, 146 Ala. 412, 8 L.R.A. (N.S.) 369, 119 Am. St. Rep. 41, 41 So. 752, 9 Ann. Cas. 1143.
- ⁷ *Underhill v. Hernandez*, 168 U. S. 250, 42 L. ed. 456, 18 Sup. Ct. Rep. 83; *United States v. Teschmaker*, 22 How. 392, 16 L. ed. 353; *Romero v. United States*, 1 Wall. 721, 17 L. ed. 627; *Coffee v. Groover*, 123 U. S. 1, 31 L. ed. 51, 8 Sup. Ct. Rep. 1.

- ⁸ *Wells v. Missouri P. R. Co.* 110 Mo. 286, 15 L.R.A. 847, 19 S. W. 530; *Coeur d'Alene Consol. Min. Co. v. Miners' Union*, 19 L.R.A. 382, 51 Fed. 260; *The Three Friends*, 166 U. S. 1, 41 L. ed. 897, 17 Sup. Ct. Rep. 495; *Jenkins v. Collard*, 145 U. S. 546, 36 L. ed. 812, 12 Sup. Ct. Rep. 868; *Armstrong v. United States*, 13 Wall. 154, 20 L. ed. 614; *Peacock v. Detroit, G. H. & M. R. Co.* 208 Mich. 403, 8 A.L.R. 964, 175 N. W. 580; *Spring v. American Teleg. & Teleph. Co.* 86 W. Va. 192, 10 A.L.R. 951, 103 S. E. 206.
- ⁹ *State ex rel Atty. Gen. v. Cunningham*, 81 Wis. 440, 15 L.R.A. 561, 51 N. W. 724; *Parker v. State*, 133 Ind. 178, 18 L.R.A. 567, 32 N. E. 836, 33 N. E. 119; *Denney v. State*, 144 Ind. 503, 31 L.R.A. 726, 42 N. E. 929; *State ex rel. Crow v. Evans*, 166 Mo. 347, 66 S. W. 355. Such judicial notice of the census will include the population of cities and counties as shown therein (*People ex rel. Holmquist v. Illinois C. R. Co.* 237 Ill. 324, 86 N. E. 724) but not school districts which are not itemized in such census (*People ex rel. Dixon v. Board of Education*, 265 Ill. 618, 107 N. E. 131).
- ¹⁰ *Chicago & N. W. R. Co. v. Railroad Commission*, 156 Wis. 47, 145 N. W. 216, 974. See also note in 27 Harvard L. Rev. 683.
- ¹¹ *Robinson v. Baltimore & O. R. Co.* 222 U. S. 506, 56 L. ed. 288, 32 Sup. Ct. Rep. 114; *Great Western Oil Ref. & Pipe Line Co. v. Chicago, M. & St. P. R. Co.* 275 Ill. 56, 113 N. E. 876.

4. Political, historical, and geographical matters.

The courts will take judicial notice of the customs and usages governing the creation and existence of political parties, which are matters of general knowledge and common information.¹ Judicial notice will be taken of the necessary qualification of voters;² of the number of votes cast at a general state election;³ but not, according to the weight of authority, of the result of a local option election;⁴ that primary elections have grown to be an essential part of our political system.⁵ But the rule that the court will take notice of political divisions does not require it to take notice of local divisions made by local officers⁶ as distinguished from those made by the legislature or by public act of some branch of the executive department of the state government.⁷ It may,⁸ but is not bound⁹ to, notice that a certain railroad runs through a given county.

Courts will take judicial notice of matters of general public history,¹⁰ and a place may be judicially noticed by reason of the historical,¹¹ or geographical¹² familiarity of its name. Judicial notice will be taken of the geography of a state;¹³ of the location

of a certain county; ¹⁴ of the size of a town; ¹⁵ of the distance between certain places; ¹⁶ of the existence of a certain river, ¹⁷ and of its source, course, and destination; ¹⁸ that a river is navigable; ¹⁹ and whether the tide ebbs and flows at a given place. ²⁰

¹ State ex rel. Howells v. Metcalf, 18 S. D. 393, 67 L.R.A. 331, 100 N. W. 923.

² Rasmussen v. Baker, 7 Wyo. 117, 38 L.R.A. 773, 50 Pac. 819.

³ Re Denny, 156 Ind. 104, 51 L.R.A. 722, 59 N. E. 359.

⁴ People v. Mueller, 168 Cal. 521, L.R.A.1915B, 788, 143 Pac. 748; note in L.R.A.1915B, 788.

See also note in 13 Mich. L. Rev. 260.

⁵ State v. Hirsch, 125 Ind. 207, 9 L.R.A. 170, 24 N. E. 1062.

⁶ Bragg v. Rush County Comrs. 34 Ind. 405, 410 (refusal to notice that there was no town in the state of a given name, because county commissioners may form and name a town).

Compare Diggins v. Hartshorne, 108 Cal. 154, 41 Pac. 283 (to the effect that notice will not be taken of the existence of a street which has been opened or adopted by municipal ordinance, without proof of the passage of the ordinance).

That courts cannot take notice of township lines, see Mayes v. St. Louis, K. & N. W. R. Co. 71 Mo. App. 140; Backenstoe v. Wabash, St. L. & P. R. Co. 86 Mo. 492.

⁷ As illustrating the rule generally as to judicial notice of political divisions, see United States v. Price, 84 Fed. 636; Scheuer v. Kelly, 121 Ala. 323, 26 So. 4; St. Louis, I. M. & S. R. Co. v. Petty, 57 Ark. 359, 20 L.R.A. 434, 21 S. W. 884; People v. Etting, 99 Cal. 577, 34 Pac. 237; Linck v. Litchfield, 141 Ill. 469, 31 N. E. 123; Carey v. Reeves, 46 Kan. 571, 26 Pac. 951; State v. Simpson, 91 Me. 83, 39 Atl. 287; Baumann v. Granite Sav. Bank & T. Co. 66 Minn. 227, 68 N. W. 1074; State v. Pennington, 124 Mo. 388, 27 S. W. 1106; People v. Wood, 131 N. Y. 617, 30 N. E. 243; State v. Snow, 117 N. C. 774, 23 S. E. 322; Hambel v. Davis, 89 Tex. 256, 34 S. W. 439; State ex rel. Atty. Gen. v. Cunningham, 81 Wis. 440, 15 L.R.A. 561, 51 N. W. 724. See also cases reviewed in note to Olive v. State, 4 L.R.A. 33.

The court takes judicial notice of the removal by the legislature of a county seat from one place to another. King v. Randall, — Nev. —, 13 A.L.R. 730, 190 Pac. 979. So the court takes judicial notice of county boundaries and also of land surveys. Allen v. Gilkison, — Ind. App. —, 132 N. E. 12.

Thus, notice may be taken that the water between two islands in a given bay is within a specified county, under a statute fixing its boundaries so as to include all the islands in the bay, where no subsequent alteration in the county lines has taken place. State v. Thompson, 85 Me. 189, 27 Atl. 97.

So, also, of the situation of the streets, squares, and public grounds of Boston, in determining the construction of a statute as to authorizing an entry upon the Public Garden in building a subway, under Mass. Stat. 1894, chap. 548. *Prince v. Crocker*, 166 Mass. 347, 32 L.R.A. 610, 44 N. E. 446.

And of the location of lands described by government subdivisions, as by township, range, and section, and the legal subdivisions thereof; but not of lands designated simply by name or reference to a private survey. *Campbell v. West*, 86 Cal. 197, 24 Pac. 1000.

In *Boston v. State*, 5 Tex. App. 383, 32 Am. Rep. 575, and *Waters v. State*, 117 Ala. 189, 23 So. 28, convictions were reversed on the ground that the court could not take notice that a given locality between two towns or known points was within a specified county.

So courts will take judicial notice of persons holding office within their several jurisdictions. *Rockford v. Mower*, 259 Ill. 604, 102 N. E. 1032.

⁸ *Indianapolis & C. R. Co. v. Case*, 15 Ind. 42.

⁹ *Indianapolis & C. R. Co. v. Stephens*, 28 Ind. 429 (proof that an accident happened within half a mile of the town held sufficient that it happened within the county), followed in *Louisville, N. A. & C. R. Co. v. McAfee*, 15 Ind. App. 442, 43 N. E. 36.

¹⁰ *Sparrow v. Strong*, 3 Wall. 97, 18 L. ed. 49, 2 Mor. Min. Rep. 320; *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. ed. 274; *Blake v. United States*, 103 U. S. 227, 26 L. ed. 462; *Prize Cases*, 2 Black, 635, 17 L. ed. 459.

¹¹ *Hart v. Bodley*, Hardin (Ky.) 98 (name of a battlefield used in describing premises); *Bond v. Perkins*, 4 Heisk. 364 (place within Confederate lines).

¹² *Cash v. Clark County Auditor*, 7 Ind. 227 (falls of Ohio river). See also cases in note to *Olive v. State*, 4 L.R.A. 38.

¹³ *Parker v. State*, 133 Ind. 178, 18 L.R.A. 567, 32 N. E. 836, 33 N. E. 119.

¹⁴ *St. Louis, I. M. & S. R. Co. v. Petty*, 57 Ark. 359, 20 L.R.A. 434, 21 S. W. 884; *People v. Ebanks*, 117 Cal. 652, 40 L.R.A. 269, 49 Pac. 1049; *State ex rel. Atty. Gen. v. Cunningham*, 81 Wis. 440, 15 L.R.A. 561, 51 N. W. 724.

¹⁵ *Western U. Teleg. Co. v. Robinson*, 97 Tenn. 638, 34 L.R.A. 431, 37 S. W. 545.

¹⁶ *Jamieson v. Indiana Natural Gas & Oil Co.* 128 Ind. 555, 12 L.R.A. 652, 3 Inters. Com. Rep. 613, 28 N. E. 76; *Mutual Ben. L. Ins. Co. v. Robison*, 22 L.R.A. 325, 7 C. C. A. 444, 19 U. S. App. 266, 58 Fed. 723; *People v. Van Gaasbeck*, 189 N. Y. 408, 22 L.R.A. (N.S.) 650, 82 N. E. 718, 12 Ann. Cas. 745.

The court should take judicial notice of distance between public places of which it may take judicial notice, even where the question involves only a matter of private right. *Hoyt v. Russell*, 117 U. S. 401, 29 L. ed. 914, 6 Sup. Ct. Rep. 881 (so held where the object was to ascertain if a new statute had by its terms come into force at that distance); *Hinckly v. Beckwith*, 23 Wis. 328 (distance of residence of

witness from place of trial); *Mutual Ben. L. Ins. Co. v. Robison*, 22 L.R.A. 325, 7 C. C. A. 444, 19 U. S. App. 266, 58 Fed. 723 (distance between Dubuque, Iowa, and Asheville, North Carolina); *Pettit v. State*, 135 Ind. 393, 34 N. E. 1118 (distance between point in Oregon and place of trial); *Blumenthall v. Pacific Meat Co.* 12 Wash. 331, 41 Pac. 47. Compare *Western U. Teleg. Co. v. Smith*, 88 Tex. 9, 28 S. W. 931, 30 S. W. 549 (holding that the distance between the place to which a telegram is addressed and the place to which the addressee was summoned thereby, the means of travel, and the time it would require to make the trip, are not matters of such common knowledge that the jury can determine the issue whether the delay in delivery prevented the sendee from reaching his father before the latter's death, without evidence thereof).

¹⁷ *United States v. Lawton*, 5 How. 10, 12 L. ed. 27; *Watts v. Lindsey*, 7 Wheat. 158, 5 L. ed. 423.

¹⁸ *People v. Truckee Lumber Co.* 116 Cal. 397, 39 L.R.A. 581, 58 Am. St. Rep. 183, 48 Pac. 374.

¹⁹ *Pennsylvania v. Wheeling & B. Bridge Co.* 13 How. 518, 14 L. ed. 249; *Terrell v. Paducah*, 122 Ky. 331, 5 L.R.A.(N.S.) 289, 92 S. W. 310; *The Daniel Ball*, 10 Wall. 557, 19 L. ed. 999; *Brockschmidt v. Sanitary Dist.* 260 Ill. 502, 103 N. E. 243.

²⁰ *Peyroux v. Howard*, 7 Pet. 324, 344, 8 L. ed. 700, 707; *Mobile Dry Docks Co. v. Mobile*, 146 Ala. 198, 3 L.R.A.(N.S.) 822, 40 So. 205, 9 Ann. Cas. 1229.

Tide tables calculated by scientific authors, e. g., *Blunt's Coast Pilot* and *Bowditch's Navigator*, may be read in evidence to prove the situation of the tide at a particular time. (*Mayor's Ct.* 1316), *Green v. Cornwell*, 1 N. Y. City Hall Rec. 11.

The court may take judicial notice of the place in a river where the current is impeded by the tide, and also of the variations between mean high tide and mean low tide at a certain point. *Seufferle v. Macfarland*, 28 App. D. C. 94.

II. BY JURY.

The ancient doctrine was that jurors were to render the verdict as well upon the facts within their personal knowledge as upon those derived from the testimony of the witnesses testifying in the case.¹ And the practice of taking jurors from the vicinage seems to have been adopted under the notion that they might thus be the better qualified from their personal acquaintance with the facts, the parties, and their witnesses, to decide the case that might be brought before them. But at the present day it is thought more likely to secure the due administration of justice, to submit cases to impartial and unbiased jurors, and

that those are less likely to be so who have come from the immediate neighborhood of the parties.² And it is now an essential element in the trial by jury that the verdict shall be rendered according to the facts of the case lawfully produced to the jury, who are sworn to give their verdict according to the evidence, and they cannot render a verdict upon knowledge within their own breasts;³ though jurors can, undoubtedly, and must, use their judgment more or less, and the weight and credit to be given the evidence should be judged of by the jury in the light of their own experience.⁴ Nor are they expected to lay aside matters of common knowledge, or their own observation and experience of the affairs of life, but may give effect to such inferences as common knowledge or their personal observation and experience may reasonably draw from the facts to be proved,⁵ and may apply to the facts proved their general knowledge as intelligent business men.⁶ And the jury may be instructed that in considering the verdict they may bring to its consideration, in determining its weight, such general practical knowledge as they may have upon the subject.⁷

¹ *Sam v. State*, 1 Swan, 61; *Schmidt v. New York Union Mut. F. Ins. Co.* 1 Gray, 529, 535.

² *Schmidt v. New York Union Mut. F. Ins. Co.* *supra*.

³ *Mitchum v. State*, 11 Ga. 615; *Clarke v. Robinson*, 5 B. Mon. 55; *People v. Zeiger*, 6 Park. Crim. Rep. 355; *Gibson v. Carreker*, 91 Ga. 617, 17 S. E. 965; *Schmidt v. New York Union Mut. F. Ins. Co.* 1 Gray. 529; *Wood River Bank v. Dodge*, 36 Neb. 708, 55 N. W. 234; *Kruidenier Bros. v. Shields*, 70 Iowa, 428, 30 N. W. 681; *Close v. Samm*, 27 Iowa, 503; *Green v. Hill*, 4 Tex. 465.

⁴ *Re Foster*, 34 Mich. 21; *People v. Zeiger*, 6 Park. Crim. Rep. 355.

⁵ *Chicago, M. & St. P. R. Co. v. Moore*, 23 L.R.A. (N.S.) 962, 92 C. C. A. 357, 166 Fed. 663; *State v. Maine C. R. Co.* 86 Me. 309, 29 Atl. 1086; *White v. Hammond*, 79 Ga. 182, 4 S. E. 102; *State v. Intoxicating Liquors*, 73 Me. 278; *Kern v. Wilson*, 82 Iowa, 407, 48 N. W. 919; *Swain v. Fourteenth Street R. Co.* 93 Cal. 179, 28 Pac. 829; *O'Neill v. State*, 85 Ga. 383, 11 S. E. 856; *Freiberg v. State*, 94 Ala. 91, 10 So. 703.

⁶ *Kitzinger v. Sanborn*, 70 Ill. 146.

⁷ *Douglass v. Trask*, 77 Me. 35; *Johnson v. Hillstrom*, 37 Minn. 122, 33 N. W. 547.

For a full review of the cases on the question of the right of jurors to act on their own knowledge of the facts in or relevant to the issue, see notes in 31 L.R.A. 489, and 37 L.R.A. (N.S.) 790.

KNOWLEDGE.

1. Direct testimony.
2. Probability of knowledge.
3. Circumstantial evidence.
4. Possession.
5. Presumptions and burden of proof.
 - a. Common fact.
 - b. Knowledge of corporation or its officers.
 - c. Of one dealing with corporation.
 - d. Knowledge of principal.
 - e. Knowledge of servant.
 - f. Knowledge of contents presumed from signing or receiving.
 - g. Knowledge of contents presumed from access or from claim.
 - h. Newspaper contents.
 - i. Knowledge of law.
 - (1.) In general.
 - (2.) Foreign law.
6. General reputation.

See also **ASSENT**; **BELIEF**; **GOOD FAITH**; **INTENT**; **MALICE**; **MOTIVE**.

1. Direct testimony.

Where knowledge is material, a person may testify directly as to whether or not he had knowledge,¹ but not (unless an expert)² as to whether another person had knowledge;³ nor can the witness be asked whether he gave another person to understand that a fact existed.⁴

¹ *Frost v. Rosecrans*, 66 Iowa, 405, 23 N. W. 895 (action to set aside deed in fraud of creditors. Error to exclude question put to alleged purchaser for value); *Turner v. Keller*, 66 N. Y. 66 (on the question of knowledge of want of authority, it is competent to ask whether at the time of the transaction the witness supposed the alleged agent had authority). s. p., *Dutchess County Mut. Ins. Co. v. Hachfield*, 73 N. Y. 226 (witness may testify whether he believed an explanation).

² *Beckwith v. New York C. R. Co.* 64 Barb. 299; *Macer v. Third Ave. R. Co.* 15 Jones & S. 461 (question allowed whether the sufferer was aware that the witness was watching his movements); *Western & A. R. Co. v. Stafford*, 99 Ga. 187, 25 S. E. 656.

³ *Major v. Spies*, 66 Barb. 576 (defendant not allowed to testify in his own behalf that plaintiff, suing for value of services, knew defendant had nothing to do with the work); *Wallis v. Randall*, 81 N. Y. 164.

170 (*dictum*; where knowledge is only incidentally in question it is usual to allow a question as to another person having knowledge, subject to cross-examination as to the witness's means of information); *Bailey v. State*, 107 Ala. 151, 18 So. 234 (prosecution for assault with intent to kill; error to allow witness to testify that defendant knew, at the time of the affray, that the person assaulted had been to obtain a warrant for his arrest); *McCosker v. Banks*, 84 Md. 292, 35 Atl. 935 (to the effect that a partner cannot testify that his copartner was ignorant of a particular fact; but each partner must show his want of knowledge by his own testimony, or that other facts must be shown from which want of knowledge may legitimately be inferred).

⁴ *Blaut v. Gabler*, 77 N. Y. 461 (not error to exclude such question, even when put to an alleged fraudulent assignor, as bearing on the question whether the assignee had notice of intent to defraud creditors).

2. Probability of knowledge.

An expert may be asked whether, if a fact existed, a person under given circumstances would be likely to know it, if the question requires special knowledge or experience, so that the jury could not make inference for themselves.¹ Otherwise not.²

¹ *Perkins v. Augusta Ins. Co.* 10 Gray, 312, 71 Am. Dec. 654 (not error to refuse to allow expert to be asked if master of vessel would know if his mast was sprung, his sails split, etc.); *Odell v. Solomon*, 23 Jones & S. 410 (expert not allowed to testify as to a man being able to tell from exterior appearances that a sash was going to fall down); *Jupitz v. People*, 34 Ill. 516, 521 (indictment for receiving stolen goods. On question of knowledge of value, machinists and brass finishers are competent to state that from common observation, and without close inspection, it could not be told whether certain brass couplings were perfect or imperfect, and useful or only old brass); *Cook v. Castner*, 9 Cush. 266 (whether decay could have been discovered on removal of covering); *Treadwell v. Whittier*, 80 Cal. 574, 5 L.R.A. 498, 22 Pac. 266 (that skilled mechanics who had repaired an elevator, and who cautioned the operator as to the careless mode in which he ran it, may testify to the operator's knowledge that he was running it carelessly).

² *Gilbert v. Guild*, 144 Mass. 601, 12 N. E. 368 (question whether the danger of manipulating a cutting machine would be obvious to one operating it); *Scroggin v. Wood*, 87 Iowa, 497, 54 N. W. 437 (that purchaser of stallion cannot testify that seller must have known of its unsoundness because he could not have owned and handled it without such knowledge).

3. Circumstantial evidence.

The fact of knowledge may be established by circumstantial evidence,¹ even where it is necessary to show actual knowledge;² and for this purpose evidence of previous transactions is competent.³

¹ *Crabb v. State*, 88 Ga. 584, 15 S. E. 455; *Knight v. State*, 88 Ga. 589, 15 S. E. 456; *Lynch v. Richardson*, 163 Mass. 160, 39 N. E. 801; *Van Raalte v. Harrington*, 101 Mo. 602, 11 L.R.A. 424, 14 S. W. 710.

² *Parker v. Conner*, 93 N. Y. 118, 124, 45 Am. Rep. 178 (*dictum*); *Rine v. Chicago & A. R. Co.* 100 Mo. 228, 12 S. W. 640; *Speer v. Burlingame*, 61 Mo. App. 75; *Stainback v. Junk Bros. Lumber & Mfg. Co.* 98 Tenn. 306, 39 S. W. 530.

³ For numerous illustrations, see *Criminal Trial Brief*; *Verona Central Cheese Co. v. Murtaugh*, 50 N. Y. 314, reversing 4 Lans. 17; *Cowley v. People*, 8 Abb. N. C. 1, 2, note, affirmed in 83 N. Y. 464, 38 Am. Rep. 464, with note; *Douglass v. Ireland*, 73 N. Y. 100 (knowledge and guilty action of trustees illegally issuing stock of a company for the purchase of property).

The same class of evidence is admissible in favor of the party to be charged with knowledge. *People v. Dowling*, 84 N. Y. 478 (held, error to refuse to allow the prisoner to prove what was said as to mode of obtaining property by the persons from whom he was alleged to have made the purchase. Also, error, after the prosecution had proved the finding of other goods in the prisoner's house, and had introduced evidence to show that they were received with guilty knowledge, to refuse to allow him to testify that he had purchased those goods, and had asked persons from whom he bought them to go and look at them).

Knowledge of insanity of one contracting party, by the other, can be proved by prior and subsequent conduct tending to show such insanity. *Beavan v. M'Donnell*, 23 L. J. Exch. N. S. 326. Here the evidence admitted was of acts prior to making of contract, and partly prior to any acquaintance between the parties, as well as subsequent acts. Held, proper on ground "that if party was insane either just before or just after the making of the contract, it raises an inference that the defendant must have known it."

Where the object is to prove that a person responsible for the acts of another knew the latter's incapacity, proof of knowledge of prior acts of the latter showing incapacity is admissible. *Baulec v. New York & H. R. Co.* 59 N. Y. 356, 17 Am. Rep. 325 (laying down the rule as above, and holding that it did not cover that case, whereby one prior act of negligence was proved, and no evidence of knowledge of it by defendant was given). Compare *Frazier v. Pennsylvania R. Co.* 38 Pa. 104, 80 Am. Dec. 467.

4. Possession.

Evidence that articles were found in a person's room is sufficient to go to the jury, to sustain an inference that they were there with his knowledge.¹

¹ *Ruloff's Case*, 11 Abb. Pr. N. S. 245, less fully as *Ruloff v. People*, 45 N. Y. 213.

5. Presumptions and burden of proof.

a. Common fact.—Knowledge is presumed of facts generally understood by persons of mature years, and of ordinary intelligence.¹

¹ *Lanigan v. New York Gaslight Co.* 71 N. Y. 29 (explosive quality of illuminating gas).

But passengers are not presumed, as matter of law, to know that the proper places to alight from street cars are at the further crossings of street intersections. *West Chicago Street R. Co. v. Manning*, 170 Ill. 417, 48 N. E. 958.

As to innocent third parties, a person is presumed to have known what he should know or has an opportunity of knowing. *Johnson v. Levy*, 109 La. 1036, 34 So. 68.

b. Knowledge of corporation or its officers.—A corporation is chargeable with knowledge of matters appearing upon its record, notwithstanding changes in the individuals composing the body.¹

Directors and officers are presumed to have known what they ought by proper diligence to have known.²

¹ *Albany City Nat. Bank v. Albany*, 92 N. Y. 363. s. p., *McAlpine v. Union P. R. Co.* 23 Fed. 168 (holding corporate record of a contract notice to consolidated corporation subsequently formed); *Gerner v. Mosher*, 58 Neb. 135, 46 L.R.A. 244, 78 N. W. 384.

That a corporation has knowledge of the fact that intoxicating liquor is sold by a firm of which its secretary and sole business manager is an active member may be inferred by a jury. *Chippewa Lumber Co. v. Tremper*, 75 Mich. 36, 4 L.R.A. 373, 13 Am. St. Rep. 420, 42 N. W. 532.

Officers of an electric railway company are supposed to know the habitual methods of their servants in managing their cars. *Sweetland v. Lynn & B. R. Co.* 177 Mass. 574, 51 L.R.A. 783, 59 N. E. 443.

² *Martin v. Webb*, 110 U. S. 7, 28 L. ed. 49, 3 Sup. Ct. Rep. 428.

Officers of a bank will be presumed to have had knowledge of its insolvent condition at the time of certain payments to them, attacked as unlawful preferences, where the bank had been insolvent for many years, and became hopelessly insolvent the day following the payments. *James Clark Co. v. Colton*, 91 Md. 195, 49 L.R.A. 698, 46 Atl. 386.

c. Of one dealing with corporation.—A person dealing with a corporation is bound to know the purpose for which it exists; and when he deals with its agents or officers to know their powers, and the extent of their authority.¹

¹ *Alexander v. Cauldwell*, 83 N. Y. 480, 485. See also *Abbott Tr. Ev.* (3d ed.) pp. 73 et seq.

As to whether he may be presumed to know its regulations, see 2 *Shearm. & Redf. Neg.* § 549, p. 400.

d. Knowledge of principal.—A person is conclusively presumed to have had notice, actual or constructive, of all the doings of his agent within the actual or apparent scope of the agency.¹ But an agent has the burden of proving his principal's knowledge and acquiescence in a purchase by himself of the subject-matter of his agency.²

¹ *Andrews v. Robertson*, 111 Wis. 334, 54 L.R.A. 673, 87 Am. St. Rep. 870, 87 N. W. 190.

² *Jansen v. Williams*, 36 Neb. 869, 20 L.R.A. 207, 55 N. W. 279.

e. Knowledge of servant.—To establish contributory negligence of a servant, the burden of proof as to his knowledge of latent danger is on the master.¹ And one employed in making enamel, which requires the drawing of the molten enamel from the melting pot into water, is not presumed, as matter of law, to have the scientific knowledge that the use of too small a quantity of water will be likely to result in an explosion.²

¹ *Myhan v. Louisiana Electric Light & P. Co.* 41 La. Ann. 964, 7 L.R.A. 172, 17 Am. St. Rep. 436, 6 So. 799.

² *Adams v. Grand Rapids Refrigerator Co.* 160 Mich. 590, 27 L.R.A. (N.S.) 953, 136 Am. St. Rep. 454, 125 N. W. 724, 19 Ann. Cas. 1152.

f. Knowledge of contents presumed from signing or receiv-

ing—Proof that one signed an instrument is sufficient evidence that he was acquainted with its contents.¹ In the ordinary case of the execution of a will by a testator of sound mind, there is a presumption from the fact of execution in accordance with the legal formalities that testator knew and understood the contents thereof.² So is proof that he accepted an instrument delivered to him as affecting his interests.³

This is a presumption of law which, in the absence of other evidence, concludes the question.

¹ *Harris v. Story*, 2 E. D. Smith, 363 (signature by mark); *Re Cooper*, L. R. 20 Ch. Div. 611, 629 (where a son, who had same initials as his father, had signed a deed mortgaging land belonging to his father, and so described in deed,—held, that he had done so knowingly and with intent to personate his father); *Guardhouse v. Blackburn*, L. R. 1 Prob. & Div. 109 (holding, in case of a will, that the presumption is conclusive if it is also shown that the will has been read over to a competent testator, although the solicitor who drew the will swore that the words had been inserted without instructions and by his inadvertence. Rule is criticized in Taylor, Ev. 1920 ed. 159); *Parsons v. Boyd*, 20 Ala. 112 (attorney charged with notice of a title to real property set out in a plea signed by his firm).

A party who applied for insurance is presumed to have read the application which he signed, and to know the limitations therein expressed. *New York L. Ins. Co. v. Fletcher*, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837.

² *Hill v. Barge*, 12 Ala. 687; *Garrett v. Heflin*, 98 Ala. 615, 39 Am. St. Rep. 89, 13 So. 326; *Davis v. Rogers*, 1 Houst. (Del.) 44; *Lipphard v. Humphrey*, 28 App. D. C. 355; *Hughes v. Meredith*, 24 Ga. 325, 71 Am. Dec. 127; *Compher v. Browning*, 219 Ill. 429, 109 Am. St. Rep. 346, 76 N. E. 678; *Re Dobals*, 176 Iowa, 479, 157 N. W. 169; *McConnell v. Keir*, 76 Kan. 527, 92 Pac. 540; *Richardson v. Richards*, 226 Mass. 240, 115 N. E. 307; *Holbrook v. Seagrave*, 228 Mass. 26, 116 N. E. 889; *Rollwagen v. Rollwagen*, 63 N. Y. 504. See note in L.R.A.1918D, 747, for other cases and a full discussion of the question. The burden of proving testator's knowledge of contents of will executed by blind person is discussed in note 9 A.L.R. 1416.

Such presumption may be rebutted by proving forgery, or that the will was falsely read over to the party signing it. *Doran v. Mullen*, 78 Ill. 342 (affirming judgment admitting will to probate in the absence of such evidence).

And also by suspicious circumstances, such as, in the case of a will, that the instrument was drawn by a party interested in it. *Lake v. Ranney*, 33 Barb. 50, 68. In such a case there must be some affirmative

evidence that the testator "knew the contents of the will, and that it expressed his real intention." *Paine v. Hall*, 18 Ves. Jr. 475, 34 Eng. Reprint, 397.

But the presumption cannot be rebutted by pleading, without alleging fraud, that the instrument was not read by the party signing it, nor by showing that untrue representations as to its legal effect were made. *Linington v. Strong*, 111 Ill. 152 (charge to jury that party not excused to sign without reading, unless induced by wilfully false representations, held proper); *Hazard v. Griswold*, 21 Fed. 178 (demurrer to a plea that the writing on which suit was brought was a bail bond, sustained); *McKinney v. Herrick*, 66 Iowa, 414, 23 N. W. 767 (allegation in answer, that instrument was not read by defendant, held demurrable).

³ Thus, a shipper is presumed to know and assent to the terms of an express company's receipt which is given for goods,—especially where those terms are made prominent and noticeable, and a book of such blank receipts is in his own possession. *Ballou v. Earle*, 17 R. I. 441, 14 L.R.A. 433, 22 Atl. 1113.

And a shipper who, for a number of years, has had possession of shipping receipts, which he filled out himself when he desired to make a shipment, will be charged with knowledge of a provision therein fixing the valuation of packages for purposes of shipment, in the absence of any evidence that he was not acquainted with the contents of the receipts. *Greenwald v. Barrett*, 199 N. Y. 170, 35 L.R.A. (N.S.) 971, 92 N. E. 218.

It will be presumed that a lessee knew of entries made in his passbook by the lessor, indicating what the rent was, where the book was returned to him, and he had possession thereof. *Heipley v. Green*, 7 Ohio Dec. 497.

g. Knowledge of contents presumed from access or from claim.—The mere fact of having an interest in a document and having had access to it, although it generally avails to make the instrument competent against the party without further evidence to bring it home to him,¹ does not alone avail to raise a presumption of his having knowledge at any particular time of matters stated therein.²

But if he had an interest and some authority, in reference to the making of the instrument, or entries therein, and neglected to inform himself when he should have done so, he may be charged with knowledge.³

If his claim in the action depends on the instrument, and the instrument is produced from his possession, there is a legal pre-

ion that he was acquainted with its contents,⁴ which, how-
s not conclusive in the absence of anything to raise an es-

the rules of a club are competent against a member without further
lence of his knowledge of them; for a member of a club is presumed
know its rules. *Raggett v. Musgrave*, 2 Car. & P. 556.

yd's lists were competent against an underwriter who had access
them, for he is presumed to know their contents. *Mackintosh v.*
rschall, 11 Mees. & W. 116, 152 Eng. Reprint, 739, s. p., next section,
e 1.

be presumed, in the absence of proof to the contrary, that an em-
ee had knowledge of the rules and regulations adopted by his em-
er for the government of its employees. *Galveston, H. & S. A. R.*
v. Gormley, 91 Tex. 393, 43 S. W. 877, reversing — *Tex. Civ. App.*
42 S. W. 314; *Helton v. Alabama Midland R. Co.* 97 Ala. 275,
So. 276.

er who is a stockholder of a national bank will be presumed to
e kept a list of the shareholders, and to have known its contents.
n v. *Brown*, 142 U. S. 56, 35 L. ed. 936, 12 Sup. Ct. Rep. 136.
rtner will be presumed to know of a transaction outside the scope
he partnership business, entered on the books of the partnership,
r the lapse of a reasonable time from its entrance therein. *Sparks*
lannery, 104 Ga. 323, 30 S. E. 823.

employee has access to his employer's books, and has been seen
ing over them, raises no presumption that he has seen certain
is charged against him. *Cheney v. Cheney*, 162 Mass. 591, 39 N.
.87.

ems to be the principle underlying *Mackintosh v. Marshall*, 11
s. & W. 116, where it was held error not to charge that the pre-
ption that the underwriter knew the contents of an entry in
d's list before taking a risk was rebutted by evidence that the risk
one he would not have taken had he known the entry.

ie v. *Brisbane* (N. Y.) 11 Rep. 587 (cotenant, who settled by the
unts kept by a common agent to which he had access, precluded
showing his ignorance of facts).

. *Parker*, 29 Hun, 62, and cases cited.

Danby v. Coutts, 33 Week. Rep. 559 (recital in power of attor-
. See also *Smith v. Burgess*, 133 Mass. 511 (where the 'word
stee' in a mortgage, though canceled, was held notice to assignee,
ough there was no corresponding word in the note to which the
gage was collateral).

Newspaper contents.—The fact that one was a subscriber

for, and took, a newspaper, does not charge him with knowledge of information,¹ or advertisements,² contained therein.

But one who sells and delivers a paper containing a libel is presumed to know that it contained the libel, in the absence of proof to the contrary.³

¹ *Milbank v. Dennistoun*, 10 Bosw. 382 (an action against factors for selling below price without waiting for a rise).

In *Abel v. Potts*, 3 Esp. 242, it was held that Lloyd's books coupled with evidence that the person subscribed to Lloyd's and daily examined the books, may go to jury, as evidence of notice to him of a fact there stated.

² *Watkinson v. Bank of Pennsylvania*, 4 Whart. 482, 34 Am. Dec. 521; *Vernon v. Manhattan Co.* 17 Wend. 524, affirmed in 22 Wend. 183.

³ *Street v. Johnson*, 80 Wis. 455, 14 L.R.A. 203, 27 Am. St. Rep. 42, 50 N. W. 395.

i. Knowledge of law.—(1) *In general.*—A person is presumed to know the existence of a state statute.¹ And stockholders of a corporation who are residents of the state in which the company is authorized to do business are presumed to know its laws.² But a quarantine order prohibiting a person from going upon the street is not like a general law, of which he will be presumed to have knowledge.³

The presumption of knowledge of law does not preclude a party from proving that the adverse party deceived him by misrepresenting the law.⁴

¹ *Saxton v. Perry*, 47 Colo. 263, 107 Pac. 281; *Sloniger v. Sloniger*, 161 Ill. 270, 43 N. E. 1111 (extending the rule to knowledge that marriage revokes a will).

² *Keystone Driller Co. v. Superior Ct.* 138 Cal. 738, 72 Pac. 398.

³ *State v. Butts*, 3 S. D. 577, 19 L.R.A. 725, 54 N. W. 603.

⁴ *O'Neil v. Lake Superior Iron Co.* 63 Mich. 690, 35 N. W. 162; *Allen v. Allen*, 95 Cal. 184, 16 L.R.A. 646, 27 Pac. 30.

(2) *Of foreign law.*—The rule that all persons are presumed to know the law does not apply to charge citizens and residents of one state, acting there, with knowledge of the law of another state,¹ except where they claim under an instrument the exist-

ence of which depended on authority given by the law in question.²

¹ *Merchants' Bank v. Spalding*, 9 N. Y. 53, affirming 12 Barb. 302 (contract of bankers, etc., of another state, contravening banking law of this state); *Honegger v. Wettstein*, 13 Abh. N. C. 393, 399 (foreigners not chargeable with knowledge of our revenue law).

Stedman v. Davis, 93 N. Y. 32 (reversing a decision that judgment creditors of a foreign debtor, who had made an assignment invalid under the foreign law, having accepted benefits under it, must be considered as having elected to treat it as valid, although there was no evidence that they had any knowledge of the foreign law).

² Knowledge of the powers contained in the charter of a corporation existing in another state must be imputed to a citizen of New York purchasing property the title to which is derived from a conveyance or assignment made by such corporation. *Wait, Insolvent Corp.* 271, s. p., *Morgan v. United States*, 113 U. S. 476, 28 L. ed. 1044, 5 Sup. Ct. Rep. 588 (holding that a holder of government bonds is presumed to know whatever has lawfully been done or declared by the government respecting them).

Parties in contract will be presumed to know the law of the state in which such contract was made, and in which it was to be performed, and to have contracted with reference thereto. *Sigua Iron Co. v. Brown*, 19 App. Div. 143, 45 N. Y. Supp. 989; *Walker v. Lovitt*, 250 Ill. 543, 95 N. E. 631.

And a nonresident of a state is presumed to know the law of that state so as to charge him with the duty of complying with its statutes in order to prevent the bar of a claim against an estate. *Cory Bros. v. Gillespie*, 94 Iowa, 347, 62 N. W. 837.

6. General reputation.

On the question whether a person had knowledge of a fact, general reputation of the fact, or of the contrary, is competent.¹

¹ *State v. Flint*, 60 Vt. 304, 14 Atl. 178 (evidence of the notoriety of a crime is admissible as tending to show defendant's knowledge of it at a time when he claims that he had not heard of it); *Hahn v. Penney*, 62 Minn. 116, 63 N. W. 843 (knowledge of insolvency); *Park v. New York C. & H. R. R. Co.* 155 N. Y. 215, 49 N. E. 674 (knowledge of incompetency of servant); *Carter v. Steyer*, 93 Iowa, 533, 61 N. W. 956 (knowledge of character of premises by owner); s. p., *Reilly v. Hannibal & St. J. R. Co.* 94 Mo. 600, 7 S. W. 407; *Pressler v. State*, 13 Tex. App. 95 (general report circulated by a young man that he had attained majority competent, as corroborating defendant's denial of knowledge that he was a minor). See also *INSOLVENCY*, § 4, and Ab-

bott, Tr. Ev. (3d ed.) p. 1563 (master's knowledge of unfitness of servant).

Contra: Greenslade v. Dare, 20 Beav. 284, 52 Eng. Reprint, 612 (holding that evidence inadmissible to prove the fact itself, is inadmissible to prove knowledge of such fact).

LEAVE TO SUE.

As to orders of court generally, see ORDER OF COURT.

Receiver.

To prove the authority of a receiver of a corporation to sue, it is sufficient to produce the petition, the order appointing him receiver, and his official bond.¹

¹ Palmer v. Clark, 4 Abb. N. C. 25. In Hauselt v. Fine, 18 Abb. N. C. 149, will be found a note on leave to sue. Leave may be granted *nunc pro tunc*, even after the commencement of the action, and the action is a common-law action. As to the form of application and order, see 1 Abbott, New Pr. & F. 544, 559, etc.

LETTERS.

1. Offering part of connected correspondence.
2. Proof of authenticity or genuineness of letter other than by proof of handwriting or typewriting.
3. Delivery; mailing.
4. Letter and inclosure let in each other.
5. Letters of an agent.
6. Mere possession.
7. Omission to answer.

For kindred topics, see ADMISSIONS; MAILS; NOTICE.

1. Offering part of connected correspondence.

A party may put in evidence a letter containing admissions material to the case, without putting in the whole correspond-

¹ subject to the right of his adversary to put in the residue of correspondence.²

More v. Taylor, 1 Esp. 326; *Stone v. Sanborn*, 104 Mass. 319; *Dix v. Jackman*, — Tex. Civ. App. —, 37 S. W. 344; *Abbott*, Tr. Ev. (3d ed.) pp. 771, 1827. *Contra*: *Simmons v. Haas*, 56 Md. 153. And that party is not entitled to put in evidence his own letter against the adverse party, if it purports to have been written in answer to one from the adverse party, unless he offers at the same time to prove or account for the one from the adverse party. *Belmont Coal Co. v. Richter*, 31 Va. 858, 8 S. E. 609; citing *Watson v. Moore*, 1 Car. & K. 626; *Isban v. Boyd*, 4 Paige, 17; *Springer v. Orr*, 82 Ill. App. 558. And according to *Dempsey v. Dobson*, 174 Pa. 122, 32 L.R.A. 761, 34 Atl. 9, a letter containing an argumentative presentation of the writer's views of his rights, and of the grievances of which he complains, being a declaration in his own behalf, cannot be received in his own favor when unanswered.

The rule stated in the text was held in *Slingloff v. Bruner*, 174 Ill. 561, 51 N. E. 772, to apply to parts of a letter. But in *Anderson v. Anderson*, 13 Tex. Civ. App. 527, 36 S. W. 816, a fragment of a lost letter was held to have been properly excluded where its meaning and weight could not be ascertained from such fragment alone, and there was no offer to prove the entire contents.

Van v. Farrel, 58 Conn. 413, 20 Atl. 614; *Lindheim v. Duys*, 11 Misc. 31 N. Y. Supp. 870; *Lewis v. Newcombe*, 1 App. Div. 59, 37 N. Y. pp. 8; *Diether v. Ferguson Lumber Co.* 9 Ind. App. 173, 35 N. E. 3, 36 N. E. 765; *Graves v. Merchants' & B. Ins. Co.* 82 Iowa, 637, N. W. 65; *Thayer v. Hoffman*, 53 Kan. 723, 37 Pac. 125; *Gage v. Myers*, 59 Mich. 300, 26 N. W. 522.

As to the remainder of a letter, a portion of which has been received, it may be put in within this rule, see *Slingloff v. Bruner*, 174 Ill. 561, N. E. 776; *Glover v. Stevenson*, 126 Ind. 532, 26 N. E. 486; *Newark, T. & M. R. Co. v. Gallaher*, 79 Tex. 685, 15 S. W. 694.

Production of a letter between the parties to an action, though not relating to the same subject as the portion introduced by the adverse party, may be put in by the writer when of a nature to elicit a reply, and when none was made. *Fleischman v. Toplitz*, 134 N. Y. 349, 31 N. E. 1089.

One who, without objection, permits a portion of a letter to be read to his adversary, has no right against objection to have another portion of the same letter read while refusing to have the entire letter read. *Corbett v. State*, 5 Ohio C. C. 155, 3 Ohio C. D. 79; *Lewis Pub. v. Lenz*, 86 App. Div. 451, 83 N. Y. Supp. 841.

2. Proof of authenticity or genuineness of letter other than by proof of handwriting or typewriting.

Where the ordinary methods of authentication by proof of handwriting or typewriting are unavailable, the authenticity may be established by indirect or circumstantial evidence.¹

A letter is not, however, made admissible against the apparent writer by evidence that it was received in due course purporting to have been mailed at the place of his residence, without proof that he either wrote or authorized it.² But it is made admissible by evidence that it was so received in answer to a letter previously sent to him.³ The courts will not presume that some stranger, surreptitiously or otherwise, got possession of the original letter and answered it,⁴ but will presume that such answer is the letter of the one whose name is signed to it,⁵ and will admit it in evidence without proof that it is in the handwriting of the party purporting to have sent it.⁶ And such a letter will be admitted even though typewritten⁷ and bearing a typewritten signature,⁸ or a rubber stamp signature.⁹

Reference in a letter to a subject shown to have been previously discussed between the parties has been held sufficient evidence to warrant its admission.¹⁰ It has frequently been held that a letter is admissible where it is proved that it stated facts which could only be known to the person purporting to have sent it.¹¹ So where letters alleged to have been sent by an illiterate purporting to contain checks, and corresponding checks were produced, the letters were admitted.¹² Likewise proof that a letter was on the letterhead and in an envelope similar to those used by the person purporting to send it and who was accustomed to sign with a rubber stamp has been held sufficient evidence.¹³

¹ Union Cent. L. Ins. Co. v. Washburn, 158 Ala. 169, 48 So. 475; Re Kennedy, 4 Cal. Unrep. 671, 36 Pac. 1030; Deep River Nat. Bank's Appeal, 73 Conn. 341, 47 Atl. 675; Nickles v. State, 48 Fla. 46, 37 So. 312; Walls v. Atlanta Newspaper Union, 141 Ga. 594, 81 S. E. 866; Abbott v. McAloon, 70 Me. 98; People v. Adams, 162 Mich. 371, 127 N. W. 354; Glauber Mfg. Co. v. Voter, 70 N. H. 332, 47 Atl. 612; Williamson v. Davis, — Okla. —, 177 Pac. 567; Com. v. Drum, 42 Pa. Super. Ct. 156; Spellman v. Richmond & D. R. Co. 35 S. C. 475, 28 Am. St. Rep. 858, 14 S. E. 947; James v. State, 72 Tex. Crim. Rep. 155, 161 S. W. 472; Ashlock v. Com. 108 Va. 877, 61 S. E. 752; Maynard v. Bailey, 85 W. Va. 679, 9 A.L.R. 981, 102 S. E. 480.

v. McHugh & Groom, 188 Ala. 237, 66 So. 452; *Rogers v. State*, 1 Ark. 45, 40 L.R.A. (N.S.) 1198, 141 S. W. 491; *Richmond Dredging Co. v. Atchison, T. & S. F. R. Co.* 31 Cal. App. 399, 160 Pac. 862; *Irwinham v. Grant*, 24 Colo. App. 131, 134 Pac. 254; *Bridgeport Hardware Mfg. Corp. v. Bouniol*, 89 Conn. 254, 93 Atl. 674; *Ginn v. Ginn*, 2 Ga. 420, 83 S. E. 118; *Lewis v. New Amsterdam Casualty Co.* 200 Ill. App. 553; *Bennett v. Com.* 171 Ky. 63, 186 S. W. 933; *Kovacs v. Mayoras*, 175 Mich. 582, 141 N. W. 662; *Buhler v. Loftus*, 53 Mont. 6, 165 Pac. 601; *Material Men's Mercantile Asso. v. Material Men's Credit Agency*, 191 App. Div. 73, 180 N. Y. Supp. 801; *Nichols v. Kingdom Iron Ore Co.* 56 N. Y. 618; *State v. Tolliver*, 47 La. Ann. 99, 17 So. 502.

ulation that a letter favorable to adverse party may be read upon condition that a deposition favorable to the stipulating party, but which was objectionable on account of certain irregularities, should so go in evidence, is not an admission that the letter is genuine, but merely dispenses with proof of its genuineness in the first instance. *Summun v. Winters*, 30 Or. 177, 46 Pac. 780.

without date or signature, shown to have been in defendant's handwriting, and bearing evidence within themselves and by comparison with other letters actually received that they were intended for the person in whose room they were found, were held admissible in evidence against defendant, without proof that they were actually received. *State v. Overstreet*, 43 Kan. 299, 23 Pac. 572.

riter's execution of the letters must be shown before they can be admitted in evidence. *Ex parte Denning*, 50 Tex. Crim. Rep. 629, 100 W. 401.

r v. Carter, 178 Iowa, 636, 160 N. W. 15; *Louisville & N. R. Co. v. J. O'Brien & Co.* 168 Ky. 403, 182 S. W. 227, Ann. Cas. 1917D, 922; *United States v. Duff*, 19 Blatchf. 9, 6 Fed. 45 (criminal case); *Campbell v. Woodstock Iron Co.* 83 Ala. 351, 3 So. 369; *Bush v. Miller*, 13 Barb. 481; *Melby v. D. M. Osborne & Co.* 33 Minn. 492, 24 N. W. 253; *People's Nat. Bank v. Geisthardt*, 55 Neb. 232, 75 N. W. 2; *Patrick v. Badger*, — Tex. Civ. Rep. —, 41 S. W. 538; *Ullman v. Abcock*, 63 Tex. 68.

must first be proved that the letter previously sent was properly addressed, stamped and mailed. *Kvale v. Keane*, 39 N. D. 560, 9 L.R. 972, 168 N. W. 74; *Consolidated Grocery Co. v. Hammond*, 99 C. A. 195, 175 Fed. 641.

go, B. & Q. R. Co. v. Roberts, 10 Colo. App. 87, 49 Pac. 428. *Old v. Parlin & O. Co.* 10 C. C. A. 83, 18 U. S. App. 692, 61 Fed. 4; *Ragan v. Smith*, 103 Ga. 556, 29 S. E. 759; *Melby v. D. M. Osborne & Co.* 33 Minn. 492, 24 N. W. 253; *Leesville Mfg. Co. v. Morganood & Iron Works*, 75 S. C. 342, 55 S. E. 768.

e v. Tolliver. 110 Ala. 300, 20 So. 97; *Atlantic Ins. Co. v. Manning*, Colo. 224; *Boykin v. State*, 40 Fla. 484, 24 So. 141; *Grayville Water-*

works v. Burdick, 109 Ill. App. 520; Lyon v. Railway Pass. Assur. Co. 46 Iowa, 631; City Nat. Bank v. Jordan, 139 Iowa, 499, 117 N. W. 758; Connecticut v. Bradish, 14 Mass. 296; J. H. Sanders Pub. Co. v. Emerson, 64 Mo. App. 662; Hays v. General Assembly American Benev. Asso. 127 Mo. App. 195, 104 S. W. 1141; People's Nat. Bank v. Geisthardt, 55 Neb. 232, 75 N. W. 582; Peycke v. Shinn, 76 Neb. 364, 107 N. W. 386; Armstrong v. Advance Thresher Co. 5 S. D. 12, 57 N. W. 1131; Lewis v. Alexander, — Tex. Civ. App. —, 31 S. W. 414; Loverin & B. Co. v. Bumgarner, 59 W. Va. 46, 52 S. E. 1000; Ovenston v. Wilson, 2 Car. & K. 1. See also additional cases cited in note in 9 A.L.R. 989.

⁷ Davis's Sons v. Robinson, 67 Iowa, 355, 25 N. W. 280; Norwegian Plow Co. v. Munger, 52 Kan. 371, 35 Pac. 11.

⁸ Huber Mfg. Co. v. Claudel, 71 Kan. 441, 80 Pac. 960; Lancaster v. Ames, 103 Me. 87, 17 L.R.A. (N.S.) 229, 125 Am. St. Rep. 286, 68 Atl. 533.

⁹ National Acci. Soc. v. Spiro, 24 C. C. A. 334, 47 U. S. App. 293, 78 Fed. 774.

¹⁰ People v. Adams, 162 Mich. 371, 127 N. W. 354.

¹¹ Maynard v. Bailey, 85 W. Va. 679, 9 A.L.R. 981, 102 S. E. 480; Ashlock v. Com. 108 Va. 877, 61 S. E. 752; Williamson v. Davis, — Okla. —, 177 Pac. 567.

¹² Fayette Liquor Co. v. Jones, 75 W. Va. 119, 83 S. E. 726.

¹³ Deep River Nat. Bank's Appeal, 73 Conn. 341, 47 Atl. 675. See also Maynard v. Bailey, *supra*.

3. Delivery; mailing.

Evidence that letter properly addressed other than notice of protest¹ was duly mailed, postpaid, by deposit either in the postoffice, a government letter box, or the hand of the official letter carrier on his round; or by deposit where in due course of business it should have been mailed or received; with evidence of such course of business,—raises the presumption of receipt by the addressee.² The presumption so arising is not a conclusive presumption of law but a rebuttable inference of fact.³

A letter received in due course of mail, in response to one sent by the receiver, is presumed, in the absence of any showing to the contrary, to be the letter of the person whose name is signed to it.⁴

The date of a letter is no evidence of the time of its receipt.⁵

¹ Evidence that notice of protest was so duly mailed, and addressed to another town, is conclusive evidence of its receipt. Wymen v. Schappert, 6 Daly, 558; Pearce v. Langfit, 101 Pa. 507, 47 Am. Rep. 737 (handed

official letter carrier on his round). Compare *Jensen v. McCorkell*, Pa. 323, 26 Atl. 366 (that it creates a strong and nearly conclusive presumption of receipt). See also *Abbott*, Tr. Ev. 3d ed. pp. 771 seq.

Walsh v. Walker, 111 U. S. 185, 28 L. ed. 395, 4 Sup. Ct. Rep. 382 (holding this presumption sufficient to let in letter-press copies); *Clinton v. Holland*, 69 N. Y. 571, 25 Am. Rep. 246, with note; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285 (deposit in private letter box); *Mer Silberberg Co. v. McNeil*, 18 N. M. 44, 49 L.R.A.(N.S.) 458, 133 Pac. 975; *Pioneer Sav. & Loan Co. v. Thompson*, 115 Ala. 552, 22 So. 2d 107; *Stockton Combined Harvester & Agri. Works v. Houser*, 109 Cal. 111, 1 Pac. 809; *Breed v. First Nat. Bank*, 6 Colo. 235; *Burch v. Vericus Grocery Co.* 125 Ga. 153, 53 S. E. 1008; *Ashley Wire Co. v. Illinois Steel Co.* 164 Ill. 149, 56 Am. St. Rep. 187, 45 N. E. 410; *Winger v. Moschino*, 93 Ind. 495; *Watson v. Richardson*, 110 Iowa, 80 N. W. 407; *Fleming & A. Co. v. Evans*, 9 Kan. App. 858, 61 Kan. 503; *McDowell v. Aetna Ins. Co.* 164 Mass. 444, 41 N. E. 665; *Mer v. Temple*, 160 Mich. 318, 125 N. W. 63; *Plath v. Minnesota Farmers' Mut. F. Ins. Asso.* 23 Minn. 479, 23 Am. Rep. 697; *Covell v. Western U. Teleg. Co.* 164 Mo. App. 630, 147 S. W. 555; *Omaha v. Coney*, 91 Neb. 261, 135 N. W. 1044; *Kruger v. Brown*, 79 N. J. L. 175, 75 Atl. 171; *Hurley v. Olcott*, 198 N. Y. 132, 28 L.R.A.(N.S.) 491, 91 N. E. 270, 2 N. C. C. A. 210; *Sherrod v. Farmers Mut. Fire Ins. Asso.* 139 N. C. 167, 51 S. E. 910; *Neubert v. Armstrong Water Co.* 211 Pa. 582, 61 Atl. 123; *Glenn v. Western U. Teleg. Co.* 84 S. C. 65, 65 S. E. 1024; *Gaar, S. & Co. v. Stark*, — Tenn. —, 36 S. W. 2d 100; *Campbell v. Gowans*, 35 Utah, 268, 23 L.R.A.(N.S.) 414, 100 Pac. 397, 19 Ann. Cas. 660; *Joshua Hendy Iron Works v. Brenneman*, 183 Fed. 183.

Sometimes said that proof of proper mailing raises the presumption of receipt. In such cases the courts must be understood to include pressing and stamping in the term "mailing." *Pitts v. Hartford & Annuity Ins. Co.* 66 Conn. 376, 50 Am. St. Rep. 96, 34 Atl. 95; *Illinois Furnace Co. v. Wilkin Mfg. Co.* 181 Ill. 582, 54 N. E. 987; *Way Officials & Employes Asso. v. Beddow*, 112 Ky. 184, 65 S. W. 2d 100; *Augusta v. Vienna*, 21 Me. 298; *Beeman v. Supreme Lodge, S. H. Pa.* 627, 64 Atl. 792; *Boorum & P. Co. v. Armstrong*, — Tenn. —, 37 S. W. 1095; *Opet v. Denzer*, — Tex. Civ. App. —, 93 S. W. 2d 100; *Walworth v. Seaver*, 30 Vt. 728, 73 Am. Dec. 332; *Small v. Utice*, 102 Wis. 256, 78 N. W. 415; and for additional cases and explanation see 49 L.R.A.(N.S.) 458.

When this rule applies to letters sent to public officers, see—
People v. Michigan Land & Iron Co. v. Republic Twp. 65 Mich. 628, 101 N. W. 88.

See also *Hammatt v. Emerson*, 27 Me. 308, 46 Am. Dec. 598 (*dictum*); *Atz v. Jordan*, 32 Fed. 55; *Abbott*, Tr. Ev. 196.

Records of the postoffice, competent between third persons, because kept by a sworn officer. *Merriam v. Mitchell*, 13 Me. 439, 29 Am. Dec. 514. That this presumption does not suffice under a statute requiring notice to be given. *Franklin Sav. Bank v. Fatzinger*, 8 Sadler (Pa.) 21, with note.

³ *Rosenthal v. Walker*, 111 U. S. 185, 28 L. ed. 395, 4 Sup. Ct. Rep. 382; *Schutz v. Jordan*, 141 U. S. 213, 35 L. ed. 705, 11 Sup. Ct. Rep. 906; *Bluthenthal v. Atkinson*, 93 Ark. 252, 124 S. W. 510; *Meyer v. Krohn*, 114 Ill. 574, 2 N. E. 495; *Huntley v. Whittier*, 105 Mass. 391, 7 Am. Rep. 536; *Austin v. Holland*, 69 N. Y. 571, 25 Am. Rep. 246; *Campbell v. Gowans*, 35 Utah, 268, 23 L.R.A. (N.S.) 414, 100 Pac. 397, 19 Ann. Cas. 660.

And see note in 49 L.R.A. (N.S.) 461, for other cases.

⁴ *Ragan v. Smith*, 103 Ga. 556, 29 S. E. 769, and cases cited; *Scofield v. Parlin & O. Co.* 10 C. C. A. 83, 18 U. S. App. 692, 61 Fed. 804. See also cases cited § 2, note 3 this topic supra.

And letters written from the home office of an insurance company, upon paper with its letter-head thereon, purporting to be signed by officers of the company, in answer to letters addressed to the company by plaintiff in regard to his loss, will be presumed to have been answered by the proper officers. *Bloom v. State Ins. Co.* 94 Iowa, 359, 62 N. W. 810.

⁵ *Uhlman v. Arnholdt & S. Brewing Co.* 53 Fed. 485.

4. Letter and inclosure let in each other.

When a document is properly in evidence, the envelope in which it was delivered, and any other relevant document which accompanied it and was delivered in the envelope, is competent as part of the *res gestæ*, not as proof of statements in it, but to show under what cover its contents reached the party.¹

¹ *United States v. Noelke*, 17 Blatchf. 554, 1 Fed. 426 (criminal case); *Darling v. Miller*, 54 Barb. 149; *Foster v. Newbrough*, 66 Barb. 645, reversed on another ground in 58 N. Y. 481.

5. Letters of an agent.

Letters of an agent through whom business was transacted may be received as part of the *res gestæ*.¹

¹ *Beaver v. Taylor*, 1 Wall. 637, 17 L. ed. 601; *Rosenstock v. Tormey*, 32 Md. 169, 3 Am. Rep. 125; *Richmond Union Pass. R. Co. v. New York & S. B. R. Co.* 95 Va. 386, 28 S. E. 573.

re possession.

re possession of letters addressed to one does not render competent against him.¹

People v. People, 27 Hun, 469 (homicide. The court says: "Such letters are the declarations of third parties, and, as hearsay, are not evidence of any facts." Affirmed without noticing this point in 92 N. Y. 1.

Letters received into the possession of the party have been put in evidence against him as received in answer to his letters or advertisements, others of like character, though intercepted, may be received. *People v. Cooper*, L. R. 1 Q. B. Div. 19.

A number of letters alleged to have called forth letters, copies of which in a testator's letter book have been admitted on the question of mental capacity, should not be laid in a mass before the jury und, for them to examine or not as they should feel inclined; but absence of proof of authenticity, that they were received in due course mail, or of any offer to produce their authors for examination, is no ground for rejecting them if they were found among testator's papers with his memoranda on them. *Barber's Appeal*, 63 Conn. 393, L.R.A. 90, 27 Atl. 973.

Unsigned, undated letter found after her death among the papers of a testatrix, and purporting to have been written by her to the father of the principal devisee, is inadmissible in the contest of a will. *Murree v. Senn*, 107 Ala. 424, 18 So. 264.

Failure to answer.

A person to whom a letter is addressed ordinarily is not required to make any reply, and failure to answer it is not an admission of the truth of the facts therein stated because such admission would be in violation of the rule that a party cannot introduce evidence for himself by his own declarations.¹

This rule applies with particular force where the unanswered letter is not part of mutual correspondence,² and the only exceptions in such cases arise where there have been subsequent communications between the parties,³ or where the unanswered letter is construed to be part of the *res gestæ*,⁴ to relate to an existing contract⁵ or to contain a demand or notice.⁶

People v. Fine, 229 Mass. 75, 8 A.L.R. 1161, 118 N. E. 187; *Learned v. Lotson*, 97 N. Y. 1, 49 Am. Rep. 508; *State, Hand, Prosecutor, v. Well*, 61 N. J. L. 142, 38 Atl. 748, and cases cited. But compare *COUNT STATED; RATIFICATION*.

ABB. FACTS—48.

But a letter unanswered may be made competent against the recipient by evidence of his subsequent conversations about it. *Dutton v. Woodman*, 9 Cush. 255, 57 Am. Dec. 46, with note. But not necessarily by his silence when it was spoken of in his presence. *Wright v. People*, 1 N. Y. Crim. Rep. 462.

² *Smith v. Abbott*, 221 Mass. 326, 109 N. E. 190; *State Bank v. McCabe*, 135 Mich. 479, 98 N. W. 20; *Morris v. Norton*, 21 C. C. A. 553, 43 U. S. App. 739, 75 Fed. 912.

³ *Kumin v. Fine*, *supra*.

⁴ *Murray v. East End Improv. Co.* 22 Ky. L. Rep. 1477, 60 S. W. 648.

⁵ *Dennis v. Waterford Packing Co.* 113 Me. 159, 93 Atl. 58, Ann. Cas. 1917D, 788.

But this exception does not prevail where the transaction is completely closed. *Wagman v. Ziskind*, 234 Mass. 509, 125 N. E. 633.

⁶ *Sonnesyn v. Hawbaker*, 127 Minn. 15, 148 N. W. 476; *Murphey v. Gates*, 81 Wis. 370, 51 N. W. 573.

For additional cases relating to the admissibility in favor of the writer of unanswered letters not part of mutual correspondence, see note in 8 A.L.R. 1163.

LOSS OF, OR DAMAGE TO, FREIGHT.

1. Burden of proof.

a. Common law liability.

b. Special contract limiting liability.

2. Bills of lading.

1. Burden of proof.

a. *Common law liability*.—In the absence of a special contract limiting its common-law liability, a common carrier must affirmatively show that a loss of goods or live stock shipped resulted from some cause for which it was not responsible,¹ such as the act of God² or that the injury was caused by the shipper's fault.³

¹ *J. H. Cownie Glove Co. v. Merchants' Dispatch Transp. Co.* 130 Iowa. 327, 4 L.R.A. (N.S.) 1060, 114 Am. St. Rep. 419, 106 N. W. 749.

² *St. Louis & S. F. R. Co. v. Dreyfus*, 42 Okla. 401, L.R.A. 1915D, 547, 141 Pac. 773.

³ *Roberts v. Riley*, 15 La. Ann. 103, 77 Am. Dec. 183.

LOSS OF, OR DAMAGE TO, FREIGHT.

Special contract limiting liability.—Where a carrier has made a special contract limiting its liability the better rule is that the burden is on the carrier to show a valid special contract and that the provisions of such contract are reasonable² and that the carrier itself is free from negligence.³

Under this rule it follows that evidence that the property was delivered to the carrier who received it for transportation and failed to make delivery establishes a prima facie case.⁴ The burden of proof is of course on the shipper in such cases to show delivery to the carrier,⁵ and failure of the carrier to deliver at the destination.⁶ Other jurisdictions have held that in special contract cases the burden of proof is on the carrier.⁷

The importance of this question of burden of proof is greatly reduced by statutory provisions placing the entire burden of proof in all cases upon the carrier⁸ and these statutes have been held to apply to both a receiver⁹ and to the Director of Railroads.¹⁰

Chicago & N. W. R. Co. v. Thomas, 222 Ill. 337, 7 L.R.A.(N.S.) 1041, 78 111; *Ferris v. Minneapolis & St. L. R. Co.* 143 Minn. 90, 173 N. W. 100; *St. L. & W. R. Co. v. Milner*, 62 Ind. App. 208, 110 N. E. 100; *Chicago, R. I. & G. R. Co. v. Dalton*, — Tex. Civ. App. —, 177 S. W. 2d 177; *Houtz v. Union P. R. Co.* 33 Utah, 175, 17 L.R.A.(N.S.) 62, 111 P. 439.

Northwestern P. R. Co. v. Northern P. R. Co. 121 Minn. 258, L.R.A.1915D, 644 W. 164.

Chicago & N. W. R. Co. v. Levy, 144 Ala. 614, 39 So. 95; *Louisville & N. R. Co. v. Shepherd*, 120 Ala. 57, 23 So. 793. See also note in 13 L.R.A. 33. *Chicago v. New York C. & H. R. R. Co.* 166 N. Y. Supp. 1083; *Massachusetts Antimony Co. v. Ocean S. S. Co.* [1917] 2 K. B. 664 86; *B. N. S.* 1417, 117 L. T. N. S. 297, 23 Com. Cas. 1. So where a custom is relied upon to show a constructive delivery of goods to a common carrier for transportation, the burden is upon the party relying on such custom or usage to clearly and definitely establish it. *Florida Coast Transp. Co. v. Howell*, 70 Fla. 544, L.R.A.1916D, 97-567.

Mobile Trade Co. 55 Ala. 387, 28 Am. Rep. 729.

St. Louis, C. & St. L. R. Co. v. Stone, 112 Tenn. 348, 105 Am. St. 79 S. W. 1031; *Colton v. Cleveland & P. R. Co.* 67 Pa. 21, 10 Am. Rep. 424. See also many additional cases cited in note in L.R.A. 5D, 644.

- ⁶ *Kerr v. Bush*, 198 Mo. App. 607, 200 S. W. 672; *Wall v. Platt*, 169 Mass. 398, 48 N. E. 270; *Brockert v. Central Iowa R. Co.* 82 Iowa, 369, 47 N. W. 1026.
- ⁹ *Lamb v. Floyd*, 148 Ga. 357, 1 A.L.R. 1172, 96 S. E. 877; *Baker v. Schroeder*, — Tex. Civ. App. —, 198 S. W. 394. See also note in 1 A.L.R. 1180.
- ¹⁰ *Hines v. McCook*, 25 Ga. App. 395, 103 S. E. 690, which, while involving the death of a passenger held that the statute placing the burden of proof on the carrier applied to the Director General of Railroads operating under Federal control.

2. Bills of lading.

If the goods shipped are in such shape that the carrier's agent is able to examine them and verify the amount and contents, the bill of lading is regarded as prima facie evidence of shipment,¹ but of course such evidence is not conclusive and may be rebutted.² Where the goods are in closed containers, so that it is impractical to ascertain their contents, the statement in the bill of lading as to contents is held not to be even prima facie evidence as to the amount and nature of goods shipped.³ Under the Interstate Commerce Act and the rulings of the Interstate Commerce Commission, when delivery to a carrier is complete, though no bill of lading was issued, the uniform bill of lading is evidence as to the rights and liabilities of the parties so far as applicable.⁴

- ¹ *Morris v. Minneapolis, St. P. & S. Ste. M. R. Co.* 25 N. D. 136, 141 N. W. 204; see also note in 21 Columbia L. Rev. 189.
- ² *Reid Phosphate Co. v. Farmers Fertilizer Co.* 94 S. C. 212, 77 S. E. 863; *Knapp v. Minneapolis, St. P. & S. Ste. M. R. Co.* 34 N. D. 466, 159 N. W. 81.
- ³ *Isdaner v. Philadelphia & R. R. Co.* 54 Pa. Super. Ct. 509; *New Zealand Shipping Co. v. Lewis* (1920) New Zealand L. R. 243.
- ⁴ *Standard Combed Thread Co. v. Pennsylvania R. Co.* 88 N. J. L. 257. L.R.A.1916C, 606, 95 Atl. 1002.

LOST RECORD.

f proving; copies.

ere an original pleading or paper is lost, the court may
ize a copy to be filed and used instead of the original.¹

of Civil Practice, Title 2, Rule 14; Parson's Practice Manual of
v York, 1921, p. 1241. See also, for cases illustrating the practice,
e to Goldman v. Kennedy, 21 Abb. N. C. 367. And see Belford, C.
o. v. Scribner, 144 U. S. 488, 36 L. ed. 514, 12 Sup. Ct. Rep. 734;
nero v. Wagner, 3 N. M. 167, 3 Pac. 50.

MAILS.

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court may,¹ but is not bound to,² take judicial notice of
e taken by the mails between principal cities.

v. Langfit, 101 Pa. 507, 47 Am. Rep. 737; abstr. s. c. 27 Alb. L.
43.

s v. Burkham, 10 Wall. 129, 19 L. ed. 884.

it.

ping in a street letter box, or delivery to the official
while he is collecting is mailing.¹

postmark on an envelope is presumptive evidence of the
; of the envelope so marked with its inclosure at the time
ce designated in such mark.²

v. Langfit, 101 Pa. 507, 47 Am. Rep. 737.

States v. Politzer, 59 Fed. 273.

3. Presumption.

A letter properly deposited in the United States mail will be presumed to have reached its destination, and to have been received by the addressee in due course.¹ But such presumption may be rebutted by evidence.²

¹ *Lindenberger v. Beall*, 6 Wheat. 104, 5 L. ed. 216; *Rosenthal v. Walker*, 111 U. S. 185, 28 L. ed. 395, 4 Sup. Ct. Rep. 382; *De Jarnette v. McDaniel*, 93 Ala. 215, 9 So. 570; *Stockton Combined Harvester & Agri. Works v. Houser*, 109 Cal. 1, 41 Pac. 809; *Bankers' Mut. Casualty Co. v. People's Bank*, 127 Ga. 326, 56 S. E. 429; *Young v. Clapp*, 147 Ill. 176, 32 N. E. 187, 35 N. E. 372; *Consolidated Coal Co. v. Block & H. Smelting Co.* 53 Ill. App. 565; *Phenix Ins. Co. v. Pickel*, 3 Ind. App. 332, 29 N. E. 432; *Pennypacker v. Capital Ins. Co.* 80 Iowa, 56, 8 L.R.A. 236, 45 N. W. 408; *Shields v. Lewis*, 20 Ky. L. Rep. 1601, 49 S. W. 803; *Long-Bell Lumber Co. v. Nyman*, 145 Mich. 477, 116 Am. St. Rep. 310, 108 N. W. 1019; *Benedict v. Grand Lodge*, A. O. U. W. 48 Minn. 471, 51 N. W. 371; *Bachman v. Brown*, 56 Mo. App. 396; *Van Doren v. Liebman*, 34 N. Y. S. R. 752, 11 N. Y. Supp. 769; *Jensen v. McCorkell*, 154 Pa. 323, 26 Atl. 366.

The presumption is that the letter was received by the addressee, if living. *Sabre v. Smith*, 62 N. H. 663.

It will be presumed that a notice of assessment mailed to an insured at the place where he resided and usually received his letters was received in due course of mail,—especially where such notice was found among his papers at his death. *Pitts v. Hartford Life & Annuity Ins. Co.* 66 Conn. 376, 34 Atl. 95.

Presumption does not apply unless the addressee resides in the place to which the letter is addressed. *Henderson v. Carbondale Coal & Coke Co.* 140 U. S. 25, 35 L. ed. 332, 11 Sup. Ct. Rep. 691.

But if the person has changed his place of business, and informed the post-office authorities of it, there is a presumption that the letter has been delivered at the new address. *Marston v. Bigelow*, 150 Mass. 45, 5 L.R.A. 43, 22 N. E. 71.

The deposit of a letter in the postoffice is not *prima facie* evidence that the person to whom it is addressed receives it unless the postage is shown to be prepaid. *Welsh v. Chicago Guaranty Fund Life Soc.* 81 Mo. App. 30.

One who brings an action against the indorser of a note, and relies on the mailing of a notice of protest, must show that the letter inclosing the letter of protest was a prepaid letter in that it was properly stamped for transmission and delivery. *Farmers' Nat. Bank v. Marshall*, 9 Pa. Super. Ct. 621, 44 W. N. C. 68.

usual course of business is for the agent to receive his principal's the presumption is that the agent received it, rather than the pal. *Schutz v. Jordan*, 141 U. S. 213, 35 L. ed. 705, 11 Sup. Ct. 906.

be presumed in aid of a court's jurisdiction that a single copy of ce directed to two defendants was delivered by the postal author- to each, where they are not shown to have been connected by f partnership or other agency. *Dennison v. Taylor*, 142 Ill. 45, E. 148, affirming 37 Ill. App. 385.

av. & L. Co. v. Thompson, 115 Ala. 553, 22 So. 511; *Buehler v.* 35 Ill. App. 225; *Home Ins. Co. v. Marple*, 1 Ind. App. 411, 27 333; *Dade v. Aetna Ins. Co.* 54 Minn. 336, 56 N. W. 48; *People's v. Scalzo*, 127 Mo. 164, 29 S. W. 1032; *Bachman v. Brown*, 56 op. 396; *Moran v. Abbott*, 26 App. Div. 570, 50 N. Y. Supp. 337; v. Welch, 85 Hun, 178, 32 N. Y. Supp. 577; *Manhattan L. Ins. Fields*, —, Tex. Civ. App. —, 26 S. W. 280; *Schutz v. Jordan*, S. 213, 35 L. ed. 705; *Henderson v. Carbondale Coal & Coke* U. S. 25, 35 L. ed. 332, 11 Sup. Ct. Rep. 691.

S. Co. v. United States, 73 C. C. A. 425, 142 Fed. 315, affirmed U. S. 187, 51 L. ed. 764, 27 Sup. Ct. Rep. 480. See also *Mer- Exch. Co. v. Sanders*, 74 Ark. 16, 84 S. W. 786, 4 Ann Cas. r (burden is on addressee to show nondelivery).
TERS, § 3, ante.

effect, and sufficiency.

assumption that the addressee of a letter duly mailed is not overcome by his testimony that he does not having received it.¹ But the presumption is overcome ressee's testimony that he never received it.²

v. Jackson, 97 Wis. 64, 72 N. W. 375.

ddressee's impression that he did not receive the letter suffi- shley Wire Co. v. Illinois Steel Co. 164 Ill. 149, 45 N. E. 410. that a letter was duly delivered through the postoffice to the nanagers of an insurance company, from the fact that it was iled addressed to them, is not overcome by their testimony r have no recollection of such a letter, and never saw it, appears that they were general managers for several differ- anies, and had an employee who received and opened all mail passed it to them for examination, and such employee does y. *East Texas F. Ins. Co. v. Perkey*, 89 Tex. 604, 35 S. W.

estate Sav. & Loan Asso. 15 Wash. 627, 47 Pac. 13.

Denial by the defendant in a replevin action that she received written demands which the plaintiff's attorney testified he mailed her does not overcome the presumption that she received the letter, but presents a question of fact for the jury. *Moran v. Abbott*, 26 App. Div. 579, 50 N. Y. Supp. 337.

Evidence that a member of a mutual benefit association, whose certificate provided that his membership should be forfeited on his failure to pay an assessment ordered within thirty days after notice thereof was mailed to him, did not receive such notice, justifies the finding that it was in fact never mailed, notwithstanding the testimony of the secretary of the association, not based upon his memory of this particular notice, but upon his practice in such matters, that it was mailed. *Hannum v. Waddill*, 135 Mo. 153, 36 S. W. 616.

Testimony that notices of the falling due of premiums upon an insurance policy were mailed to the insured is insufficient to show that the postage was paid thereon, where the witness, in addition, enumerates what was done, and does not include payment of postage. *Provident Sav. Life Assur. Soc. v. Nixon*, 19 C. C. A. 414, 44 U. S. App. 316, 73 Fed. 144.

5. Best evidence.

Records of a postoffice as to the date when the office was established is better evidence than statements contained in an encyclopedia as to the date of settlement of the town, when offered to disprove the statement of a witness that on a stated date a letter postmarked and mailed at such town was received by the witness.¹

¹ *Howard v. Russell*, 75 Tex. 171, 12 S. W. 525.

MALICE.

1. Direct testimony.
2. Indicative conduct and declarations.
3. Presumptions and burden of proof.
 - a. In libel or slander case.
 - b. In action for malicious prosecution.
4. Relevancy of evidence generally.

For kindred topics, see GOOD FAITH; INTENT; KNOWLEDGE; MOTIVE AND PURPOSE.

1. Direct testimony.

One to whom malice is imputed may testify directly as to whether or not he was actuated by malice.¹

¹ *Arnett v. Standard Asso.* 57 Conn. 86, 3 L.R.A. 69, 17 Atl. 361; *Dorn v. Cooper*, 139 Iowa, 742, 117 N. W. 1, 118 N. W. 35, 16 Ann. Cas. 744, overruling *Barr v. Hack*, 46 Iowa, 308; *Hay v. Reid*, 85 Mich. 296, 48 N. W. 507; *Lally v. Emery*, 54 Hun, 517, 8 N. Y. Supp. 135; *Henn v. Horn*, 56 Ohio St. 442, 47 N. E. 248; *Wilson v. Noonan*, 35 Wis. 321 (actions for libel); *Heap v. Parrish*, 104 Ind. 36, 3 N. E. 549; *Coleman v. Heurich*, 2 Mackey, 189; *Flickinger v. Wagner*, 46 Md. 580; *Spaulding v. Lowe*, 56 Mich. 366, 23 N. W. 46; *Turner v. O'Brien*, 5 Neb. 542; *Leake v. Carlisle*, 75 N. Y. Supp. 382; *George v. Johnson*, 25 App. Div. 125, 49 N. Y. Supp. 203; *McCormack v. Perry*, 47 Hun, 71; *Autry v. Floyd*, 127 N. C. 186, 37 S. E. 208; *Greer v. Whitfield*, 4 Lea, 85; *Sherburne v. Rodman*, 51 Wis. 474, 8 N. W. 414 (actions for malicious prosecution). *Contra*: *Vandiver v. Waller*, 143 Ala. 411, 39 So. 136.

And that the correspondent of a paper, who sent to it a libelous article, cannot testify that he acted without malice or ill will toward the person libeled, and stated the facts as he heard them, in his investigation, where the newspaper published the article without any inquiry, relying simply upon its correspondent, see *Van Alstyne v. Rochester Printing Co.* 25 App. Div. 282, 49 N. Y. Supp. 523.

2. Indicative conduct and declarations.

Evidence of an insulting manner,¹ or other conduct² or declarations,³ indicative of malicious intent or motive on the part of the doer, is competent as evidence of malice. So repetition of privileged statements may be shown as evidence of malice.⁴

¹ *Raisler v. Springer*, 38 Ala. 703, 82 Am. Dec. 736. See also *Abbott, Tr. Ev.* (3d ed.) p. 1803.

As to mode of proving manner, see FEELINGS; INTENT.

² Thus, in libel and slander, proof of repetition of the charge is competent on the question of malice. *Beneway v. Thorp*, 77 Mich. 181, 43 N. W. 863; *Cruikshank v. Gordon*, 48 Hun, 308, 1 N. Y. Supp. 443; *Freeman v. Sanderson*, 123 Ind. 264, 24 N. E. 239; *Enos v. Enos*, 135 N. Y. 609, 32 N. E. 123; *McCleneghan v. Reid*, 34 Neb. 472, 51 N. W. 1037; *Ransom v. McCurley*, 140 Ill. 626, 31 N. E. 119; *Preston v. Frey*, 91 Cal. 107, 27 Pac. 533. Even though the repetition be subsequent to suit brought. *Westerfield v. Scripps*, 119 Cal. 607, 51 Pac. 958 (libel); *Craven v. Walker*, 101 Ga. 845, 29 S. E. 152 (slander); *Barker v. Prizer*, 150 Ind. 4, 48 N. E. 4 (slander); *Welch v. Tribune Pub. Co.* 83 Mich. 661, 11 L.R.A. 233, 47 N. W. 562 (libel); *Eldridge v. State*, 27 Fla. 162, 9 So. 448 (libel). But see *Eccles v. Radam*, 75 Hun, 535, 27 N. Y. Supp. 486, to the effect that neither repetition of the libel, nor the publication of other libelous matter after suit begun, is competent for any purpose. *Beshiers v. Allen*, 46 Okla. 331, L.R.A. 1915E, 413, 148 Pac. 141.

So, in actions for malicious prosecution, acts indicating malice are competent; such as activity and forwardness in causing the publication of the fact of plaintiff's arrest. *Smith v. Maben*, 42 Minn. 516, 44 N. W. 792; *Cooney v. Chase*, 81 Mich. 203, 45 N. W. 853. The apparent anxiety of defendant to have an arrest made, and his efforts to that end. *Lunsford v. Dietrich*, 93 Ala. 565, 9 So. 308; *Willard v. Petitt*, 153 Ill. 663, 39 N. E. 991 (evidence that defendant, who claimed to have acted in good faith on the advice of counsel, inquired where she could get a lawyer to do a "dirty trick"). That defendant had said plaintiff was a rascal, and that before he was through with him he would have him behind the bars, even though said after he had taken advice of counsel and been told that plaintiff was guilty. *Hidy v. Murray*, 101 Iowa, 65, 69 N. W. 1138. And that plaintiff may, on his direct examination, testify to his having had difficulty with defendant, see *Thurston v. Wright*, 77 Mich. 96, 43 N. W. 860. But evidence as to the number of persons present when the officer went to arrest plaintiff is improper where defendant did not direct the manner of making the arrest, participate in it, or subsequently approve it. *Marks v. Hastings*, 101 Ala. 165, 13 So. 297.

³ So held of declarations of one sued for slander, as to the motives which influenced him in his conduct toward plaintiff. *Hintz v. Graupner*, 138 Ill. 158, 27 N. E. 935; *Wright v. Gregory*, 9 App. Div. 85, 41 N. Y. Supp. 139. Though made after suit begun. *Morasse v. Brochu*, 151 Mass. 567, 8 L.R.A. 524, 25 N. E. 74.

So, also, of threats of violence by one accused of murder, directed against the deceased. *State v. Pain*, 48 La. Ann. 311, 19 So. 138; *State v. Fontenot*, 48 La. Ann. 305, 19 So. 111; *Com. v. Holmes*, 157 Mass. 233, 32 N. E. 6. And in *People v. Coughlin*, 13 Utah, 58, 44 Pac. 94, evidence that defendant, charged with murder in killing a person while resist-

ing arrest, upon being informed five days before the homicide that the officers were after him, said, "Let them come, I am ready for them,"—was held admissible to show malice against any person attempting to arrest him. See further as to the proof of threats, note to *Wilson v. State* (Fla.) 17 L.R.A. 654.

⁴ *Schomberg v. Walker*, 132 Cal. 224, 64 Pac. 290; *Austin v. Remington*, 46 Conn. 116; *Rausch v. Anderson*, 75 Ill. App. 526; *Sharp v. Bowlar*, 103 Ky. 282, 45 S. W. 90; *Garrett v. Dickerson*, 19 Md. 418; *Clark v. Brown*, 116 Mass. 504; *Collier v. Postum Cereal Co.* 150 App. Div. 169, 134 N. Y. Supp. 847; *Fields v. Bynum*, 156 N. C. 413, 72 S. E. 449; *Behee v. Missouri P. R. Co.* 71 Tex. 424, 9 S. W. 449.

For additional cases see note in 42 L.R.A. (N.S.) 1109. See also cases cited *infra*, § 3 a.

3. Presumptions and burden of proof.

a. *In libel or slander case.*—In an action for libel, malice need not be expressly proved,¹ since libelous publications are presumed to be made maliciously.² So, malice may be inferred from proof that slanderous words were spoken without justification.³

If the statement itself is not necessarily libelous, as where a man is referred to as being a negro, and subsequently proves to be white, the presumption of malice may be rebutted by showing that defendant did not act recklessly nor with knowledge that the words were libelous.⁴

The presumption of malice is also rebutted in cases of privileged communications. Where the privilege is absolute, malice becomes immaterial and cannot be shown. So statements of witness⁵ or counsel⁶ in any judicial proceeding if relevant to the issue, are held absolutely privileged, and malice, no matter how clear, cannot be shown. Similarly statements made in the course of duty by public officials such as members of legislatures, judges and high executive officers are absolutely privileged and in such cases proof of malice is not permitted.⁷

Where however, the statement is one of conditional or qualified privilege only, malice may be shown but the burden of proving it is on the party alleging it.⁸ A familiar statement of this general rule is that where a communication is made by a person on a subject concerning which he has an interest or a moral duty, to another having a corresponding interest or duty, it is

usually held to be conditionally privileged only, and therefore to permit malice to be shown although as noted above the burden of proving such malice is then on the plaintiff.⁹

Thus where a public official who has made an alleged libelous or slanderous statement is a member of an inferior board such as a city council or an investigating committee the better rule is that the communication is only conditionally or qualifiedly privileged, in which case malice cannot be inferred from the mere falsity of the statement but the burden of proving such malice by affirmative evidence rests on the plaintiff who has alleged it.¹⁰ So the privilege existing in relation to a member or prospective member of a church¹¹ or of a voluntary society other than a church¹² is only qualified and malice may be proved.

¹ *Jozsa v. Moroney*, 125 La. 813, 27 L.R.A.(N.S.) 1041, 51 So. 908, 19 Ann. Cas. 1193.

² *State v. Mason*, 26 Or. 273, 26 L.R.A. 779, 46 Am. St. Rep. 629, 38 Pac. 130; *Pennsylvania Iron Works Co. v. Henry Vogt Mach. Co.* 139 Ky. 497, 8 L.R.A.(N.S.) 1023, 139 Am. St. Rep. 504, 96 S. W. 551; *Levert v. Daily States Pub. Co.* 123 La. 594, 23 L.R.A.(N.S.) 726, 131 Am. St. Rep. 356, 49 So. 206.

³ *Broughton v. McGrew*, 5 L.R.A. 406, 39 Fed. 672; *Byam v. Collins*, 111 N. Y. 143, 2 L.R.A. 129, 7 Am. St. Rep. 726, 19 N. E. 75.

⁴ *Jones v. R. I. Polk & Co.* 190 Ala. 243, 67 So. 577. But see *Upton v. Times-Democrat Pub. Co.* 104 La. 141, 28 So. 970, and other cases cited in notes in 36 L.R.A.(N.S.) 974, and L.R.A.1916E, 679.

⁵ *Keeley v. Great Northern R. Co.* 156 Wis. 181, L.R.A.1915C, 986, 145 N. W. 664; *Laing v. Mitten*, 185 Mass. 233, 70 N. E. 128; *McDavitt v. Boyer*, 169 Ill. 475, 48 N. E. 317. For other cases and full discussion see notes in L.R.A.1915C, 986, and 12 A.L.R. 1247.

If testimony is immaterial but responsive to a question by court or counsel it is held to be absolutely privileged even though made maliciously. See cases cited in note in 12 A.L.R. 1252.

Immaterial testimony where voluntary is entitled to a conditional privilege only. Note in 12 A.L.R. 1253 and cases cited. See also other cases in notes in 22 L.R.A. 836, and L.R.A.1915C, 988.

Where the statement is made before a legislative body the same rules apply as in a judicial proceeding. *Tuohy v. Halsell*, 35 Okla. 61, 43 L.R.A. (N.S.) 323, 128 Pac. 126, Ann. Cas. 1916B, 1110; note in 12 A.L.R. 1255.

Where the statements are irrelevant they are only qualifiedly privileged, and proof of actual malice may therefore be made. *Tuohy v. Halsell*, 35 Okla. 61, 43 L.R.A. (N.S.) 323, 128 Pac. 126, Ann. Cas. 1916B, 1110. For other cases see notes in 22 L.R.A. 836, and L.R.A.1915C, 988.

⁶ *Andrews v Gardiner*, 224 N. Y. 440, 2 A.L.R. 1371, 121 N. E. 341, where the statement was by an attorney.

There is a disagreement among the authorities as to whether an application for a pardon is a judicial proceeding and therefore as to whether statement by counsel in such proceeding is absolute or qualified. See note in 2 A.L.R. 1376. *Andrews v. Gardiner*, supra, holds the privilege is qualified in such a case.

⁷ *Rogers v. Thompson*, 89 N. J. L. 639, 99 Atl. 389; note in 32 Harvard L. Rev. 577. See also other cases in notes in 5 L.R.A.(N.S.) 163, and 27 L.R.A.(N.S.) 1041, the latter covering public officers in general and school teachers in particular.

⁸ *Nichols v. Eaton*, 110 Iowa, 509, 47 L.R.A. 483, 80 Am. St. Rep. 319, 81 N. W. 792; *Redgate v. Roush*, 61 Kan. 480, 48 L.R.A. 236, 59 Pac. 1050; *Holmes v. Royal Fraternal Union*, 222 Mo. 556, 26 L.R.A.(N.S.) 1080, 121 S. W. 100; *Denver Public Warehouse Co. v. Holloway*, 34 Colo. 432, 3 L.R.A.(N.S.) 696, 114 Am. St. Rep. 171, 83 Pac. 131, 7 Ann. Cas. 840; *Lawson v. Hicks*, 38 Ala. 279, 81 Am. Dec. 49; *Atwater v. Morning News Co.* 67 Conn. 504, 34 Atl. 865; *Coloney v. Farrow*, 5 App. Div. 607, 39 N. Y. Supp. 460; *Haft v. First Nat. Bank*, 19 App. Div. 423, 46 N. Y. Supp. 481; *Brown v. Norfolk & W. R. Co.* 100 Va. 619, 60 L.R.A. 472, 42 S. E. 664; *Johnson v. Brown*, 13 W. Va. 71; *Calkins v. Sumner*, 13 Wis. 194, 80 Am. Dec. 738, and other cases in note in 3 L.R.A.(N.S.) 696.

As to complaints about employees as conditionally privileged, see notes in 15 Columbia L. Rev. 718 and 20 Columbia L. Rev. 707; also *Doyle v. Clauss*, 190 App. Div. 838, 180 N. Y. Supp. 671.

As to a defamation message transmitted by a telegraph company, see article by Young B. Smith, 20 Columbia L. Rev. 369.

As to whether confidential communications by mercantile agencies are conditionally privileged, see two articles by Jeremiah Smith, 14 Columbia L. Rev. 296 and 1187.

As to reports of police officers as privileged communications, see note in 30 L.R.A.(N.S.) 315.

As to whether charges against the moral character of candidates for elective office are conditionally privileged see two articles by Jeremiah Smith, 18 Mich. L. Rev. 1 & 104.

As to communications made to a prosecuting officer see note in 9 A.L.R. 1099.

A statement made to a sheriff held qualifiedly privileged: *Beshiers v. Allen*, 46 Okla. 331, L.R.A.1915E, 413, 148 Pac. 141.

⁹ *Fahey v. Shafer*, 98 Wash. 517, 167 Pac. 1118; *Globe Furniture Co. v. Wright*, 49 App. D. C. 315, 18 A.L.R. 772, 265 Fed. 873; *Klinck v. Colby*, 46 N. Y. 427, 7 Am. Rep. 360; *Caldwell v. Story*, 107 Ky. 10, 45 L.R.A. 735, 52 S. W. 850, note in 13 Columbia L. Rev. 261.

¹⁰ *Sweeney v. Higgins*, 117 Me. 415, 104 Atl. 791, where an Alderman charged a policeman to be unfit for service; *Ivie v. Minton*, 75 Or.

483, 147 Pac. 395, where a councilman charged that plaintiff kept a disorderly house.

Some courts hold that even with such inferior officers the privilege is absolute. So in *Bolton v. Walker*, 197 Mich. 699, 164 N. W. 420, Ann. Cas. 1918E, 1007, a statement by a city poor commissioner about a lawyer member of the board of estimates, was held absolutely privileged, and therefore the question of malice immaterial.

¹¹ *Dickson v. Lights*, — Tex. Civ. App. —, 170 S. W. 834. See note in 13 Mich. L. Rev. 341.

¹² *Wise v. Brotherhood of Locomotive Firemen & Enginemen*, 164 C. C. A. 469, 252 Fed. 961, notes in 13 Mich. L. Rev. 341; 3 A.L.R. 1654; and 26 L.R.A. (N.S.) 1080.

b. In action for malicious prosecution.—Malice may be inferred from gross and culpable negligence in omitting to make suitable and reasonable inquiries before instituting the prosecution.¹ It may be inferred from the circumstances surrounding and attending upon the prosecution; and in legal contemplation there is malice if the prosecution was instituted wilfully and purposely, whether the motive was injury to the accused, to gain some advantage to the prosecutor, or through mere wantonness or carelessness, if it was at the same time wrong and unlawful within the knowledge of the actor.² It may be inferred from the conduct, zeal, and activity of a party in conducting the prosecution of a plaintiff;³ from gross misstatements made for the purpose of misleading the prosecuting officers;⁴ from the falsity of an affidavit on which the arrest was procured;⁵ from the fact that the plaintiff in his affidavit for an attachment knowingly stated the debt sued for at a greater amount than was due;⁶ from the fact that the action was wilfully and purposely prosecuted, if at the same time it was wrong and unlawful and that fact was known to the prosecutor;⁷ from proof showing a gross, wanton, and reckless disregard of the rights of the person prosecuted;⁸ from the discharge of plaintiff by the committing magistrate;⁹ from the intentional use of criminal process in order to coerce payment of a debt, and not to vindicate public justice;¹⁰ or from any improper and unjustifiable motives which the facts disclose influenced the conduct of the defendant in instituting the prosecution.¹¹

But malice may not be inferred from plaintiff's discharge by a magistrate without an investigation into the merits, on the

ground that he had no jurisdiction; nor can it be inferred from a second prosecution for the same offense in another county, which, after advice of counsel that, without reference to the truth of the charge, the prosecution was likely to fail for want of jurisdiction in that court, was nolle prossed with consent of the prosecutor;¹² nor from the fact that defendant discontinued the prosecution for the reason that he had been advised by counsel that the affidavit was not in proper form;¹³ nor from the mere fact that the termination of the attachment suit was in favor of plaintiff;¹⁴ nor from the fact that defendant, subpoenaed before the grand jury, testified, on being questioned, that plaintiff had assaulted him, it not appearing that he had any other connection with the prosecution;¹⁵ nor merely from the doing of an act without that ordinary prudence and discretion which persons of mature minds and sound judgment are presumed to have.¹⁶

¹ *Wiggin v. Coffin*, 3 Story, 1, Fed. Cas. No. 17,624; *Stubbs v. Mulholland*, 168 Mo. 47, 67 S. W. 650.

² *Lunsford v. Dietrich*, 93 Ala. 565, 30 Am. St. Rep. 79, 9 So. 308; *Alsop v. Lidden*, 130 Ala. 548, 30 So. 401; *Stamper v. Raymond*, 38 Or. 16, 62 Pac. 20; *Eggett v. Allen*, 119 Wis. 625, 96 N. W. 803.

³ *Straus v. Young*, 36 Md. 246.

⁴ *Wiggin v. Coffin*, 3 Story, 1, Fed. Cas. No. 17,624.

⁵ *Navarina v. Dudrap*, 66 N. J. L. 620, 50 Atl. 353.

⁶ *Tamblyn v. Johnston*, 62 C. C. A. 601, 126 Fed. 267.

⁷ *Pullen v. Glidden*, 66 Me. 202; *Leake v. Carlisle*, 75 N. Y. Supp. 382.

⁸ *Johnson v. McDaniel*, 5 Ohio S. & C. P. Dec. 717, 7 Ohio N. P. 467; *Blunk v. Atchison, T. & S. F. R. Co.* 38 Fed. 311.

⁹ *Sappington v. Watson*, 50 Mo. 83.

¹⁰ *Ross v. Langworthy*, 13 Neb. 492, 14 N. W. 515; *Peterson v. Reisdorph*, 49 Neb. 529, 68 N. W. 943; *Rosenblatt v. Rosenberg*, 1 Neb. (Unof.) 656, 95 N. W. 686.

¹¹ *Gee v. Culver*, 13 Or. 598, 11 Pac. 302; *Stamper v. Raymond*, 38 Or. 16, 62 Pac. 20.

¹² *McClafferty v. Philp*, 151 Pa. 86, 24 Atl. 1042.

Where the indictment has been nolle prossed the burden of proof to show want of probable cause in a malicious prosecution suit is still on the plaintiff: *Swartz v. Bortree*, 253 Pa. 304, 98 Atl. 597.

¹³ *Funk v. Amor*, 7 Ohio C. C. 419, 4 Ohio C. D. 662.

¹⁴ *Leyser v. Field*, 5 N. M. 356, 23 Pac. 173.

¹⁵ *Richter v. Koster*, 45 Ind. 440.

¹⁶ *Jenkins v. Gilligan*, 131 Iowa, 176, 9 L.R.A. (N.S.) 1087, 108 N. W. 237.

4. Relevancy of evidence generally.

Upon the trial of an action for malicious prosecution the plaintiff, when attempting to establish a want of probable cause, is not confined to proof of such facts as he can affirmatively show were actually known to defendant, but may also prove the existence of such open and notorious facts as would or should have been ascertained by the latter had he, before instituting the proceedings, made such inquiry and investigation as anyone with honest motives, and not actuated by malice, would have made.¹ So, testimony as to knowledge of the business and financial affairs of a person against whom an attachment suit was brought, and of his efforts to borrow money, is admissible on the question of probable cause and malice, in a suit for malicious prosecution of such attachment suit.² For the purpose of showing the absence of an improper or unjustifiable motive for the publication of an alleged libel, defendant may show that he derived his information from articles in newspapers previously given to the public, and may give such articles in evidence before the jury.³ But evidence that a newspaper correspondent had heard the substance of a publication which is libelous *per se*, before sending the item to his paper, is inadmissible, in an action against the publisher, to rebut malice or to mitigate damages, where the libelous article was published without any inquiry or knowledge by defendant on the subject.⁴ To prove malice in an action for the publication of a libel, other articles published by the same defendant are admissible, if they will bear the construction of ill will towards plaintiff, although in one construction they contain mere matters of general political interest.⁵

¹ Tabert v. Cooley, 46 Minn. 366, 13 L.R.A. 463, 49 N. W. 124.

² LeClear v Perkins, 103 Mich. 131, 26 L.R.A. 627, 61 N. W. 357.

³ Arnott v. Standard Asso. 57 Conn. 86, 3 L.R.A. 69, 17 Atl. 361.

⁴ Morey v. Morning Journal Asso. 123 N. Y. 207, 9 L.R.A. 621, 20 Am. St. Rep. 730, 25 N. E. 161.

⁵ Meriwether v. Publishers: George Knapp & Co. 211 Mo. 199, 16 L.R.A. (N.S.) 953, 109 S. W. 750.

MARK.

1. Genuineness.
2. Burden of proof.
3. Absence of attesting witness.
4. Attestation after death.
5. Intelligence of execution.

See also ACCOUNTS; HANDWRITING.

And as to the necessity of calling subscribing witnesses to prove attested instruments, generally, including those signed by mark, see note to *Garrett v. Hanshue*, 35 L.R.A. 321 *et seq.*

1. Genuineness.

An ordinary witness, who is sufficiently acquainted with a mark used by a person in affixing his signature to documents as to be able to identify it, may testify directly to the genuineness of the mark.¹ But if it appear, by cross-examination or otherwise, that his knowledge is not derived from the marksman having made or acknowledged the identical mark in the witness's absence, nor from the witness having frequently seen the mark affixed by the marksman on a number of other documents, his opinion should be excluded or struck out.²

Expert evidence is ordinarily held competent, as in the case of handwriting properly so called,³ but other jurisdictions hold that a mark is not such a writing as to permit a comparison by experts.⁴

¹ Thus, where his acquaintance with the mark comes from his having seen it affixed to various other documents than the one in controversy. *George v. Surrey*, *Moody & M.* 516; *Strong v. Brewer*, 17 Ala. 706; *Sayer v. Glossop*, 12 Jur. 465.

Considering the manner in which marks of persons unable to write their own signature are usually made, by merely touching the pen while the scrivener forms the character, it is a matter of doubtful propriety whether any person ought to be allowed, as a matter of evidence, to identify such a mark as a handwriting, but the mark of some persons by reason of methods of their own adoption in its formation and its inherent peculiarities may be capable of identification. And accordingly, *State v. Tice*, 30 Or. 457, 48 Pac. 367, holds that the statutory rule as to proving handwriting by a person having a knowledge of the handwriting acquired as provided by the same statute may be applied

to proving the person's mark; but that the attending circumstances touching the habits of the person whose mark is in the balance, his accustomed manner of making it, and the peculiarity attending it, which render it capable of identification, should be carefully considered and scrutinized by the jury in determining the weight to be ascertained to the proof of identification.

But in *Carrier v. Hampton*, 33 N. C. (11 Ired. L.) 311, in response to an objection to the admissibility of an instrument, on the ground that there had been no proof of the signature of the attesting witness which was made by his mark, it was said that, although in some very extraordinary instances the mark of an illiterate person might become so well known as to be susceptible of proof, like handwriting, yet generally a mark, a mere cross, cannot be identified; and that the instrument might be read in evidence upon proof merely of the handwriting of the party making it.

Again, in *Engles v. Bruington*, 4 Yeates, 345, 2 Am. Dec. 411, the court admitted evidence of the handwriting of an absent attesting witness, but refused to go into evidence of the genuineness of a mark, declaring that to "attempt to prove a mark would be idle and ludicrous."

But in a later case, the Pennsylvania court, although it reversed the judgment for allowing proof identifying a mark to be introduced, declaring that its admission would lead to great uncertainty and open the door to fraud, seems to incline to the belief that a mark might, on inspection, appear to have something in its construction distinguishing it from the ordinary marks used by illiterate persons to authenticate their contracts. *Shinkle v. Crock*, 17 Pa. 159.

And *Travers v. Snyder*, 38 Ill. App. 379, seems also to recognize the rule that a mark may have such established characteristics, like a handwriting, as to render it capable of recognition and identification, but holds that a mere mark or cross without any such characteristics cannot be identified.

² On this question the authorities are not agreed; but the true rule doubtless is that testimony to handwriting, founded on the principle of uniformity in the characteristics of the habit of a writer, is inapplicable to a casual mark made by a person not in the habit of signing frequently. In other words, evidence founded on the assumption of a certain uniformity of habit should be excluded when it is shown that there was no such habit. For the cases, see *Jackson ex rel. Van Dusen v. Van Dusen*, 5 Johns. 144, 155; *Travers v. Snyder*, 38 Ill. App. 379, and 2 Taylor, Ev. p. 1584, note; *Lawson*, Exp. Op. Ev. 296.

³ *Ausmus v. People*, 47 Colo. 167, 107 Pac. 204, 19 Ann. Cas. 491; *State v. Tice*, 30 Or. 457, 48 Pac. 367; *Ryan v. State*, 30 Ohio C. C. 306. See also note in L.R.A.1918D, 644.

For the rules governing the admission of such evidence see HANDWRITING.

⁴ *Re Caffrey*, 174 App. Div. 398, 161 N. Y. Supp. 277; note in 15 Mich. L. Rev. 443.

2. Burden of proof.

One who alleges a signature by mark has the burden of proof.¹

¹Com. v. Campbell, 20 Ky. L. Rep. 54, 45 S. W. 89.

3. Absence of attesting witness.

Where an attesting witness to an instrument signed by mark cannot be produced by reason of his absence or death, the instrument is admissible in evidence on proof of his handwriting.¹

¹Sanborn v. Cole, 63 Vt. 590, 14 L.R.A. 208, 22 Atl. 716. For cases showing the rule as to proof of signature by mark when the attesting witnesses thereto are dead or cannot remember the transaction, see note to Wienecke v. Arbin, 44 L.R.A. 142.

4. Attestation after death.

But an attesting witness to a signature by mark, who has subscribed his attestation after the death of the alleged marksman, cannot speak to the genuineness of the mark.¹

¹Such an attestation is a nullity. Chadwell v. Chadwell, 98 Ky. 643, 33 S. W. 1118.

5. Intelligence of execution.

One seeking to enforce the advantages secured by an instrument signed with a mark by an illiterate person must show that the latter fully understood the object and import of the writing he executed.¹

¹Selden v. Myers, 20 How. 506, 15 L. ed. 976.
Compare KNOWLEDGE, § 5, note 1.

MARRIAGE.

1. Direct testimony.
2. Eye-witnesses.
3. Certificates.
4. Admissions and declarations.
5. Cohabitation and repute.
6. Presumptions and burden of proof.
 - a. In general.
 - b. Presumptions flowing from marriage ceremony.
7. Marriage by mail.

See also STATUS.

1. Direct testimony.

The fact of marriage may be proved by the direct testimony of one of the parties.¹

¹State v. Schweitzer, 57 Conn. 532, 6 L.R.A. 125, 18 Atl. 787; Bailey v. State, 36 Neb. 808, 55 N. W. 241; Com. v. Dill, 156 Mass. 226, 30 N. E. 1016. See also note to Lauderdale Peerage Claim, 17 Abb. N. C. 500.

Marriage may be proved by any person who knows the facts. Sellers v. Page, 127 Ga. 633, 56 S. E. 1011; Smith v. Fuller, 138 Iowa, 91, 16 L.R.A.(N.S.) 98, 115 N. W. 912; Southern R. Co. v. Brown, 126 Ga. 1, 54 S. E. 911.

The marriage may be proved by the testimony of the parties thereto, in an action for criminal conversation, without the necessity of producing the marriage certificate. Stark v. Johnson, 43 Colo. 243, 16 L.R.A. (N.S.) 674, 127 Am. St. Rep. 114, 95 Pac. 930, 15 Ann. Cas. 868.

An extensive note upon proof of a ceremonial marriage by testimony of eye-witnesses, celebrant or parties appear in L.R.A.1915E, 121.

2. Eye-witnesses.

Marriage may be established by the testimony of a witness who was present at the ceremony.¹

¹People v. Imes, 110 Mich. 250, 68 N. W. 157; State v. Ulrich, 110 Mo. 350, 19 S. W. 656; United States v. De Amador, 6 N. M. 173, 27 Pac. 488; Odd Fellows' Beneficial Asso. v. Carpenter, 17 R. I. 720, 24 Atl. 578; McQuade v. Hatch, 65 Vt. 482, 27 Atl. 136; Williams v. Walton & W. Co. 9 Houst. (Del.) 322, 32 Atl. 726. See also cases in note to Lauderdale Peerage Claim, 17 Abb. N. C. 501.

3. Certificates.

A certificate, purporting to be an original marriage certificate, is competent, in connection with the testimony of the alleged wife, to prove marriage.¹

¹ State v. Schweitzer, 57 Conn. 532, 6 L.R.A. 125, 18 Atl. 787. See also cases in note to Lauderdale Peerage Claim, 17 Abb. N. C. 497.

A paper purporting to be an original certificate of marriage by a rabbi in a foreign country, verified by the signature and seal of the official minister, is admissible as *res gestæ* to prove the marriage, in a criminal prosecution, where one of the parties testifies that it was given to her at the time of the marriage. State v. Behrman, 114 N. C. 797, 25 L.R.A. 449, 19 S. E. 220.

Otherwise of a certificate fifteen years old, which has never been filed for record as required by statute, until the suit was pending, and there is no proof of its genuineness or any explanation of the delay in filing it for record. People v. Etter, 81 Mich. 570, 45 N. W. 1109.

And an instrument purporting to be a marriage certificate after the signature to which appear the letters "J. P. C. Co., Ga.," was held in Miller v. Miller, 43 S. C. 306, 21 S. E. 254, not competent to prove the fact of marriage in Georgia, in the absence of any explanation as to the meaning of the letters.

For an example of a purported marriage certificate held incompetent because not properly authenticated, and not complying with the statute as to form and contents, see People v. Crawford, 62 Hun, 160, 16 N. Y. Supp. 575.

In People v. Imes, 110 Mich. 250, 68 N. W. 157, a foreign certificate of marriage was held unimportant as being hearsay.

An explanation of the absence of a marriage certificate is unnecessary. Lopez v. Missouri, K. & T. R. Co. —Tex. Civ. App. —, 222 S. W. 695.

4. Admissions and declarations.

Marriage may also be shown by the admissions and declarations of the party.¹

Letters from a husband to alleged first wife are admissible to establish the fact of that marriage in a prosecution for bigamy.²

As to the admissibility of declarations of a person since deceased, against his or her marriage, the courts are about equally divided.³

¹ State v. Ulrich, 110 Mo. 350, 19 S. W. 656; Owens v. State, 94 Ala. 97, 10 So. 669; State v. Wylde, 110 N. C. 500, 15 S. E. 5; Israel v.

Arthur, 18 Colo. 158, 32 Pac. 68; *Atlantic City R. Co. v. Goodin* (N. J. Err. & App.) 62 N. J. L. 394, 45 L.R.A. 671, 72 Am. St. Rep. 652, 42 Atl. 333. See also cases in notes to *Lauderdale Peerage Claim*, 17 Abb. N. C. 502, and *Eisenlord v. Clum*, 12 L.R.A. 838.

² *McNeill v. State*, 117 Ark. 8, 173 S. W. 826, 1200. See also note in 28 Harvard L. Rev. 823.

³ Holding such declarations admissible: *Drawdy v. Hesters*, 130 Ga. 161, 15 L.R.A.(N.S.) 190, 60 S. E. 451; *Topper v. Perry*, 197 Mo. 531, 114 Am. St. Rep. 777, 95 S. W. 203; *Imboden v. St. Louis Union Trust Co.* 111 Mo. App. 220, 86 S. W. 263; *Craufurd v. Blackburn*, 17 Md. 49, 77 Am. Dec. 323; *Hube's Succession*, 20 La. Ann. 97; *Barnum v. Barnum*, 42 Md. 251.

Holding such declarations inadmissible: *Hill v. Hill*, 32 Pa. 511; *Hull v. Rawls*, 27 Miss. 471; *Thompson v. Nims*, 83 Wis. 261, 17 L.R.A. 847, 53 N. W. 502; *Moore's Estate*, 9 Pa. Co. Ct. 338.

5. Cohabitation and repute.

Cohabitation of persons as husband and wife, and their reputation and recognition as such in society, is competent evidence of their marriage.¹

¹ That cohabitation and repute are competent, see *State v. Schweitzer*, 57 Conn. 532, 6 L.R.A. 125, 18 Atl. 787; *White v. White*, 82 Cal. 427, 7 L.R.A. 799, 23 Pac. 276; *Arnold v. Chesebrough*, 46 Fed. 700; *Robinson v. Redd*, 19 Ky. L. Rep. 1422, 43 S. W. 435; *State v. Sherwood*, 68 Vt. 414, 35 Atl. 353; *Jackson v. Jackson*, 80 Md. 176, 30 Atl. 752; *Durning v. Hastings*, 183 Pa. 210, 38 Atl. 627; *Richardson v. Smith*, 80 Md. 89, 30 Atl. 568; *Potter v. Potter*, 45 Wash. 401, 88 Pac. 625; *Drawdy v. Hesters*, 130 Ga. 161, 15 L.R.A.(N.S.) 190, 60 S. E. 451. And see note to *White v. White*, 7 L.R.A. 799; *Travers v. Reinhardt*, 205 U. S. 423, 51 L. ed. 865, 27 Sup. Ct. Rep. 563; *Re Baldwin*, 162 Cal. 471, 123 Pac. 267; *Albinet v. Yazoo & M. Valley R. Co.* 107 La. 133, 31 So. 675; *Barnum v. Barnum*, 42 Md. 251; *Eaton v. Eaton*, 66 Neb. 676, 60 L.R.A. 605, 92 N. W. 995, 1 Ann. Cas. 199; *Ferrall v. Broadway*, 95 N. C. 551; *Schwingle v. Keifer*, — Tex. Civ. App. —, 135 S. W. 194, and for additional cases and full explanation see L.R.A. 1915E, 33 and 72.

But marriage cannot be proved by cohabitation alone, however long maintained. *Arnold v. Chesebrough*, 7 C. C. A. 508, 20 U. S. App. 87, 58 Fed. 833.

And a divided reputation in the community, as to the marriage of persons, cannot be proved. *Jackson v. Jackson*, 82 Md. 17, 34 L.R.A. 773, 33 Atl. 317.

The cohabitation, to be evidence of marriage, must be constant, not hidden and limited, and must be accompanied by general repute extending to

relatives and friends of both parties with whom their daily lives are spent. *Re Wallace*, 49 N. J. Eq. 530, 25 Atl. 260; *Smith's Estate*, 3 Lack. L. News, 122.

Common reputation in a family as to who are members of the family is admissible, where no superior evidence is attainable, or in connection with superior evidence, to prove pedigree, legitimacy, and marriage. *Picken's Estate*, 163 Pa. 14, 25 L.R.A. 477, 39 Atl. 875.

6. Presumptions and burden of proof.

a. In general.—The presumption of law is that when a man and woman live together as husband and wife, and declare themselves to be such, they are lawfully married.¹

But if the relationship was meretricious in its inception, the presumption is that it continues as it began, and there must be further evidence to establish the marriage.²

So when this presumption would result in holding some one guilty of a crime such as bigamy³ or miscegenation⁴ it is outweighed by the presumption of innocence. In Southern jurisdictions a presumption of fact is held to exist against a marriage between a white person and a negro even if such marriage was not at the time forbidden by statute.⁵

A decree of separation raises a presumption of the marriage of the parties.⁶

¹ *Robinson v. Taylor*, 42 Fed. 803; *Re Ruffino*, 116 Cal. 304, 48 Pac. 127; *Re Hartman*, 157 Cal. 206, 36 L.R.A.(N.S.) 530, 107 Pac. 105, 21 Ann. Cas. 1302; *State v. Schweitzer*, 57 Conn. 532, 6 L.R.A. 125, 18 Atl. 787; *Bothick v. Bothick*, 45 La. Ann. 1382, 14 So. 293; *Costill v. Hill*, 55 N. J. Eq. 479, 40 Atl. 32.

But it is a rebuttable presumption. *Costill v. Hill*, 55 N. J. Eq. 479, 40 Atl. 32; *Laurence v. Laurence*, 164 Ill. 367, 45 N. E. 1071; *Lula's Succession*, 44 La. Ann. 61, 10 So. 406; *United States v. Smith*, 5 Utah, 232, 273, 14 Pac. 291, 15 Pac. 1.

And the presumption is rebutted by a similar presumption arising from similar relations subsequently sustained to another person. *Hiler v. People*, 156 Ill. 511, 41 N. E. 181.

In an action by a mother to recover damages for the alleged killing of her minor child, the burden of proof rests upon the plaintiff to show marriage, where an issue in that regard is tendered by the defendant. *Lynch v. Knoop*, 118 La. 611, 8 L.R.A.(N.S.) 480, 118 Am. St. Rep. 391, 43 So. 252, 10 Ann. Cas. 804.

² Grimm's Estate, 131 Pa. 199, 6 L.R.A. 717, and note, 18 Atl. 1061; Barnes v. Barnes, 90 Iowa, 282, 57 N. W. 851; Bates v. Bates, 7 Misc. 547, 27 N. Y. Supp. 872; Drawdy v. Hesters, 130 Ga. 161, 15 L.R.A. (N.S.) 190, 60 S. E. 451; Tedder v. Tedder, 108 S. C. 271, 2 A.L.R. 438, 94 S. E. 19.

Relations which are meretricious cannot ripen into connubial relations, but are characterized as immoral until a change of purpose is in some manner manifested. This change of purpose may not require direct proof to render relations innocent, but may be found in circumstances, and inferred from them. Wilcox v. Wilcox, 46 Hun, 40; Caujolle v. Ferrie, 23 N. Y. 90.

But the presumption that when a connection between parties is illicit it continues as it began, whether it is a presumption of fact or of law, is rebuttable. White v. White, 82 Cal. 427, 7 L.R.A. 799, 23 Pac. 276.

³ Bowman v. Little, 101 Md. 273, 61 Atl. 223, 657, 1084; State v. Cooper, 103 Mo. 266, 15 S. W. 327.

⁴ Tedder v. Tedder, *supra*; Armstrong v. Hodges, 2 B. Mon. 69; note in 18 Columbia L. Rev. 276.

⁵ Tedder v. Tedder, *supra*.

⁶ Killackey v. Killackey, 156 Mich. 127, 120 N. W. 680.

b. Presumptions flowing from marriage ceremony.—When the celebration of a marriage is once shown, the contract of marriage, the capacity of the parties, and, in fact, everything necessary to the validity of the marriage, will be presumed, in the absence of proof to the contrary; ¹ and the burden is on the party questioning its validity to prove such facts and circumstances as will establish its invalidity.² The strength of this presumption increases with the lapse of time.³ And the presumption of the marriage of a man and woman, arising from cohabitation and repute, falls before proof of the subsequent marriage, in due form, of the man or woman to a third party.⁴ In case of a conflict of presumptions arising from two marriages of the same party, the general trend of the authorities is to the effect that the presumption in favor of the subsequent marriage overcomes that in favor of the former.⁵

¹ Cartwright v. McGown, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737; Thomas v. Thomas, 124 Pa. 646, 17 Atl. 182; Ward v. Dulaney, 23 Miss. 410; Re Megginson, 21 Or. 387, 14 L.R.A. 540, 28 Pac. 388; State v. McGilvery, 20 Wash. 240, 55 Pac. 115; Summerville v. Summerville, 31 Wash. 411, 72 Pac. 84.

Proof of due solemnization of a marriage is sufficient to raise the presumption that the place where the marriage took place was duly licensed and that the registrar was present (*Sichel v. Lambert*, 15 C. B. N. S. 781, 33 L. J. C. P. N. S. 137, 10 Jur. N. S. 617, 9 L. T. N. S. 687, 12 Week. Rep. 312; *Reg. v. Cresswell*, 45 L. J. Mag. Cas. N. S. 77, L. R. 1 Q. B. Div. 446, 33 L. T. N. S. 760, 24 Week. Rep. 281, 13 Cox, C. C. 126; *Reg. v. Manwaring*, 37 Eng. L. & Eq. Rep. 609); that a proper license had been procured (*Murphy v. State*, 50 Ga. 150; *Piers v. Piers*, 2 H. L. Cas. 331, 9 Eng. Reprint, 1118, 13 Jur. 569); that the ceremony was performed by a competent person (*Legeyt v. O'Brien*, Milward, 325; *Goshen v. Stonington*, 4 Conn. 219, 10 Am. Dec. 121; *State v. Hodgskins*, 19 Me. 155, 36 Am. Dec. 742; *Com. v. Hayden*, 163 Mass. 453, 28 L.R.A. 318, 47 Am. St. Rep. 468, 40 N. E. 846, 9 Am. Crim. Rep. 408; *People v. Schoonmaker*, 117 Mich. 190, 72 Am. St. Rep. 560, 75 N. W. 439; *Re Sloan*, 50 Wash. 86, 17 L.R.A. (N.S.) 960, 96 Pac. 684; *Patterson v. Gaines*, 6 How. 550, 12 L. ed. 553); and that the parties were capable of entering into the marital contract (*Schmisseur v. Beatrice*, 147 Ill. 210, 35 N. E. 525; *Barber v. People*, 203 Ill. 543, 68 N. E. 93; *Alabama & V. R. Co. v. Beardsley*, 79 Miss. 417, 89 Am. St. Rep. 660, 30 So. 660; *Rooney v. Rooney*, 54 N. J. Eq. 231, 34 Atl. 682; *Murchison v. Green*, 128 Ga. 339, 11 L.R.A. (N.S.) 702, 57 S. E. 709; *Franklin v. Lee*, 30 Ind. App. 31, 62 N. E. 78; *Bergdoll's Estate*, 7 Pa. Dist. R. 137).

For other authorities on the question of presumptions flowing from marriage ceremony, see notes in 14 L.R.A. 540, and 16 L.R.A. (N.S.) 98, 34 L.R.A. (N.S.) 940, and L.R.A. 1915E, 186.

§ *Jones v. Gilbert*, 135 Ill. 27, 25 N. E. 566; *Davis v. Davis*, 7 Daly, 308; *Raynham v. Canton*, 3 Pick. 293; *Lindsay v. Lindsay*, 42 N. J. Eq. 150, 7 Atl. 666; *Franklin v. Lee*, 30 Ind. App. 31, 62 N. E. 78; *Cash v. Cash*, 67 Ark. 278, 54 S. W. 744; *Smith v. Reed*, 145 Ga. 724, L.R.A. 1917A, 492, 89 S. E. 815; *Jones v. Jones*, 63 Okla. 208, L.R.A. 1917E, 921, 164 Pac. 463; *Tedder v. Tedder*, 108 S. C. 271, 2 A.L.R. 438, 94 S. E. 19.

The law is so positive in requiring one who asserts the illegality of a marriage to take the burden of proving it that such requirement is enforced even though it involves the proving of a negative. *Schmisseur v. Beatrice*, 147 Ill. 210, 35 N. E. 525; *Senge v. Senge*, 106 Ill. App. 140; *Leach v. Hall*, 95 Iowa, 611, 64 N. W. 790; *Alabama & V. R. Co. v. Beardsley*, 79 Miss. 417, 89 Am. St. Rep. 660, 30 So. 660.

But it is sufficient if he offer such evidence as, in the absence of counter testimony, affords ground for presuming that his contention is true. *Compton v. Benham*, 44 Ind. App. 51, 85 N. E. 365.

§ *Pittinger v. Pittinger*, 28 Colo. 308, 89 Am. St. Rep. 193, 64 Pac. 195; *Howton v. Gilpin*, 24 Ky. L. Rep. 630, 69 S. W. 766; *Scott v. Scott*, 25 Ky. L. Rep. 1356, 77 S. W. 1122; *Picken's Estate*, 163 Pa. 14, 25

L.R.A. 477, 29 Atl. 875; *Nixon v. Wichita Land & Cattle Co.* 84 Tex. 408, 19 S. W. 560.

⁴ *Norman v. Gcode*, 113 Ga. 121, 38 S. E. 317; *Moore v. Heineke*, 119 Ala. 627, 24 So. 374; *Lampkin v. Travelers' Ins. Co.* 11 Colo. App. 249, 52 Pac. 1040; *Lowery v. People*, 172 Ill. 466, 64 Am. St. Rep. 50, 50 N. E. 165, 11 Am. Crim. Rep. 169; *Hiler v. People*, 156 Ill. 511, 47 Am. St. Rep. 221, 41 N. E. 181; *Moore v. Moore*, 102 Tenn. 148, 52 S. W. 778.

The presumption of the validity of a marriage, arising from the performance of a ceremony and cohabitation, will prevail over the presumption of the continued life of the former spouse of one of the parties. *Murchison v. Green*, 128 Ga. 339, 11 L.R.A.(N.S.) 702, 57 S. E. 709; *Cash v. Cash*, 67 Ark. 278, 54 S. W. 744; *Hunter v. Hunter*, 111 Cal. 261, 31 L.R.A. 411, 62 Am. St. Rep. 180, 43 Pac. 756; *Stein v. Stein*, 66 Ill. App. 526; *Smith v. Fuller*, 138 Iowa, 91, 16 L.R.A.(N.S.) 98, 115 N. W. 912; *Dixon v. People*, 18 Mich. 84; *Wagoner v. Wagoner*, 128 Mich. 635, 87 N. W. 898; *Nixon v. Wichita Land & Cattle Co.* 84 Tex. 408, 19 S. W. 560; *McCausland's Estate*, 213 Pa. 189, 110 Am. St. Rep. 540, 62 Atl. 780; *Johnson v. Johnson*, 114 Ill. 611, 55 Am. Rep. 883, 3 N. E. 232; *Greensborough v. Underhill*, 12 Vt. 606; *Kelly v. Drew*, 12 Allen, 107, 90 Am. Dec. 138; *Wilkie v. Collins*, 48 Miss. 496; *Rex v. Twynning*, 2 Barn. & Ald. 386, 106 Eng. Reprint, 407, 20 Revised Rep. 480.

The existence of a divorce may be presumed in favor of the validity of the second marriage. *Blanchard v. Lambert*, 43 Iowa, 228, 22 Am. Rep. 245; *Re Edwards*, 58 Iowa, 437, 10 N. W. 793; *Harris v. Harris*, 8 Ill. App. 57; *Carroll v. Carroll*, 20 Tex. 740; *Klein v. Laudman*, 29 Mo. 259; *Re Rash*, 21 Mont. 170, 69 Am. St. Rep. 649, 53 Pac. 312; *Howton v. Gilpin*, 24 Ky. L. Rep. 630, 69 S. W. 766; *Senge v. Senge*, 106 Ill. App. 140; *Thewlis's Estate*, 217 Pa. 307, 66 Atl. 519.

But where divorce is against the policy of the law it will not be presumed. *McCarty v. McCarty*, 33 S. C. L. (2 Strobb.) 11, 47 Am. Dec. 585.

And a presumption of divorce does not arise from the second marriage, if no record thereof can be found in the counties in which it might properly have been granted. *Barnes v. Barnes*, 90 Iowa, 282, 57 N. W. 851; *Smith v. Fuller*, 138 Iowa, 91, 16 L.R.A.(N.S.) 98, 115 N. W. 912.

⁵ *Bowman v. Little*, 101 Md. 273, 61 Atl. 223, 657, 1084; *Franklin v. Lee*, 30 Ind. App. 31, 62 N. E. 78; *Parsons v. Grand Lodge, A. O. U. w.* 108 Iowa, 6, 78 N. W. 676; *Erwin v. English*, 61 Conn. 502, 23 Atl. 753; *Rooney v. Rooney*, 54 N. J. Eq. 231, 34 Atl. 682; *United States v. Green*, 98 Fed. 63; *Turner v. Williams*, 202 Mass. 500, 24 L.R.A.(N.S.) 1199, 132 Am. St. Rep. 511, 89 N. E. 110; *Smith v. Smith*, 194 App. Div. 543, 185 N. Y. Supp. 558; *Fagin v. Fagin*, 88 Misc. 304, 151 N. Y. Supp. 809.

See also notes in 15 *Columbia L. Rev.* 457, and 34 *Harvard L. Rev.* 790.

But the presumption attaching to a second marriage of a person is not sufficient to overcome direct testimony of himself and his former wife and disinterested witnesses, that the first marriage was legally solemnized. *Sloan v. West*, 50 Wash. 86, 17 L.R.A.(N.S.) 960, 96 Pac. 684. In *McCombs v. State*, 50 Tex. Crim. App. 490, 9 L.R.A.(N.S.) 1036, 123 Am. St. Rep. 855, 99 S. W. 1017, 14 Ann. Cas. 72, it was held that in a prosecution for bigamy the validity of the first ceremonial marriage will not be presumed, but the evidence must show it beyond a reasonable doubt. But in *State v. Kniffen*, 44 Wash. 485, 120 Am. St. Rep. 1009, 87 Pac. 837, 12 Ann. Cas. 113, it was held that in a prosecution for bigamy no presumption arises that there was an impediment to accused's first marriage, and the burden is upon him to establish its illegality.

For other cases on question of presumption of validity of former marriage in prosecution for bigamy, see note in 9 L.R.A.(N.S.) 1036.

7. Marriage by mail.

Evidence that a man and woman exchanged by mail written agreements signed by both in duplicate by which they undertook to assume thenceforth the relation of husband and wife, has been held sufficient to establish a valid common-law marriage.¹

¹ *Great Northern R. Co. v. Johnson*, 166 C. C. A. 181, 254 Fed. 683. The plaintiff in a suit for death of her husband by wrongful act was permitted to establish the necessary fact that she was the widow of the deceased by evidence of a signed agreement sent in duplicate by the deceased from Minnesota to the plaintiff in Missouri, one copy of which she signed and returned to him. This was held to show a common-law marriage which is valid in Missouri.

For full discussion of Marriage by Mail see note in 32 Harvard L. Rev. 848.

MEASURE.

1. Measurer.
2. Comparison.
3. Usage.
4. Best and secondary evidence.
5. Documentary evidence.
6. Parol evidence.
7. Opinions and conclusions.
8. Declarations.
9. Relevancy.

See also QUANTITY; WEIGHT.

1. Measurer.

In the absence of statute, a measurer, though not officially authorized as such, may prove his own measurement,¹ but his certificate is not evidence except as against a party who assented to that standard, or dealt under a usage sanctioning it.²

A stipulation calling for measurement by a particular person does not preclude a party from proving a deficiency by the testimony of any other person.³

¹ Thomas v. Conant (Me.) 5 Atl. 533.

² Bissell v. Campbell, 54 N. Y. 353.

³ Bigler v. Hall, 54 N. Y. 167. Compare QUANTITY; WEIGHT.

2. Comparison.

To prove a measurement not exactly known, a witness may be asked how the size of the thing compared with that of another which is known.¹

¹ Isbell v. New York & N. H. R. Co. 25 Conn. 556 (height of fence). S. P., QUANTITY.

3. Usage.

Usage of trade as to what quantity is actually called for by language expressive of quantity is competent.¹

A general usage of the place being proved,² the burden is on a party seeking to evade its effect, to prove his ignorance of it.

¹ Abb. Tr. Ev. (3d ed.) p. 799.

Proof of custom is admissible to show the amount to be allowed on logs sold according to "board measure," for hollow or pecky logs. Destrehan v. Louisiana Cypress Lumber Co. 45 La. Ann. 920, 13 So. 230.

Also to show the method intended by the parties to a contract for the sale of logs to be followed in measuring the logs, where the contract does not express the mode. Ibid.

² Johnson v. De Peyster, 50 N. Y. 666; Walls v. Bailey, 49 N. Y. 464, 10 Am. Rep. 407; Limited, see Abbott, Tr. Ev. 364, note.

4. Best and secondary evidence.

Scale books of logs are admissible to determine the quantity of lumber cut where they were accurately and properly kept and

are identified by witnesses familiar with their contents. The testimony of camp scalers is not better evidence.¹

And a copy of a tally of logs is admissible in evidence where the paper on which the original tally was kept was not preserved.²

The seller of logs may introduce secondary evidence of the quantity, consisting of measurements made by himself on buying them, where he claims that the measurement of the purchaser from him was fraudulent, and a remeasurement is impossible because the logs have been sawed and the lumber disposed of.³

A witness who testifies to his measurements of plastering work need not produce the tracings or drawings by which he made his measurements.⁴ Nor need witnesses who testify concerning the length and dimensions of piling, in an action for the breach of a contract for the purchase of piling of a specified size and length, have memoranda concerning it.⁵

¹ *Mississippi River Logging Co. v. Robson*, 16 C. C. A. 400, 32 U. S. App. 520, 69 Fed. 773.

² *Moore v. Beale*, 20 Ky. L. Rep. 2029, 50 S. W. 850.

³ *Buckwalter Bros. v. Arnett*, 17 Ky. L. Rep. 1233, 34 S. W. 238.

⁴ *Fitzgerald v. Beers*, 31 Mo. App. 536.

⁵ *Lindsey v. Singletary*, — Tex. Civ. App. —, 43 S. W. 273.

5. Documentary evidence.

A memorandum of measurements of stumps of trees with a rough estimate of the amount of lumber cut from them cannot be put in evidence.¹

In a proceeding to confirm a special tax for an improvement, an assessment roll estimating the width of a street is not overcome by evidence of a witness that the width of the street varied, where his testimony is partly based on measurements found in maps not shown to be correct.²

A record of the height and measurements of an accused person, required to be kept by the marshal, is not inadmissible as hearsay, although the clerk wrote down the measurements as they were taken and called off by another.³

¹ *Snodgrass v. Coulson*, 90 Ala. 347, 7 So. 736.

² *White v. Alton*, 149 Ill. 626, 37 N. E. 96.

³ *United States v. Cross*, 9 Mackey, 365.

6. Parol evidence.

Parol evidence is admissible to show the real agreement of the parties to a written contract for the purchase of a certain number of cords of wood, the length of which it not stated.¹ Also to show that logs should be scaled by a scaler sent by one of the parties, where the written contract contains no provision for scaling.² And to prove a contemporaneous oral agreement for a certain mode of measuring logs sold under a written contract wherein no mode of measurement is specified.³

¹ Maynard v. Render, 95 Ga. 652, 23 S. E. 194.

² Gould v. Boston Excelsior Co. 91 Me. 214, 39 Atl. 554.

³ Johnson v. Burns, 39 W. Va. 658, 20 S. E. 686.

7. Opinions and conclusions.

The court does not exceed its discretion by appointing experts, when necessary, to obtain information as to measurements necessary to be made under a contract, where they are matters peculiarly within the knowledge of experts.¹ And parol testimony of experts is admissible to show the number of acres by measurement in a fractional quarter-section embraced in a patent.²

A civil engineer may testify as an expert as to the number of cubic feet in a wall, based upon the measurements of another engineer, who has testified for the adverse party, in order to show whether the calculations of the latter were correct.³

But a measurement of the cubic contents of a bank of earth is inadmissible where the parties making it had no knowledge of the original contour of the ground; and did not use proper instruments, or run profiles over any portion of the bank.⁴

One without personal knowledge of the work done may testify to the quantity of paving done under a contract where he ascertained the amount after completion by measurements and calculations.⁵

An answer of a witness who has measured an opening through which the plaintiff had fallen, that he was called to go and measure it, and therefore was "careful" in doing so, while it states

a conclusion, is harmless if other portions of his testimony show how the measurements were made.⁶

¹ O'Donnell v. Henry, 44 La. Ann. 845, 11 So. 245.

² Campbell v. Wood, 116 Mo. 196, 22 S. W. 796.

³ Moelering v. Smith, 7 Ind. App. 451, 34 N. E. 675.

⁴ Rothwell v. Dean, 60 Mo. App. 428.

⁵ Vulcanite Paving Co. v. Ruch, 147 Pa. 251, 23 Atl. 555.

⁶ Pennsylvania Co. v. Frund, 4 Ind. App. 469, 30 N. E. 1116.

8. Declarations.

A witness without personal knowledge of the facts, but who obtained all his information from one who made the measurements, is incompetent to testify as to them.¹ But the declarations of a deceased person against the correctness or honesty of the measurements made by him are admissible in an action involving such measurements.²

Measurements made by two persons, each relying on the correctness of the other's statements, cannot be proved by one alone when both can be produced.³

¹ Holmes v. Chartiers Oil Co. 138 Pa. 546, 21 Atl. 231.

² Malone v. Gates, 87 Mich. 332, 49 N. W. 638.

³ Sovereign v. Mosher, 86 Mich. 36, 48 N. W. 611.

9. Relevancy.

Testimony by a station agent that he does not know of any change in a switch, between the time of an accident and of measurements taken over a year afterwards, is sufficient foundation for the introduction of such measurements.¹

¹ Brooke v. Chicago, R. I. & P. R. Co. 81 Iowa, 504, 47 N. E. 74.

Evidence of the correctness and manner of taking measurements of the place where plaintiff was injured by a fall on a sidewalk is admissible. Stapleton v. Newburg, 9 App. Div. 39, 41 N. Y. Supp. 96.

MEDICAL BOOKS.

Medical books as evidence.

Medical books and other learned treatises are not in most jurisdictions, admitted as evidence of the opinions they contain,¹ although such books have been admitted in a few states,² and it has been suggested that this is the better rule.³ Such books may be offered in evidence to contradict an expert witness who has referred to them,⁴ and may be used on cross-examination of such expert even where he has only referred to his general reading of the authorities.⁵

¹ *Denver City Tramway Co. v. Gawley*, 23 Colo. App. 332, 129 Pac. 258; *State v. Brunette*, 28 N. D. 539, 150 N. W. 271, Ann. Cas. 1916E, 340; 26 Harvard L. Rev. 642. See also note in 40 L.R.A. 553.

² *Barfield v. South Highlands Infirmary*, 191 Ala. 553, 68 So. 30, Ann. Cas. 1916C, 1097; *Birmingham R. Light & P. Co. v. Moore*, 148 Ala. 115, 42 So. 1024.

³ Wigmore, Ev. §§ 1960 et seq.

⁴ *Baldwin v. Gaines*, 92 Vt. 62, 102 Atl. 338, and cases there cited.

⁵ *Baldwin v. Gaines*, supra.

MEMBERSHIP.

1. Record.
2. Judicial notice.
3. Presumptions and burden of proof.
 - a. In general.
 - b. Office holding.
 - c. Attendance at meeting.
4. Best and secondary evidence.
5. Parol evidence.

1. Record.

Neither the record of a corporation or society,¹ nor a statutory registry of members,² is conclusive.

¹ *Hawkshaw v. Supreme Lodge K. of H.* 29 Fed. 770; *Lazensky v. Supreme*

Lodge K. of H. 24 Blatchf. 533, 31 Fed. 592; *Cook v. Chittenden*, 25 Fed. 544 (stock book).

Entries in stock book of corporation are admissible in an action against the stockholder to enforce their personal liability on a judgment against the corporation, for the purpose of raising the presumption that one of the defendants whose name appeared on the stock book as a stockholder was the owner of the stock, even though such stock book did not contain the entries prescribed by statute. *Holland v. Duluth Iron Min. & Development Co.* 65 Minn. 324, 68 N. W. 50.

The stock books of a corporation are admissible in evidence in a suit to collect an unpaid subscription to its capital stock, to show that the defendant is a stockholder, where it is shown, either by the contents of the books, or extrinsic evidence, that the person sued is the same person whose name appears upon the books. *Liggett v. Glenn*, 2 C. C. A. 286, 4 U. S. App. 438, 51 Fed. 381; *Wells v. Thompson Mfg. Co.* 54 Mo. App. 41; *Taussig v. Glenn*, 2 C. C. A. 314, 4 U. S. App. 524, 51 Fed. 409.

A stock book of a corporation showing the name of an individual as a stockholder is admissible in evidence to show that he was a subscriber to the stock of such corporation. *South Branch R. Co. v. Long*, 43 W. Va. 131, 27 S. E. 297.

A stub of a stock certificate book of a corporation, containing a memorandum indicating that a certificate of shares of stock had been issued to a person, is wholly insufficient to prove that he was a member of such corporation. *Hinsdale Sav. Bank v. New Hampshire Bkg. Co.* 59 Kan. 716, 54 Pac. 1051.

Entries on books of a corporation of a person's name as a stockholder are inadmissible against him to show his character as such in a suit to recover assessments from him. *Carey v. Williams*, 25 C. C. A. 227, 51 U. S. App. 204, 79 Fed. 906.

The books of a corporation, showing who are shareholders, are admissible in evidence to show the assent of the corporation to the contract of membership, but not to show the contract of the shareholder. *Ibid.*

The only competent evidence of suspension or expulsion of a member of a fraternal and beneficial society, or that such a member lacked good standing in his lodge, is some authorized resolution or act of the lodge by which he is expelled, suspended or degraded. *Osterman v. District Grand Lodge, I. O. B. B.* 5 Cal. Unrep. 237, 43 Pac. 412; *High Court of I. O. of F. v. Edelstein*, 70 Ill. App. 95; *High Court I. O. of F. v. Zak*, 136 Ill. 185, 26 N. E. 593.

Proof of the fact of membership is prima facie made by a copy of the record of the board of directors. *Van Frank v. United States Masonic Benev. Asso.* 158 Ill. 560, 41 N. E. 1005.

A certificate of the secretary of a lodge, stating merely his conclusion derived from the lodge records, as to the time when a certain person became a member and the date at which he received his demit, is inadmissible where the entry showing these facts might have been established by examined copies. *Howard v. Russell*, 75 Tex. 171, 12 S. W. 525.

The report of a local lodge of a benefit society, that a member was suspended on a certain date, is not entitled to any weight, when the assessment for which it is stated the member was in default was not payable until two weeks after the suspension, or until the day following that on which the report was forwarded. *Order of Chosen Friends v. Austerlitz*, 75 Ill. App. 74.

² *Brice, Ultra Vires*, 135, notes 3, 4; *People v. Peck*, 11 Wend. 604 (under statute requiring register to be kept of members entitled to vote); *Herries v. Wesley*, 13 Hun, 492 (list presumptive evidence against stockholders).

A stock-certificate book, designed for the stock and transfer book of a corporation, though not designated as such, and the stock ledger and stock journal containing the names of all the stockholders, are admissible to enable the court to determine the individual liability of stockholders for the debts of the corporation, under Cal. Civ. Code, § 378 (*Kerr 1920, Civ. Code of Cal. Part I. p. 574*), providing that corporations for profit shall keep a book to be known as the "stock and transfer book," in which must be kept a record of all stock and transfers thereof. *Knowles v. Sandercock*, 107 Cal. 629, 40 Pac. 1047.

2. Judicial notice.

The court cannot, for the purpose of applying the act of Congress to protect commerce against unlawful monopolies, take judicial notice that a railroad corporation is a member of a traffic association.¹ But it is a matter of common knowledge that the attendants of any particular church are not limited to its members.²

¹ *Houston & T. C. R. Co. v. Dumas*, — Tex. Civ. App. —, 43 S. W. 609.

² *McAlister v. Burgess*, 161 Mass. 269, 24 L.R.A. 158, 37 N. E. 173.

3. Presumptions and burden of proof.

a. In general.—Membership¹ in good standing² in a fra-

ternal or benevolent association will be presumed to continue such until the contrary is made to appear.

And a benefit society has the burden of proving that a member was not in good standing³ at the time of his death, or had not been a member sufficiently long to entitle him to a benefit.⁴

A stockholder in a corporation is presumed to continue such until the contrary is shown.⁵

And one whose name appears as a stockholder on the stock-book of a corporation will be presumed the owner of the stock, and has the burden of overcoming such presumption in an action against him as a stockholder.⁶

The burden is upon one seeking the removal of an election officer on the ground that he is not a member of the political party to which he is attributed, to prove that fact.⁷

¹ Cornfield v. Order Brith Abraham, 64 Minn. 261, 68 N. W. 970.

² Grand Lodge A. O. U. W. v. Furman, 6 Okla. 649, 52 Pac. 932; High Court I. O. F. v. Edelstein, 70 Ill. App. 95.

The production of a mutual benefit certificate by the plaintiff on the trial of an action thereon makes a prima facie case that the assured was in good standing at the time of his death. Forse v. Supreme Lodge K. of H. 41 Mo. App. 106.

³ Mulroy v. Supreme Lodge, K. H. 28 Mo. App. 463; Demings v. Supreme Lodge K. of P. 20 App. Div. 622, 48 N. Y. Supp. 649.

The burden of proof is upon a fraternal and beneficial society, to prove that a member was not in good standing at the time of his death, where it is expressly admitted in its answer that he "remained such member down to the time of his death, except as hereinafter set forth." Osterman v. District Grand Lodge, No. 4, I. O. B. B. 5 Cal. Unrep. 237, 43 Pac. 412.

⁴ Weiss v. Tennant, 2 Misc. 213, 21 N. Y. Supp. 252.

⁵ Barron v. Paine, 83 Me. 312, 22 Atl. 218.

⁶ Holland v. Duluth Iron Min. & Development Co. 65 Minn. 324, 68 N. W. 50.

But see Sigua Iron Co. v. Greene, 31 C. C. A. 477, 59 U. S. App. 555, 88 Fed. 207, holding that the appearance of a person's name upon the books of a corporation as a stockholder does not constitute prima facie proof that he is a stockholder, so as to throw the burden of disproving it on him.

Burden of showing time of a transfer of stock of a corporation on the books of the company is upon defendant asserting it as a defense in an action under Compiled Code of Iowa, 1919, § 5357, p. 1628, to recover the amount of a judgment against the corporation from a stockholder. *Calumet Paper Co. v. Stotts Investment Co.* 96 Iowa, 147, 64 N. W. 782.

⁷ *Mullen v. Morrow*, 123 N. C. 773, Appx. 31 S. E. 1003.

b. Office holding.—If holding stock or membership is a legal qualification required for holding office, proof of holding office is prima facie evidence of membership or holding stock.¹

But a person will not be presumed to be a stockholder in a corporation, merely because he is its secretary and treasurer.²

¹ *Butterfield v. Radde*, 6 Jones & S. 1; *Herries v. Wesley*, 13 Hun. 492.

(This presumption is not sufficient against evidence to the contrary.

Butterfield v. Radde, 9 Jones & S. 181, reversing 6 Jones & S. 1.)

² *Horbach v. Tyrrell*, 48 Neb. 514, 37 L.R.A. 434, 67 N. W. 485.

c. Attendance at meeting.—Attendance at meeting raises no presumption of membership.¹

¹ *Stevens v. Taft*, 3 Gray, 487; *Kilborn v. Rewee*, 8 Gray, 415.

In an action to recover money alleged to have been paid at the defendant's request, for a certificate of stock in a baseball corporation, defendant having denied such request or ratification, or that he ever became a stockholder, evidence that while games were in progress the defendant occupied seats reserved exclusively for stockholders is admissible. *Priest v. Hale*, 155 Mass. 102, 29 N. E. 197.

4. Best and secondary evidence.

In the absence of any stock book found among the papers and books of a corporation, the treasurer is a competent witness to the fact that he issued certificates of stock to certain persons.¹

¹ *Congdon v. Winsor*, 17 R. I. 236, 21 Atl. 540.

5. Parol evidence.

The minutes of a mutual association are not conclusive of the fact that a member was legally suspended, as required by its laws, and may be contradicted by parol evidence.¹

It may be shown by parol who were the members of a partnership at the time goods were sold to it, although the written agreements under which it was formed show different persons as members.²

¹ Supreme Lodge K. of H. v. Wickser, 72 Tex. 257, 12 S. W. 175.

² Fonda v. Burton, 63 Vt. 355, 22 Atl. 594.

MERGER.

1. Presumptions and burden of proof.
2. Extrinsic evidence.
3. Declarations and acts.

For kindred topics, see ELECTION; INTENT.

1. Presumptions and burden of proof.

It will be presumed where a mortgagee of land acquires the equity of redemption and expresses at the time no intention in relation to whether or not the mortgage shall merge in the fee, that he intended to do that which would prove most advantageous to himself, in the absence of circumstances indicating a contrary purpose.¹

And one taking a conveyance of mortgaged property in satis-

faction of the mortgage debt has the burden of showing that no merger of the mortgage into the fee was intended.² Whenever two estates in the same property unite in the same person in the same capacity, and it is contended that no merger took place, the person making such contention, if entitled so to do, must allege and prove facts negating the existence of such merger.³

¹ Wyatt-Bullard Lumber Co. v. Bourke, 55 Neb. 9, 75 N. W. 241.

It is presumed that a merger was not intended by the grantee of mortgaged land, who is also the mortgagee, when the mortgage is essential to his security as against an intervening title or lien, it being a question of intent and of interest whether a merger results from uniting the fee with the mortgage. Moffet v. Farwell, 222 Ill. 543, 78 N. E. 925, affirming 123 Ill. App. 528.

And the presumption is against a merger where an owner of an undivided interest in real property purchased a mortgage covering the entire property; and the burden is upon a person asserting a merger to prove facts tending to rebut such presumption. Brendt v. Bredt, 25 Misc. 359, 53 N. Y. Supp. 1026.

² Gainey v. Anderson, 87 S. C. 47, 31 L.R.A.(N.S.) 323, 68 S. E. 888.

³ Muscogee Mfg. Co. v. Eagle & P. Mills, 126 Ga. 210, 7 L.R.A.(N.S.) 1139, 54 S. E. 1028.

2. Extrinsic evidence.

The question whether one contract or title merges in another is no longer regarded as a question of law determinable only on the face of the papers; but extrinsic evidence is freely received to show intention,¹ and to show how the interest of the party is affected,—at least before a third person's right has intervened.²

¹ Murdock v. Gilchrist, 52 N. Y. 242, Reversing 1 Alb. L. J. 124 (executory contract not merged in deed if otherwise agreed).

² Smith v. Roberts, 91 N. Y. 470 (mortgage not merged in fee).

3. Declarations and acts.

Declarations of intent are not alone conclusive, and proof of them does not preclude proof of subsequent acts establishing a contrary intent.¹

¹ James v. Morey, 2 Cow, 246, reversing James v. Johnson, 6 Johns. Ch. 417.

MESSAGE.

1. Effect of oral message.
2. Answer competent.
3. How answer proved.

And see ADMISSIONS AND DECLARATIONS; CONVERSATION; TELEGRAMS;
TELEPHONE.

1. Effect of oral message.

As to effect of oral messages and errors therein, see ¹

- ¹ *Oakland Ice Co. v. Maxcy*, 74 Me. 294; *Brown v. Leach*, 107 Mass. 364; *Tryon v. White & C. Co.* 62 Conn. 161, 20 L.R.A. 291, 25 Atl. 712, and cases cited in note to *Oregon S. S. Co. v. Otis*, 14 Abb. N. C. 397, 398.

2. Answer competent.

The answer returned by the messenger is competent as part of the *res gestæ* of the message.¹

- ¹ *McGoon v. Irvin*, 1 Pinney (Wis.) 526, 44 Am. Dec. 409.

3. How answer proved.

The answer reported by the messenger on returning from making an inquiry may be proved by anyone who heard it.¹

- ¹ *Robbins v. Richardson*, 2 Bosw. 248.

The bearer of a message calling for an answer is competent to testify to the answer he reported as having been received, notwithstanding the delivery of the message itself may have been a communication which he is incompetent to testify to. *Hill v. Woolsey*, 113 N. Y. 391, 21 N. E. 127.

MISNOMER.

1. In contract or deed.
2. In proceedings.

See also **IDENTITY**; **NAME**.

1. In contract or deed.

Misnomer may be proved and corrected by oral evidence in any action without bringing an action to reform the instrument.¹

The record of a deed accepted and placed on record by the grantee, showing a misnomer of such grantee, is sufficient proof that the deed had the same defect, and that the grantee knew it.²

- ¹ *Cleveland v. Burnham*, 64 Wis. 347, 25 N. W. 407, 409, and cases cited.
² *Blinn v. Chessman*, 49 Minn. 140, 51 N. W. 666.

2. In proceedings.

Misnomer in name used in the process and pleading is freely amendable before judgment whenever the fact appears.¹

A variance in name is not fatal where there is no question as to the identity² of the person, firm, or corporation, and the opposite party has not been misled thereby³ or affected in any substantial right.⁴

- ¹ *Bank of Havana v. Magee*, 20 N. Y. 355; 1 Abbott, N. Pr. & F. 697.
² *Galveston, H. & S. A. R. Co. v. Gormley*, — Tex. Civ. App. —, 35 S. W. 488; *Hackett v. Marmet Co.* 3 C. C. A. 76, 8 U. S. App. 149, 52 Fed. 268.

A foreign judgment purporting to be against "C. A. Coutant" is not inadmissible in an action thereon against "Charles A. Coutant," because of the variance, especially where the affidavit verifying the answer is signed "C. A. Coutant," and recites that "Charles A. Coutant" was duly sworn. *Rice v. Coutant*, 38 App. Div. 543, 56 N. Y. Supp. 351.

An allegation that one partner at the dissolution of the partnership assumed liabilities of the firm, as shown by an itemized list showing a debt due "J. McAdam & Co.," is not sustained by proof of a debt due "John McAdams." *Elbridge v. McAdams*, — Tex. Civ. App. —, 24 S. W. 310.

A variance between allegations and proof is not shown where the writ describes plaintiff as "United States National Bank of New York,"

and the judgment introduced in evidence describes plaintiff as "United States National Bank," and the complaint sets forth that plaintiff is "an association or corporation duly organized and existing under the act of Congress of the United States known as the national bank act, and carrying on business in the city of New York as a national bank." *United States Nat. Bank v. Venner*, 172 Mass. 449, 52 N. E. 543.

That the name of the payee of a note as described in a complaint in replevin is different from the name of the payee as it appears when the note is presented in evidence does not constitute a variance, where the difference was the result of an alteration in the note made after execution. *Citizens' Nat. Bank v. Lewis*, 78 Ill. App. 217.

3 *Osborn v. Logus*, 28 Or. 302, 37 Pac. 456, 38 Pac. 190, 42 Pac. 997; *Bosley v. Pease*, 86 Tex. 292, 24 S. W. 279.

▲ variance between an appeal bond offered in evidence and that set out in the complaint in inserting the name of "Wilson" for "Nelson" is a mere clerical error, and not misleading. *Thalheimer v. Crow*, 13 Colo. 397, 22 Pac. 779.

4 A slight variance relating to the firm name of interveners between a plea of intervention and proofs will be disregarded where it cannot affect any substantial right. *Finding v. Hartman*, 14 Colo. 596, 23 Pac. 1004.

MISTAKE.

1. Mistake in certified copy.
2. Mistake as an excuse.
3. Oral evidence.
4. Burden of proof.
5. Cogency of proof.

See also ACCIDENTS; ACCOUNTS; INTENT; KNOWLEDGE.

1. Mistake in certified copy.

A mistake in a certified copy offered in evidence may be proved by any witness who has read the original instrument and the record thereof.¹

¹ *Booth v. Tiernan*, 109 U. S. 205, 27 L. ed. 907, 3 Sup. Ct. Rep. 122.

2. Mistake as an excuse.

For the purpose of negating the excuse that an act was a mistake, evidence of a course of similar acts is competent as tending to show intent.¹

¹ Criminal Trial Brief.

3. Oral evidence.

The rule that oral evidence is inadmissible to contradict a written instrument does not preclude oral evidence of mistake.¹

¹ *Fitschen v. Thomas*, 9 Mont. 52, 22 Pac. 450; *Gill v. Pelkey*, 54 Ohio St. 348, 43 N. E. 991; *Sperry v. Wesco*, 26 Or. 483, 38 Pac. 623; *Brock v. O'Dell*, 44 S. C. 22, 21 S. E. 976; *Bumpas v. Zachary*, — Tex. Civ. App. —, 34 S. W. 672; *Fudge v. Payne*, 86 Va. 303, 10 S. E. 7. See more fully cases in notes to *Page v. Higgins*, 5 L.R.A. 158; *Ferguson v. Rafferty*, 6 L.R.A. 33, 46; *German Ins. Co. v. Gueck*, 6 L.R.A. 838, and *Durkin v. Cobleigh*, 17 L.R.A. 272.

Otherwise where the mistake is a mistake of law. *Potter v. Sewall*, 54 Me. 142; *Wheaton v. Wheaton*, 9 Conn. 96.

No proof as to mistake or error can be heard in court to contradict the provisions of a statute which is perfectly regular on its face, and has passed its several readings and been duly ratified. *Russell v. Ayer*, 120 N. C. 180, 37 L.R.A. 246, 27 S. E. 133.

That a provision in a will locates land devised in a section where testator owned no land will not admit parol evidence of a mistake in description, although he in fact owned land answering the description in another section, of which he did not dispose in the will. *Lomax v. Lomax*, 218 Ill. 629, 6 L.R.A.(N.S.) 942, 75 N. E. 1076.

For discussion of the subject of correction of mistake in description of land devised by will, see ante, chapter on Intent, § 9, b, and notes in 16 L.R.A. 321, 6 L.R.A.(N.S.) 942, and L.R.A.1915E, 1008.

4. Burden of proof.

The burden of proving mistake in a written instrument is upon the party impeaching the writing upon that ground.¹

¹ *Smith v. Allen*, 102 Ala. 407, 14 So. 760; *Martyn v. Arnold*, 36 Fla. 446 18 So. 791; *Fitschen v. Thomas*, 9 Mont. 52, 22 Pac. 450; *Parker v. Thomson*, 21 Or. 523, 28 Pac. 502; *Brown v. Chandler*, 50 S. C. 385, 27 S. E. 868. See also cases in note to *Page v. Higgins*, 5 L.R.A. 159.

5. Cogency of proof.

One seeking to reform a written instrument upon the ground of mistake must establish that fact by proof which is full, clear, and decisive, free from doubts and uncertainty, and such as to satisfy the conscience of a court.¹

- ¹ *Van Vleet v. Sledge*, 45 Fed. 743; *Breneiser v. Davis*, 141 Pa. 85, 21 Atl. 508; *Linscott v. Linscott*, 83 Me. 384, 22 Atl. 253; *Chapman v. Persinger*, 87 Va. 581, 13 S. E. 549; *Long v. Long*, 12 Ky. L. Rep. 883, 15 S. W. 853; *Shulters v. Toledo*, 57 Ohio St. 667, 50 N. E. 1133; *Parker v. Vanhoozer*, 142 Mo. 621, 44 S. W. 728; *Hupsch v. Resch*, 45 N. J. Eq. 657, 18 Atl. 372; *Conant v. Kimball*, 95 Wis. 550, 70 N. W. 74; *Ren-sink v. Wiggers*, 99 Iowa, 39, 68 N. W. 569. But that proof beyond reasonable doubt is not necessary, see *Southard v. Curley*, 134 N. Y. 148, 16 L.R.A. 561, 31 N. E. 330. It is sufficient if the evidence tending to prove the alleged mistake, if standing alone and uncontradicted, would establish a *prima facie* case of mistake. *Ward v. Waterman*, 85 Cal. 488, 24 Pac. 930. See further, on this question, cases in notes to *Page v. Higgins*, 5 L.R.A. 159, and *Ferguson v. Rafferty*, 6 L.R.A. 46, and 17 L.R.A. 272.

MOON.

Almanac.

An almanac may be used to ascertain the time at which the moon rose or set on a specified date.¹

- ¹ *Mobile & B. R. Co. v. Ladd*, 92 Ala. 287, 9 So. 169; *Munshower v. State*, 55 Md. 11, 39 Am. Rep. 414.

The controversy is not as to whether it is evidence, as held in *Munshower v. State*, 55 Md. 11, 39 Am. Rep. 414; or only the means of refreshing the knowledge of the court or jury, as held in *Case v. Perew*, 46 Hun, 57. S. P., SUNRISE.

On an issue as to the time when the moon set on a particular night, an almanac whose calculations were made on the basis of solar time is admissible without proof of the difference between solar and standard time. *State v. Murray*, 83 Kan. 148, 110 Pac. 103.

MORTALITY TABLES.

1. Admissibility generally.
2. Necessity and conclusiveness.
3. Secondary evidence of contents.
4. Authentication.

Judicial notice as to, see JUDICIAL NOTICE, § 1.

1. Admissibility generally.

On an issue as to the probable duration of a life, standard mortality tables are admissible to aid the jury in determining the question.¹ The better rule is that good health need not be shown before such tables can be admitted, and that evidence of poor health or disease goes to the weight and not to the admissibility of such evidence.² Some courts, however, hold that such tables are made up of selected risks, persons of sound mind and body who have no physical defects or constitutional troubles, and therefore, that a party relying on such table must show that the person whose expectancy of life is in question belongs to the class of persons from which such tables are made up.³ And mortality tables have no connection with a suit for weekly benefits, and the admission thereof in evidence is error.⁴ And such tables cannot be used in fixing the length of a sentence in a criminal case.⁵

¹ *Collins Park & Belt R. Co. v. Ware*, 112 Ga. 663, 37 S. E. 975; *Calvert v. Springfield Electric Light & P. Co.* 231 Ill. 290, 14 L.R.A.(N.S.) 782, 83 N. E. 184, 12 Ann. Cas. 423; *Shover v. Myrick*, 4 Ind. App. 7, 30 N. E. 207; *Pittsburgh, C. C. & St. L. R. Co. v. Lightheiser*, 168 Ind. 438, 78 N. E. 1033; *Kircher v. Larchwood*, 120 Iowa, 578, 95 N. W. 184; *Croft v. Chicago, R. I. & P. R. Co.* 132 Iowa, 687, 109 N. W. 1053; *Illinois C. R. Co. v. Houchins*, 121 Ky. 526, 1 L.R.A.(N.S.) 375, 123 Am. St. Rep. 205, 89 S. W. 530; *Daniell v. Boston & M. R. Co.* 184 Mass. 337, 68 N. E. 337; *Wilkins v. Flint*, 128 Mich. 262, 87 N. W. 195; *Merrinane v. Miller*, 157 Mich. 279, 25 L.R.A.(N.S.) 585, 118 N. W. 11, 122 N. W. 82; *Hunn v. Michigan C. R. Co.* 78 Mich. 513, 7 L.R.A. 500, 44 N. W. 502; *St. Louis, S. F. & T. R. Co. v. Taylor*, — Tex. Civ. App. —, 134 S. W. 819; *Pecos & N. T. R. Co. v. Williams*. 34 Tex. Civ. App. 100, 78 S. W. 5; *Ward v. Dampskibsselskabet Kjoebenhavn*, 144 Fed. 524; *Nevers Lumber Co. v. Fields*, 151 Ala. 367,

44 So. 81; *Kansas City Southern R. Co. v. Morris*, 80 Ark. 528, 98 S. W. 363, 10 Ann. Cas. 618; *Valente v. Sierra R. Co.* 151 Cal. 534, 91 Pac. 481, s. c. subsequent appeal in 158 Cal. 413, 111 Pac. 95; *Denver, S. P. & P. R. Co. v. Woodward*, 4 Colo. 1, 9 Am. Neg. Cas. 115; *Western & A. R. Co. v. Clark*, 117 Ga. 548, 44 S. E. 1; *Winn v. Cleveland, C. C. & St. L. R. Co.* 239 Ill. 132, 87 N. E. 954; *Pittsburgh, C. C. & St. L. R. Co. v. Brown*, 178 Ind. 11, 97 N. E. 145, 98 N. E. 625; *Erb v. Popritz*, 59 Kan. 264, 68 Am. St. Rep. 362, 52 Pac. 871; *Southern R. Co. v. Adkins*, 133 Ky. 219, 117 S. W. 321, 119 S. W. 820; *Little v. Bousfield & Co.* 165 Mich. 654, 131 N. W. 63; *Deisen v. Chicago, St. P. M. & O. R. Co.* 43 Minn. 454, 45 N. W. 864; *Collins v. Star Paper Mill Co.* 143 Mo. App. 333, 127 S. W. 641; *Murray v. Omaha Transfer Co.* 98 Neb. 482, 7 A.L.R. 1349, 153 N. W. 488; *Notto v. Atlantic City R. Co.* 75 N. J. L. 826, 17 L.R.A. (N.S.) 1138, 127 Am. St. Rep. 835, 69 Atl. 968; *Hall v. Germain*, 37 N. Y. S. R. 320, 14 N. Y. Supp. 5, affirmed in 131 N. Y. 536, 30 N. E. 591; *Coley v. Statesville*, 121 N. C. 301, 28 S. E. 482; *Rober v. Northern P. R. Co.* 25 N. D. 394, 142 N. W. 22; *Emery v. Philadelphia*, 208 Pa. 492, 57 Atl. 977, 16 Am. Neg. Rep. 563; *Reynolds v. Narragansett Electric Lighting Co.* 26 R. I. 457, 59 Atl. 393; *Whaley v. Vidal*, 27 S. D. 642, 132 N. W. 248; *Huber v. Texas & P. R. Co.* — Tex. Civ. App. —, 113 S. W. 984; *Norfolk & W. R. Co. v. Spencer*, 104 Va. 657, 52 S. E. 310; *Culp v. Virginian R. Co.* 77 W. Va. 125, 87 S. E. 187; *Louisville & N. R. Co. v. Thomas*, 170 Ky. 145, 185 S. W. 840. For additional cases see notes in L.R.A. 1918C, 1071 and 13 Mich. L. Rev. 58.

2 *Broz v. Omaha Maternity & General Hospital Asso.* 96 Neb. 648, L.R.A. 1915D, 334, 148 N. W. 575, 7 N. C. C. A. 298, and cases there cited.

3 *Vicksburg R. Power & Mfg. Co. v. White*, 82 Miss. 468, 34 So. 331.

4 *Baltimore & O. Employees' Relief Asso. v. Post*, 122 Pa. 579, 2 L.R.A. 44, 9 Am. St. Rep. 147, 15 Atl. 885.

5 *People v. Burns*, — Cal. —, 60 L.R.A. 270, 69 Pac. 16, on rehearing 138 Cal. 159, 60 L.R.A. 272, 70 Pac. 1087.

Such a table was held inadmissible in the case of a child four and a half years of age, where the table did not show the expectancy of life of a person under ten years of age. *Decker v. McSorley*, 111 Wis. 91, 86 N. W. 554.

2. Necessity and conclusiveness.

While mortality tables are competent evidence, their introduction is not indispensable¹ although some courts hold that a verdict will be set aside as excessive where it appears that the jury computed damages on a basis in excess of that supported by mortality tables.² Such tables are not conclusive on the question of expectancy of life, and the jury may determine such

expectancy from all the evidence.³ Where there is no other evidence showing an expectancy of life greater or less than that shown by the tables, such tables are held to be controlling.⁴

¹ Ruehl v. Lidgerwood Rural Teleph. Co. 23 N. D. 6, L.R.A.1918C, 1063, 135 N. W. 793, Ann. Cas. 1914C, 680; Little v. Bousfield & Co. 165 Mich. 654, 131 N. W. 63; Moses v. Mathews, 95 Neb. 672, 146 N. W. 920, Ann. Cas. 1915A, 698. See also note in L.R.A.1918C, 1076.

² Little v. Bousfield & Co. *supra*.

³ Moses v. Mathews, 95 Neb. 672, 146 N. W. 920, Ann. Cas. 1915A, 698; Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545, 30 L. ed. 257, 7 Sup. Ct. Rep. 1, 10 Am. Neg. Cas. 754; Joliet v. Blower, 155 Ill. 414, 40 N. E. 619; Jones v. McMillan, 129 Mich. 86, 88 N. W. 206; Texas Mexican R. Co. v. Higgins, 44 Tex. Civ. App. 523, 99 S. W. 200; Ward v. Dampskibsselskabet Kjoebenhavn (D. C. E. D. Pa.) 144 Fed. 524; Hunn v. Michigan C. R. Co. 78 Mich. 513, 7 L.R.A. 500, 44 N. W. 502.

See also for additional cases note in L.R.A.1918C, 1074.

⁴ Little v. Bousfield & Co. *supra*.

3. Secondary evidence of contents.

One who has studied life tables cannot testify as to expectancy of life of a person, from the knowledge thus gained, where he has no other knowledge on the subject.¹

¹ Erb v. Popritz, 59 Kan. 264, 68 Am. St. Rep. 362, 52 Pac. 871.

4. Authentication.

The authenticity of writings produced as standard mortality tables must be established by proof satisfactory to the court.¹ The tables must be shown to have been in actual use or to have acquired a reputation for accuracy.² But it is not necessary to show that they have been universally adopted.³ Tables used by reputable insurance companies are admissible without further proof as to their authenticity.⁴

¹ Camden & A. R. Co. v. Williams, 61 N. J. L. 646, 40 Atl. 634.

Life tables printed pursuant to legislative authority, as in a Code Supplement, and there stated to be based upon the actuaries and combined experience tables, are sufficiently authenticated to be admitted in evidence. Clark v. Van Vleck, 135 Iowa, 194, 112 N. W. 648.

And in *Gorman v. Minneapolis & St. L. R. Co.* 78 Iowa, 509, 43 N. W. 303, mortality tables were admitted as properly authenticated where, in addition to the fact that the tables offered were contained in Johnson's New Universal Encyclopedia, there was the testimony of one who had "had something to do with the books," that he considered it a standard and scientific work.

² *Notto v. Atlantic City R. Co.* 75 N. J. L. 826, 17 L.R.A.(N.S.) 1138, 127 Am. St. Rep. 835, 69 Atl. 968.

³ *Mississippi & T. R. Co. v. Ayres*, 16 Lea, 725.

⁴ *Mississippi & T. R. Co. v. Ayres*, 16 Lea, 725; *San Antonio & A. P. R. Co. v. Morgan*, — Tex. Civ. App. —, 46 S. W. 672; *Missouri, K. & T. R. Co. v. Ransom*, 15 Tex. Civ. App. 692, 41 S. W. 826; *Gulf, C. & S. F. R. Co. v. Johnson*, 10 Tex. Civ. App. 254, 31 S. W. 255; *Kreuger v. Sylvester*, 100 Iowa, 647, 69 N. W. 1059; *Valente v. Sierra R. Co.* 151 Cal. 534, 91 Pac. 481. See also note in L.R.A.1918C, 1076.

MOTIVE AND PURPOSE.

1. Direct testimony.
2. Declarations.
3. Motive as affecting cause of action.
4. Motive in suing.
5. Relevant facts.

For kindred topics, see BELIEF; CORROBORATION; EXPLANATION; FEELINGS; GOOD FAITH; INDICTMENT; INTENT; KNOWLEDGE; MALICE.

As to criminal cases, see Criminal Trial Brief.

See also *Spannell v. State*, 83 Tex. Crim. Rep. 418, 2 A.L.R. 593, 203 S. W. 357; *People v. Thau*, 219 N. Y. 39, 3 A.L.R. 1537, 113 N. E. 556.

1. Direct testimony.

When the motive of an act is relevant, a person may testify to the motive or inducement which led him to do it.¹

One who participated in a transaction may testify directly to the purpose of any ambiguous act.²

But a witness cannot give his opinion as to the motive or purpose of another.³

- ¹ *Richmondville Union Seminary v. McDonald*, 34 N. Y. 379 (holding that, in an action by a corporation upon a subscription paper, an officer of the corporation, examined as a witness and having knowledge upon the matter, may state that debts were contracted by the corporation on the

faith of the subscription. This is rather a matter of fact than opinion); *Hess v. Blakeslee*, 2 N. Y. S. R. 309 (creditor may testify that debtor's representations induced him to delay proceedings); *Barrett v. Western*, 66 Barb. 205 (plaintiff suing for deceit may testify that he relied on defendant's representations); *Kruse v. Seiffert & W. Lumber Co.* 108 Iowa, 352, 79 N. W. 118; *Cushing v. Friendship*, 89 Me. 525, 36 Atl. 1001; *Hay v. Reid*, 85 Mich. 296, 48 N. W. 507; *McCormack v. Perry*, 47 Hun, 71; *Blankenship & B. Co. v. Willis*, 1 Tex. Civ. App. 657, 20 S. W. 952. s. p., *Ross v. Terry*, 63 N. Y. 613 (reliance on personal responsibility, competent as negating presumption that there was no implied warranty). *Contra*: *Baldwin v. Walker*, 91 Ala. 428, 8 So. 364. Compare *Cullmans v. Lindsay*, 114 Pa. 166, 6 Atl. 332 (holding that testimony to unexpressed motive is not competent; but the question is for the jury); *Weaver v. Cone*, 174 Pa. 104, 34 Atl. 551 (holding it competent to ask plaintiff, in an action for fraudulently procuring him to sell corporate stock at less than its value, what induced him to sell at the figure at which he did sell).

Thus, it having been shown that a life policy was issued on the representations of the insured, the agent or officer of the company, to whom they were made, may testify whether the representations had any and what effect upon his mind, and in inducing his recommendation of the risk; and whether, but for the representations, he would have recommended its acceptance. *Valton v. National Loan Fund Life Assur. Soc.* 4 Abb. App. Dec. 437, reversing 17 Abb. Pr. 268. (But *contra*, see § 1, *INDUCEMENT*.)

But if the applicant made no representations, evidence as to what effect facts respecting the habits of the insured would have on the minds of the insurers is incompetent. *Rawls v. American Mut. L. Ins. Co.* 27 N. Y. 282, 291, 84 Am. Dec. 280, affirming 36 Barb. 357; *Joyce v. Maine Ins. Co.* 45 Me. 168. s. p., *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 473, 24 L. ed. 256.

For authorities in criminal cases, see Criminal Trial Brief.

Testimony of a witness (in the interest of his employers), as to his motive in doing an act, is not conclusive. *Courtney v. Baker*, 60 N. Y. 1, dismissing appeal from, and overruling, 5 Jones & S. 249.

Plaintiff in an action for alienating the affections of his wife may properly answer a question as to why he left defendant's farm by stating that defendant gained the affections of his wife, and that she was no more a wife to him. *Hartpence v. Rogers*, 143 Mo. 623, 45 S. W. 650.

An agent who sued out a written attachment cannot testify that he was not actuated by malice in suing it out, but may state that in taking out the writ he did not intend to injure or harass defendant, and was actuated only by an honest desire to collect the debt. *Gimbel v. Gomprecht*, — Tex. Civ. App. —, 36 S. W. 781.

Defendant cannot be asked with what motive he plowed up a garden, and whether or not he considered that a contract which had been entered

into with the plaintiff with reference to the garden had been forfeited, although the question whether he acted maliciously is in issue, as the matter of forfeiture is not for him to determine. *Gall v. Dickey*, 91 Iowa, 126, 58 N. W. 1075.

Defendant in an action for the wrongful killing of plaintiff's husband cannot testify that his purpose in firing the fatal shot was to protect his life and person, since this is a mere declaration that he shot the deceased in self-defense, and an answer to the very question the jury is called upon to determine. *Vawter v. Hultz*, 112 Mo. 633, 20 S. W. 689.

As to right of person to testify as to his own intent or motive, see ante, Intent, § 1, and notes 23 L.R.A. (N.S.) 367, and 34 L.R.A. (N.S.) 323.

² *Osborn v. Robbins*, 36 N. Y. 365, 4 Abb. Pr. N. S. 15, Reversing 37 Barb. 481 (question of duress); *National Bank of the Metropolis v. Kennedy*, 17 Wall. 19, 21 L. ed. 554 (purpose of payment); *Wilson v. Montague*, 57 Mich. 638, 24 N. W. 851 (purpose of mortgagor in demanding possession of the mortgaged property).

³ *Hamer v. First Nat. Bank*, 9 Utah, 215, 33 Pac. 941; *Hulbut v. Boaz*, 4 Tex. Civ. App. 371, 23 S. W. 446.

But he may state the facts from which the jury may determine the motive, or purpose. *Hamer v. First Nat. Bank*, 9 Utah, 215, 33 Pac. 941. See also INTENT. *Mutual F. Ins. Co. v. Ritter*, 113 Md. 163, 77 Atl. 388; *Bowers v. Atchison, T. & S. F. R. Co.* 82 Kan. 95, 107 Pa. 777.

2. Declarations.

Where the motive or purpose of an act is a material fact to be shown, declarations by the actor at the time,¹ from which his motive or purpose may be gathered, are competent, although the actor may not be a party to the suit.²

¹ In *People v. Buchanan*, 145 N. Y. 1, 39 N. E. 846, a trial for wife murder, declarations made by defendant during his marriage, reflecting upon his wife, exhibiting his feelings toward her, or showing a desire to be rid of her, were held competent to show motive. So, in *Duncan v. State*, 88 Ala. 31, 7 So. 104, a trial for wife murder, conversations of the defendant in reference to a girl with whom he was infatuated, had both before and after his wife's death, as well as remarks tending to show dissatisfaction with his wife, were held competent.

And in *Tucker v. Tucker*, 74 Miss. 93, 32 L.R.A. 623, 19 So. 955, an action against a father for alienating his son's affections from his wife, conversations between plaintiff and defendant after the offense charged are competent to show the motive of the defendant in his supposed wrongful action.

² *Williams v. Williams*, 20 Colo. 51, 37 Pac. 614, citing 1 Greenl. Ev. 108, 123 (holding that declarations of a husband relating to his separation
ABB. FACTS—51.

or contemplated separation from his wife are competent to show the motive of the separation, in an action by the wife against the husband's mother for alienating his affections).

So, statements to defendant, made by a third person on which an alleged libel was founded, although made in plaintiff's absence, are admissible for the purpose of showing the motive and intent actuating defendant in making the publication. *Patten v. Belo*, 79 Tex. 41, 14 S. W. 1037.

One who has taken a policy of life insurance from his debtor as collateral security for his debt cannot, although the absolute owner of the policy, object to the introduction by the company, in an action upon the policy, of evidence as to acts and declarations of the insured before the transfer of the policy, which tend to show a deliberate purpose on the part of the insured to heavily insure his life, and then commit suicide, with the intent of defrauding the companies, it being part of the *res gestæ*. *Smith v. National Ben. Soc.* 123 N. Y. 85, 9 L.R.A. 616, 25 N. E. 197.

3. Motive as affecting cause of action.

If the doing of an act be legal, the motive is irrelevant to the question whether the act constituted a cause of action against the person doing it.¹ But if the doing of an act be illegal, evil motive may be relevant to enhance damages.

¹ *Oglesby v. Attrill*, 105 U. S. 605, 26 L. ed. 1186 (motive of corporate officers in issuing stock); *Moran v. McClearns*, 60 Barb. 388, 4 Lans. 288; *Simpson v. Dall*, 3 Wall. 460, 476, 18 L. ed. 265, 267 (motive in payment); *Adler v. Fenton*, 24 How. 407, 16 L. ed. 696 (transfer to evade creditors); *Pape v. Lathrop*, 18 Ind. App. 633, 46 N. E. 154 (motive of master in discharging servant); *National Protective Asso. v. Cumming*, 170 N. Y. 315, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369; *Bohn Mfg. Co. v. Hollis* (*Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.*) 54 Minn. 223, 21 L.R.A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119; *Allen v. Flood* [1898] A. C. 1, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 46 Week. Rep. 258, 17 Eng. Rul. Cas. 285.

Malicious prosecution is an apparent exception. Thus, *Fuller v. Redding*, 16 Misc. 634, 39 N. Y. Supp. 109, holds that the motive of the defendant in this class of cases is a proper subject of investigation in order to enable the jury to pass upon the question of exemplary damages.

But the appearance of a bad motive for suing may be ground for requiring a very clear case. *Re Bennett*, 12 Nat. Bankr. Reg. 183, Fed. Cas. No. 1,315.

The court has inherent power to guard against abuse of its own process.

See note to *People v. Hektograph Co.* 10 Abb. N. C. 361.

Motive in buying a cause of action may be relevant in the assignee's suit in equity. See *Wait, Insolv. Corp.* 573, and cases cited. Compare *Morris v. Tuthill*, 72 N. Y. 575.

The motive of a husband for a gift to his wife is immaterial, in the absence of evidence of fraud in an action brought by the wife to recover on an insurance policy on property which she had bought partly with her own earnings and partly with her husband's gift. *German Ins. Co. v. Hyman*, 34 Neb. 704, 52 N. W. 401.

For full discussion of question, effect of bad motive to make actionable what would otherwise not be, see note in 62 L.R.A. 674.

4. Motive in suing.

If there is a good cause of action, evil motive in suing on it is irrelevant.¹

¹ *Morris v. Tuthill*, 72 N. Y. 575; *State ex rel. Wilson v. St. Louis & S. F. R. Co.* 29 Mo. App. 301; *Wait, Insolv. Corp.* 440.

But extreme remedies peculiar to equity are often refused because so invoked.

Plaintiff's motive is not a subject of inquiry in an action to enjoin a liquor nuisance. *Rizer v. Tapper*, 133 Iowa, 628, 110 N. W. 1038. See also *Catlin v. Vichachi Min. Co.* 73 N. J. Eq. 286, 67 Atl. 194.

5. Relevant facts.

Wherever the motive or purpose of an act is material, any fact which tends to show that motive or purpose, or which in any way tends to explain or throw light upon the act, is competent.¹

¹ *Alienation of affections:*

To show the motive of the defendant in an action for alienating the affections of his son from the latter's wife, conversations after the offense charged against him may be admitted. *Tucker v. Tucker*, 74 Miss. 93, 32 L.R.A. 623, 19 So. 955.

So, for the purpose of showing the motive of the husband, defendant, in an action for enticing away another woman's husband, may show her own financial condition. *Scott v. O'Brien*, 129 Ky. 1, 16 L.R.A. (N.S.) 742, 130 Am. St. Rep. 419, 110 S. W. 260.

Evidence that defendant, whose son plaintiff had married, was averse to plaintiff having children, is admissible in an action for alienating her husband's affections to show motive in her plot to accomplish her purpose of a separation between plaintiff and her husband. *Lockwood v. Lockwood*, 67 Minn 476, 70 N. W. 784.

Malicious prosecution:

The slight value of timber cut and removed from land is relevant upon the question of motive, in an action for malicious prosecution based upon

an arrest for an alleged wilful trespass in the cutting and removal of such timber. *Parker v. Parker*, 102 Iowa, 500, 71 N. W. 421.

Evidence that defendant in an action for malicious prosecution; prior to the act on which the action is based advised an employee of the plaintiff, who was a stranger to him, to leave such employment, and offered to obtain him another job, is admissible on the question of motive in causing the arrest; where the parties are brothers. *Ibid*.

For examples of relevant facts to show that defendant in an action for malicious prosecution had probable cause for instituting the prosecution, see: *Call v. Hayes*, 169 Mass. 586, 48 N. E. 777 (testimony by plaintiff that he instructed a third person to tell defendant that he would settle with him on Monday evening for money collected by him during the day, which offer defendant declined, competent when such third person has testified that he delivered the message, where, on Tuesday morning, defendant caused plaintiff's arrest for embezzlement); *Messman v. Ihlenfeldt*, 89 Wis. 585, 62 N. W. 522 (evidence of matters testified to by the witnesses upon an examination before a justice, in presence of defendant in an action for malicious prosecution, who made a complaint against plaintiff, and of the advice of the district attorney based on such testimony, held competent); *LeClear v. Perkins*, 103 Mich. 131, 26 L.R.A. 627, 61 N. W. 357 (holding competent testimony as to knowledge of the business and financial affairs of a person against whom an attachment suit was brought); *Chatfield v. Bunnell*, 69 Conn. 511, 37 Atl. 1074 (to the effect that testimony tending to show amount of money taken, and that defendants believed it to be theirs, is admissible upon the question of probable cause involved in an action for the malicious prosecution of plaintiff for stealing money, the amount and ownership of which was in controversy in the criminal proceedings); *Carrigan v. Graham*, 166 Ky. 333, 179 S. W. 198 (statement of all facts to attorney and acting on his advice held to show probable cause); *McElroy v. Catholic Press Co.* 254 Ill. 290, 98 N. E. 527 (a conviction although subsequently set aside held to establish probable cause). See also note in 16 Columbia L. Rev. 75.

Evidence that plaintiff in a suit for malicious prosecution pleaded guilty to the criminal charge is admissible as evidence of probable cause, some courts holding it conclusive on this point: *Dennehey v. Woodsum*, 100 Mass. 195; *Erie R. Co. v. Reigherd*, 20 L.R.A. (N.S.) 295, 92 C. C. A. 590, 166 Fed. 247, 16 Ann. Cas. 459, and cases there cited; and others holding such evidence merely prima facie. *Olson v. Neal*, 63 Iowa, 214, 18 N. W. 863.

The plaintiff in an action for malicious prosecution is not confined, on the question of want of probable cause, to proof of such facts as he can affirmatively show were actually known to defendant, but may prove the existence of such open and notorious facts as would or should have been ascertained by the latter had he made such inquiry and investigation, before instituting the prosecution, as anyone with hon-

est motives, and not instigated by malice, would have made. *Tabert v. Cooley*, 46 Minn. 366, 13 L.R.A. 463, 49 N. W. 124.

He may prove that the defendant authorized him to do the act for which he was prosecuted, although he has not alleged that fact in the complaint, for the purpose of showing malice and want of probable cause. *Sutor v. Wood*, 76 Tex. 403, 13 S. W. 321.

So, also, evidence of plaintiff's conduct at the time and place of the alleged offense with which she was charged is admissible in her behalf, to show that there was nothing that constituted probable cause, although it is not claimed by defendant that she was guilty of the offense, but only that he had good reason to believe the charge. *Bigelow v. Sickles*, 80 Wis. 98, 49 N. W. 106.

But the bad character of a mother is not competent to show probable cause in an action by her son of thirteen for malicious prosecution for his arrest, with her, on a charge of larceny of which both were acquitted. *Bruce v. Tyler*, 127 Ind. 468, 26 N. E. 1081.

See other cases cited under topic MALICE.

False imprisonment:

In an action by one detained unlawfully and against her will in a reformatory institution, to recover damages for false imprisonment, evidence is admissible tending to prove a motive other than a purely charitable one for the detention, and that she was made to work for the profit of the institution. *Gallon v. House of Good Shepherd*, 158 Mich. 361, 24 L.R.A. (N.S.) 286, 133 Am. St. Rep. 387, 122 N. W. 631.

Sealed instruments:

The parol evidence rule does not forbid the use of parol evidence to show the circumstances of delivery of unsealed instruments, or that an instrument executed and delivered for one purpose was being diverted and used for a different purpose, or that it was delivered to the payee, promisee or beneficiary on a condition that it was not to take effect except in a given event, or under given conditions. *Whitaker & Fowle v. Lane*, 128 Va. 317, 11 A.L.R. 1157, 104 S. E. 252.

Miscellaneous actions:

Thus, as tending to show a motive for endeavoring to defeat dower without parting with dominion and real ownership, evidence of family disturbances between husband and wife, and between her and one of his children by a former marriage, is relevant. *Flowers v. Flowers*, 89 Ga. 632, 18 L.R.A. 75, 15 S. E. 834.

Evidence of the seduction, by defendant charged with murder, of the sister of the deceased, and of the whipping by him of the nephew of deceased, is admissible to show motive. *Webb v. State*, 73 Miss. 456, 19 So. 238.

The relations between the testator and his son-in-law, tending to show the existence of a possible motive for discriminating against his daughter, are admissible in evidence, where the will is attacked on the ground of undue influence. *Miller v. Miller*, 187 Pa. 572, 41 Atl. 277.

If the question is to be determined by a person's intent in doing a partic-

ular act, evidence of other similar instances is admissible. **Powell v. St. Louis & S. F. R. Co.** 229 Mo. 246, 129 S. W. 963.

For discussion as to when the question of fact as to the existence of reasonable or probable cause is one for the court and when one for the jury, see note in 20 Columbia L. Rev. 897.

MOVING PICTURES.

1. Pictures of original events.
2. Pictures artificially reconstructed.
3. Exhibition of particular moving pictures.

1. Pictures of original events.

Where a moving picture is taken at the time and place of the original event it is entitled to be admitted in evidence on the same principles as still photographs.¹

Proper precaution should be taken to guard against error due to variation in the speed with which the moving picture is run off, and as to direction of movement and focus of the camera.²

For example, a picture of a fire, flood or windstorm should be admitted where it can illustrate any disputed fact.³ So such a picture of the progress of a parade should be admissible.⁴

¹ Note by Prof. Wigmore drawn up in the form of a new section for his treatise on Evidence, 15 Ill. L. Rev. 123. See also *Hampton v. Norfolk & W. R. Co.* 120 N. C. 534, 543, 35 L.R.A. 808, 27 S. E. 96, 2 Am. Neg. Rep. 444.

² Note by Prof. Wigmore, 15 Ill. L. Rev. 124.

³ Opinion of Judge Ernest Weyand in a homicide case, Superior Court, Colusa County, California, New York Times, Feb. 22, 1920.

⁴ Such a picture was admitted in evidence in the case of *Mooney v. People* in California (1918), although this point was not passed on in reviewing court.

2. Pictures artificially reconstructed.

Still photographs of reconstructed scenes are subject to the possibility that the bias of the party taking the picture may alter the original setting. This danger is greatly increased in

the case of a moving picture, and in the language of Prof. Wigmore, "its reliability as identical with the original scene is decreased and may be minimized to the point of worthlessness."¹ The court, in a recent California case, rejected such a reconstructed picture in a murder case.²

¹ Note in 15 Ill. L. Rev. 124.

² Judge Weyand—opinion reported New York Times, Feb. 22, 1920.

3. Exhibition of particular moving pictures.

Ordinarily the proper method of proving the exhibition of a motion picture is not by the production of the film but by the testimony of those who saw it thrown upon the screen.¹ So in an action for damages for exhibition of a Caesarean operation, testimony of witnesses who saw the picture presented was held admissible.²

¹ Frolich & Schwartz, Law of Motion Pictures (1918), page 598.

² Feeney v. Young, 191 App. Div. 501, 181 N. Y. Supp. 481, 6 Va. L. Reg. (N.S.) 460.

NAME AND DESIGNATION.

1. Judicial notice.
2. Hearsay.
3. Forgotten name.
4. Interrogating witness to discover names of informants.
5. Omitting from testimony or document.
6. Trade designation.
7. Parol evidence.

And see IDENTITY; JUDICIAL NOTICE; MISNOMER.

Concerning the acquisition and use by an individual of a name, see notes to Laffin & R. Powder Co. v. Steytler, 14 L.R.A. 690 and in L.R.A.1915D, 982.

Upon presumption of identity of person from identity of name, see note to Rupert v. Penner, 17 L.R.A. 824.

Presumption of identity of persons from identity of name in chain of title to real property is discussed in note in 5 A.L.R. 428.

1. Judicial notice.

Courts cannot take judicial notice of the commercial designation of an article,¹ or as to what the synonym of an English name is in the Chinese language.²

But the court has judicial knowledge of the names of counties³ and streets.⁴

¹ Seeberger v. Schlesinger, 152 U. S. 581, 38 L. ed. 560, 14 Sup. Ct. Rep. 729.

² United States v. Smith, 45 Fed. 476.

³ Camp v. Marion County, 91 Ala. 240, 8 So. 786; Trammell v. Chambers County, 93 Ala. 388, 9 So. 815.

⁴ Poland v. Dreyfous, 48 La. Ann. 83, 18 So. 906.

2. Hearsay.

Hearsay not necessarily incompetent.¹

¹ Berniaud v. Beecher, 71 Cal. 38, 11 Pac. 802 (*dictum*, that witness may testify to what given name is represented by the initial in a person's name, although his knowledge was acquired by hearsay).

3. Forgotten name.

If a witness cannot recollect a name, a list of names may be read to him to ask him which it is.¹

¹ Acerro v. Petroni, 1 Starkie, 100. And see FORGOTTEN FACTS.

4. Interrogating witness to discover names of informants.

Witness may be protected in refusal to disclose name of person from whom he obtained information, if the name or identity is not relevant to the issue.¹

¹ State v. Soper, 16 Me. 293, 33 Am. Dec. 665. (held, no error to exclude an inquiry of a witness as to the names of the persons from whom he obtained information which led to the arrest of the accused; for a witness in a criminal trial is not bound to disclose such names).

5. Omitting from testimony or document.

A name of a third person is not to be omitted from testimony or a document otherwise competent, merely because of the incriminating or scandalous connection;¹ but it may be omitted by consent.²

¹ Rex v. Walkley, 6 Car. & P. 175; Criminal Trial Brief.

3 If counsel agree to withhold the name, it may be written on paper, identified by the witness, and shown to the judge, without being announced or going into the record.

6. Trade designation.

An expert may be asked by what name or designation an article or structure is generally known or spoken of in the trade.¹

¹ *Mead v. Northwestern Ins. Co.* 7 N. Y. 530 (builder may be asked whether he would call buildings filled in, brick buildings); *Downs v. Sprague*, 1 Abb. App. Dec. 550, 2 Keyes, 57 (action on contract to supply gas fixtures; gas fitter competent to say whether gas meters are usually classified as gas fixtures); *Pollen v. Le Roy*, 10 Bosw. 38, affirmed in 30 N. Y. 549 (brand of lead).

Compare *Schmieder v. Barney*, 113 U. S. 645, 28 L. ed. 1130, 5 Sup. Ct. Rep. 624 (holding that an expert cannot be asked whether, in his opinion, Saxony dress goods were known in trade among merchants as goods of similar description to delaines, for this is a matter of common knowledge but he might be asked if "of similar description" is a commercial term; and if so what is its meaning).

Compare *Morton v. Fairbanks*, 11 Pick. 368 (holding that whether what defendant offered in performance of a contract for shingles were such, was for the jury; and that the court could not on inspection rule that they were only chips).

7. Parol evidence.

Parol evidence is admissible to explain an ambiguity in a written instrument arising from insufficient description of a person or corporation or from change of name.¹

¹ A latent ambiguity in the designation of a trustee in a charitable bequest, arising from the fact that there are two corporations answering to the description of the trustee in the will, is explainable by parol evidence. *Keith v. Scales*, 124 N. C. 497, 32 S. E. 809.

But parol evidence is inadmissible to show that the legatee intended by a devise to the "Philadelphia Paid Fire Department Relief Association" is the "Firemen's Pension Fund," where there is an association named the "Philadelphia Fire Department Relief Association." *Jeanes's Estate*, 3 Pa. Dist. R. 314.

Parol evidence is admissible to identify a corporation which has executed a contract by a name other than that by which it was incorporated. *Marmet Co. v. Archibald*, 37 W. Va. 778, 17 S. E. 299.

Extrinsic evidence to establish identity of legatee or devisee is the subject of an exhaustive note in 47 L.R.A.(N.S.) 514.

See also additional cases cited under topic IDENTITY.

NATIONALITY.

1. Of person.
2. Of vessel.

As to proof of nationality, see *Abbott, Tr. Ev. 130.*

And see NATURALIZATION.

1. Of person.

The court will so far notice judicially the relation of the Dominion of Canada to Great Britain as to recognize the citizens of Canada as citizens and subjects of a foreign state.¹ But no inference that a person has acquired the status of a tribal Indian arises from the United States authorities permitting him to reside on an Indian reservation.²

¹ *Lumley v. Wabash R. Co.* 71 Fed. 21.

² *Stiff v. McLaughlin*, 19 Mont. 300, 48 Pac. 232.

2. Of vessel.

Of vessel, when incidentally involved, may be shown by any evidence; and the documentary evidence is not essential.¹

A vessel at sea will not be presumed to have belonged to a nation whose law is different from ours.²

¹ *United States v. Furlong*, 5 Wheat. 184, 5 L. ed. 64 (piracy).

² *Hynes v. McDermott*, 82 N. Y. 41, 37 Am. Rep. 538, affirming 7 Abb. N. C. 98.

See also *United States v. Holmes*, 5 Wheat. 412, 5 L. ed. 122; *The Merritt*, *Murray v. United States*, 17 Wall. 582, 21 L. ed. 682; *Reusse v. Myers*, 3 Campb. 475; *Wynkoop's Documenting of Vessels*.

NATURALIZATION.

1. Presumptions and burden of proof.
2. Best and secondary.
3. Certified copy.
4. Record conclusive.

And see NATIONALITY.

1. Presumptions and burden of proof.

Evidence that one voted may raise a legal presumption of naturalization.¹ And the burden of establishing alienage of persons otherwise interested in property sought to be partitioned is upon the plaintiff in partition.²

¹ Behrensmeyer v. Kreitz, 135 Ill. 591, 26 N. E. 704; People ex rel. Smith v. Pease, 27 N. Y. 45, 84 Am. Dec. 242, 25 How. Pr. 495, affirming 30 Barb. 588 (so held on question of legality of vote, in trying title to office).

² Toole v. Toole, 112 N. Y. 333, 2 L.R.A. 465, 8 Am. St. Rep. 750, 19 N. E. 682.

2. Best and secondary.

Naturalization cannot be proved by parol,¹ unless a foundation for secondary evidence is first laid; and then it may be.²

¹ Charles Green's Son v. Salas, 31 Fed. 106.

Since proceedings of naturalization have to be recorded under 2 Story, Laws U. S. 851, neither parol testimony nor the Great Register, if not correctly made up, is admissible to prove citizenship or the filing of an intention to become a citizen. Bode v. Trimmer, 82 Cal. 513, 23 Pac. 187; Prentice v. Miller, 82 Cal. 570, 23 Pac. 189.

The order of a court admitting an alien to citizenship can be proved only by the record. State ex rel. Thayer v. Boyd, 31 Neb. 682, 48 N. W. 739, 51 N. W. 602.

² Hogan v. Kurtz, 94 U. S. 773, 24 L. ed. 317.

Naturalization is not established, in the absence of record evidence, by proof that the alien made leases and performed acts relating to real estate which only a citizen might legally perform. Richardson v. Amsdon, 85 N. Y. Supp. 342.

3. Certified copy.

A certified copy of a record of naturalization in another state, certified according to the act of Congress¹ admissible, without further proof that it has been in the custody of the clerk, etc., and without extraneous proof of any of the preliminaries of naturalization.²

¹ Charles Green's Son v. Salas, 31 Fed. 106; United States v. Walsh, 22 Fed. 644 (indictment for perjury; clerk cannot contradict fact involved in record); McCarthy v. Marsh, 5 N. Y. 263, overruling Banks v. Walker, 3 Barb. Ch. 438.

² McCarthy v. Marsh, 5 N. Y. 263.

4. Record conclusive.

The record, if produced or proved by certified copy, cannot be contradicted collaterally,¹ even by producing a declaration made in the same court by the same alien, which is insufficient to sustain the judgment.²

¹ For the form, see 2 Abbott, New Pr. 728; and for the authorities more fully, see Abbott, Tr. Ev. (3d ed.) p. 316.

But a mistake in the copy can be shown. See MISTAKE.

² People v. Snyder, 41 N. Y. 397, affirming 51 Barb. 589.

Compare St. Paul, M. & M. R. Co. v. Burton, 111 U. S. 788, 28 L. ed. 604, 4 Sup. Ct. Rep. 699.

NAVIGABILITY.

1. Judicial notice.

2. Presumptions and burden of proof.

3. Government survey.

1. Judicial notice.

Judicial notice is taken.¹

¹ People v. Gold Run Ditch & Min. Co. 66 Cal. 138, 144, 56 Am. Rep. 80, 4

Pac. 1152; *Terrell v. Paducah*, 122 Ky. 331, 5 L.R.A. (N.S.) 289, 92 S. W. 310; *McKinney v. Northcutt*, 114 Mo. App. 146, 89 S. W. 351; *Neaderhouser v. State*, 28 Ind. 257, 267 (dictum as to large rivers and point above which navigability ceases); *Tewksbury v. Schulenberg*, 41 Wis. 584, 593 (small streams; and usage of improving log driving by dams); *Clark v. Cambridge & A. Irrig. & Improv. Co.* 45 Neb. 798, 64 N. W. 239 (un-navigability of a stream).

Contra, as to the point at which navigability ceases, *United States v. Rio Grande Dam & Irrig. Co.* 174 U. S. 690, 43 L. ed. 1136, 19 Sup. Ct. Rep. 770. But see *Com. v. King*, 150 Mass. 221, 5 L.R.A. 536, 22 N. E. 905, holding that judicial notice might be taken that a river above a certain dam does not, either by itself or by uniting with other water, constitute a navigable stream.

Courts will not necessarily take judicial notice that a stream is navigable. *People ex rel. Highway Comrs. v. Whiteside County*, 122 Ill. App. 40.

2. Presumptions and burden of proof.

A stream tributary to a navigable river above the ebb and flow of the tides is *prima facie* un-navigable; and he who asserts its navigability must aver and prove it.¹

And a *prima facie* presumption of non-navigability results from failure to meander a stream, or to declare it navigable by legislation.²

¹ *Morrison Bros. v. Coleman*, 87 Ala. 655, 5 L.R.A. 384, 6 So. 374.

So held, also, as to a ditch connected at one end with a navigable stream.

Ligare v. Chicago, M. & N. R. Co. 166 Ill. 249, 46 N. E. 803.

² *Allaby v. Mauston Electric Service Co.* 135 Wis. 345, 16 L.R.A. (N.S.) 420, 116 N. W. 4.

3. Government survey.

On a question of navigability a government survey of the body of water is competent, but not conclusive, evidence.¹

¹ *Harrison v. Fite*, 78 C. C. A. 447, 148 Fed. 781.

NECESSARIES AND NECESSITY.

1. Judicial notice.
2. Burden of proof.
3. Presumptions.
4. Opinion.
5. Relevancy.

For kindred topics, see CARE; CAUSE; CONDITION; EFFECT.

1. Judicial notice.

The necessity of a screen to prevent the escape of sparks from a steam engine used to propel a threshing machine is not such a matter of common observation and experience as to render evidence inadmissible.¹

Nor will the court take judicial notice that land was arid and needed irrigation to justify a diversion of water by a riparian owner.²

¹ Gillingham v. Christen, 55 Ill. App. 17.

² Slattery v. Harley, 58 Neb. 575, 79 N. W. 151.

2. Burden of proof.

The burden of proof is on the petitioning company to establish the necessity of taking particular land for the purpose of obtaining gravel or other material.¹ And a village demanding the removal of a railroad track has the burden of showing that the original necessity therefor no longer exists.²

The burden is upon defendant to show that goods furnished him while an infant and living apart from his parents were not necessities, and that he was supplied with all such necessities by his parents.³

One who sues for damages arising from the breach of a covenant against encumbrances assumes the burden of proving that a sum paid by him to remove an encumbrance was reasonably necessary to discharge the property from liability.⁴

¹ Wisconsin C. Co. v. Kneale, 79 Wis. 89, 48 N. W. 248.

Formerly one whose gravel had been taken by a township supervisor to be used in the repair of the highway of the township, under Burns' Ann. Code of Ind. Stats. 1914, vol. 3, § 1771 (§ 6830 under Ind. Rev. Stats. 1894), was not required to show that there was a necessity for the taking before recovering the value thereof. *Clear Creek Twp. v. Rittger*, 12 Ind. App. 355, 39 N. E. 1052. This Indiana Statute has now been repealed. See Burns' Ann. Code of Ind. Stats. vol. 6, containing supplement for 1921, § 7771, p. 1259.

² *Wayzata v. Great Northern R. Co.* 67 Minn. 385, 69 N. W. 1073.

³ *Lynch v. Johnson*, 109 Mich. 640, 67 N. W. 908.

⁴ *Hartshorn v. Cleveland*, 52 N. J. L. 473, 19 Atl. 974.

3. Presumptions.

The location of a railway across certain lands, and the railway company's determination that such lands are necessary for its right of way, shows *prima facie* a necessity for their condemnation.¹ And the necessity upon which a railroad company acted when building its road is presumed to be continuous and to exist in proceedings instituted to compel a change of its track.²

Notice from the supreme secretary of a mutual benefit association to the subordinate secretaries to collect an assessment is presumptive proof that the benefit is insufficient, and that the assessment is necessary.³

It will be presumed that cooking utensils, food, and materials for cooking, painting, and repairing of sails were necessary to fit a vessel, and that it was necessary that it should be obtained on the credit of the vessel.⁴

¹ *O'Hare v. Chicago, M. & N. R. Co.* 139 Ill. 151, 28 N. E. 923.

² *Wayzata v. Great Northern R. Co.* 67 Minn. 385, 69 N. W. 1073.

³ *Demings v. Supreme Lodge, K. P.* 131 N. Y. 522, 30 N. E. 572.

⁴ *The Templar*, 59 Fed. 203.

4. Opinion.

The opinion of a witness that specified articles are necessary in ordinary life, within the meaning of the rule of law, is not competent.¹

Otherwise as to what is necessary under a contract.²

On a question for expert testimony,—such as whether a jet-

tison was necessary in a particular storm,—the opinion of an expert is competent.³

¹ *Whitmarsh v. Angle*, 3 N. Y. Code Rep. 53, Am. Law R. N. S. 595 (exemption from execution); *Pooch v. Miller*, 1 Hilt. 108 (clothing for infant. Held, that testimony that the articles "were necessary" was not sufficient evidence that they were "necessaries," within the rule. The circumstances should be shown); *Tolles v. Wood*, 16 Abb. N. C. 1, s. c., less fully, 99 N. Y. 616 (necessary support for beneficiary, which creditors cannot touch).

² *Merritt v. Seaman*, 6 N. Y. 168 (promise to pay for whatever might be needed for the support; opinion competent that certain allowances made to the party were proper); *France v. McElhone*, 1 Lans. 7 (agent being authorized to make necessary deductions in settling claims, his opinion as to the necessity is admissible in his favor).

Oral evidence of the acts and declarations of the parties, showing what they consider to be necessary, is admissible. *Almgren v. Dutilh*, 5 N. Y. 28.

³ *Price v. Hartshorn*, 44 N. Y. 94, 4 Am. Rep. 645, affirming 44 Barb. 655. (Compare *Amstein v. Gardner*, 134 Mass. 4; cattle guard; opinion held incompetent.)

The conductor and engineer of a train, who have been long in the service of the railroad company, are competent to testify whether, under a special order, it is necessary for a train to stop at a certain station. *Albert v. Sweet*, 116 N. Y. 363, 22 N. E. 762. But in an action against a railroad company for the negligent killing of an engineer, a former fireman on defendant's road is not competent to testify as an expert in relation to the necessity of having at the side track, where the accident occurred, a device known as a "safety switch," such witness not being a civil engineer or a railroad builder, and his only employment about a railroad having been as fireman. *Ballard v. New York, L. E. & W. R. Co.* 126 Pa. 141, 19 Atl. 35.

The opinion of a witness as to the necessity of straightening a road by removing encroaching fences is not admissible in an action to enjoin such removal. *Nicolai v. Davis*, 91 Wis. 370, 64 N. W. 1001.

To entitle a county surveyor to recover the compensation prescribed by Kan. Laws 1891, chap. 89, § 13, for keeping his office open more than one day in each week, he must show that some actual and specific necessity existed for keeping it open, and that it was in fact so kept open because of such specific or particular necessity therefor. His own testimony to his conclusion of such necessity is not sufficient. *Sumner County Comrs. v. Simmons*, 51 Kan. 304, 33 Pac. 13.

The Kansas statute has now been amended to require county surveyors to keep their offices open six days a week in counties having a population between seventy and ninety thousand. See Gen. Stats. of Kans. 1915, § 2723, p. 553.

5. Relevancy.

In a proceeding to remove an administrator, evidence of unsatisfied mortgages of record against the decedent is competent to show the necessity of an administrator.¹

¹ *Bowen v. Stewart*, 128 Ind. 507, 26 N. E. 168, affirmed on rehearing in 128 Ind. 512, 28 N. E. 73.

NEGATIVE.

1. Presumption of innocence.
2. Lack of entry in account.
3. Lack of entry in public record.
4. Official act.
5. Nonobservation of witness.

For kindred topics, see **CONTRADICTION**; **CORROBORATION**; **EXPLANATION**; **POSSIBILITY**.

1. Presumption of innocence.

The presumption of innocence, when in favor of the affirmative of the issue as against an imputation of fraud or crime, is a sufficient support to the affirmative to throw on the other party the burden of proving the negative,¹ even though the fact be peculiarly within the knowledge of the party having an affirmative.²

¹ For the general rules, and illustrative cases, as to burden of proof of negative, see *Civil Jury Brief* (4th ed.) p. 469; *Abbott, Tr. Ev.* (3d ed.) p. 2097, note 29; *New Albany v. Endres*, 143 Ind. 192, 42 N. E. 683; *Carmel Natural Gas & Improv. Co. v. Small*, 150 Ind. 427, 47 N. E. 11, 50 N. E. 476; *Sherman Center Town Co. v. Swigart*, 43 Kan. 292, 23 Pac. 569.

² *Colorado Coal & I. Co. v. United States*, 123 U. S. 307, 31 L. ed. 182, 8 Sup. Ct. Rep. 131 (reviewing cases); *Maxwell Land-Grant Case* (*United States v. Maxwell Land-Grant Co.*) 121 U. S. 325, 30 L. ed. 949, 7 Sup. Ct. Rep. 1015; followed in *United States v. Iron Silver Min. Co.* 128 U. S. 673, 32 L. ed. 571, 9 Sup. Ct. Rep. 195; *Cumberland & P. R. Co. v. State use of Millsagle*, 73 Md. 74, 20 Atl. 785; *Nye v. Lothrop*, 94 Mich. 411, 54 N. W. 178; *Morley v. Liverpool, L. & G. Ins. Co.* 92 Mich. 590, 52 N. W. 939; *Grant v. Riley*, 15 App. Div.

190, 44 N. Y. Supp. 238; *Burdick v. Marshall*, 8 S. D. 308, 66 N. W. 462; *Stevenson v. Gunning*, 64 Vt. 601, 25 Atl. 697.

In an action for libel in the publication of an article charging the commission of a crime, it is generally sufficient to prove the publication, and it is not necessary to prove that the charges contained in the article were false, since the law presumes such charges to be false, and casts the burden of proving them true upon the person making them. *Grace v. Dempsey*, 75 Wis. 313, 43 N. W. 1127.

When, however, the parties are not upon an equal footing, each acting for himself, but some relation of trust or confidence exists between them, touching the subject-matter of the contract, the law is not so considerate or trustful. Where such relations exist, it views the transaction with caution, if not with suspicion. In such cases it will not assume in favor of the agent of the fiduciary that the contract was fairly made, and that there was no abuse of confidence. It waits for such party to satisfy it affirmatively,—to affirmatively show that there was in fact no abuse of confidence; that the contract was in fact fairly made; that the other party was in truth made acquainted with all the material facts and reasons known to the fiduciary. The very making of the contract is incongruous,—*prima facie* inconsistent with the fiduciary relation. The transaction may be valid, but there is no presumption in its favor. The presumption is of invalidity, which can only be overcome, if at all, by clear evidence of good faith, full knowledge, and of independent consent and action. *Burnham v. Heselton*, 82 Me. 495, 9 L.R.A. 90, 20 Atl. 80, citing *Pom. Eq. Jur.* §§ 955–957; *Adams*, Eq. § 61, and notes; *Story*, Eq. Jur. § 310; *Hopkinson v. Jones*, 28 Ill. App. 409.

2. Lack of entry in account.

To prove that a person never had any dealings with another, the accounts or records of the dealings of the latter are admissible,¹ and so is the testimony of a witness who has examined them;² and such witness may be allowed to testify to the result in the negative, without producing the accounts themselves.³

¹ *Contra*: *Mattocks v. Lyman*, 18 Vt. 98, 46 Am. Dec. 138. But the objection goes to the weight, not the competency, of the evidence, unless the accounts are those of the party offering them. Even then they may be made competent by testimony that all the party's dealings were recorded.

Entries in a bank book are inadmissible in an action by a third person to show that the depositor had never received the amount for which the note in suit was given because no entry thereof was to be found in such bank book. *Roe v. Nichols*, 5 App. Div. 472, 38 N. Y. Supp. 1100.

² *Burton v. Driggs*, 20 Wall. 125, 22 L. ed. 299.

³ *Ibid.* And see ABSTRACTS.

3. Lack of entry in public record.

To prove the fact that an instrument or entry does not appear in a public record, testimony of any person who has examined the record is competent.¹

The certificate of the officer having custody of the record is competent when made so by statute;² but the existence of such a statute does not preclude proving the fact by the testimony of any person.³

¹ *Jackson ex dem. Schuyler v. Russell*, 4 Wend. 543.

² As by N. Y. Civil Prac. Act, § 367; *Parson's Prac. Manual of N. Y.* 1921, p. 153 (formerly § 921), reversing 2 Rev. Stat. 552, § 12.

³ *Teall v. Van Wyck*, 10 Barb. 376; *People v. Parker*, 67 Mich. 222, 34 N. W. 720.

Testimony of a witness that he had visited the recording office and examined the book of protocol or powers of attorney for specified years, and that between specified dates there was no such instrument, and there was no visible evidence of mutilation, the witness producing photographic copies of the pages, held, not sufficient where the deed was an ancient one corroborated by possession, etc. *McPhaul v. Lapsley*, 20 Wall. 264, 22 L. ed. 344. *Swayne, J.*, said (p. 287, L. ed. p. 347): It should at least have been shown by someone officially connected with the office, that the book seen by the witness was the book, and the only book there, wherein the instrument could have been properly recorded, and that there was no such protocol anywhere in that book, or elsewhere in the office. It was also possible it was known in the office that the missing signature had been removed by some dishonest hand.

4. Official act.

To disprove an alleged official act, or the genuineness of an apparent official document, the officer may testify that his custom was not to do the act in question except under given circumstances, evidence being also given that such circumstances did not exist in this case.¹

¹ *Morrow v. Ostrander*, 13 Hun, 219.

5. Nonobservation of witness.

Upon the question whether an alleged fact occurred, a witness who had adequate opportunities of observation may testify that he did not observe it, as tending to disprove its occurrence, although he cannot swear positively that it never took place, and although it does not appear that he was watching for it.¹

To show his opportunity of observation, he may testify that he would have heard or seen it if it had occurred, if he can state this as a fact, and not as a conclusion or opinion.²

¹ Greany v. Long Island R. Co. 101 N. Y. 419, 5 N. E. 425 (passenger on train, not hearing signal). s. p., Maxwell v. Harrison, 8 Ga. 61, 52 Am. Dec. 385 (witness never heard any adverse claim of title); Fredenburgh v. Biddlecom, 85 N. Y. 196, 202 (never heard him make such a claim); Powell v. State, 101 Ga. 9, 29 S. E. 309 (never heard a neighbor's reputation or character for peaceableness questioned or attacked).

So, on the question of the practical location of a boundary line, it is competent to ask a witness whose residence and relation to the parties are such that had there been a difference between the adjoining proprietors in respect to the line he would have been likely to know it, whether he ever heard of more than one line; and his answer, that he had not, is some evidence of acquiescence in that line. Ratcliffe v. Cary, 4 Abb. App. Dec. 4, s. c., as Ratcliffe v. Gray, 3 Keyes, 510.

Compare Chicago & A. R. Co. v. Johnson, 116 Ill. 206, 4 N. E. 381 (not error on question of seriousness of injury, to refuse to allow neighbors and friends to testify that they never heard of plaintiff's being seriously injured).

And that one libelously stated to be indebted to several banks at high rates of interest cannot testify that he never heard it reported that he was so indebted, to negative the existence of such report, see Simons v. Burnham, 102 Mich. 189, 60 N. W. 476.

² Casey v. New York, C. & H. R. R. Co. 6 Abb. N. C. 104, 124, with note, 8 Daly, 220, affirmed in 78 N. Y. 518; Hollender v. New York, C. & H. R. R. Co. 19 Abb. N. C. 18; Chicago & A. R. Co. v. Dillon, 123 Ill. 570, 15 N. E. 181 (bell at crossing); Burnham v. Sherwood, 56 Conn. 229, 14 Atl. 715 (requiring, however, that the witness state all the details).

On an issue as to whether an injury occurred in August or several months prior thereto, a witness living in the vicinity was permitted to testify that she had not heard of the injury until the latter part of August, it appearing that the witness would probably have heard of the injury at the time it occurred. Lincoln v. Hemenway, 80 Vt. 530, 69 Atl. 153.

NEW PROMISE.

1. Burden of proof.
2. Presumption of knowledge.
3. Documentary evidence.

How proved, see Abbott, Tr. Ev. (3d ed.) pp. 2155, 2226.

1. Burden of proof.

The burden is upon plaintiff to prove the new promise relied upon by him to take his action out of the statute of limitations.¹

¹ *Wellman v. Miner*, 73 Ill. App. 448.

Plaintiff must show that the running of the statute has been arrested if he relies on such contention. *Mason v. Henry*, 152 N. Y. 529, 46 N. E. 837.

Or that his claim is excepted from the statutory bar by payment or otherwise. *Burdick v. Hicks*, 29 App. Div. 205, 51 N. Y. Supp. 789.

A claimant against a decedent's estate, relying on a renewal acknowledgment in writing of the debt, has the burden of proving its execution, under Complete Tex. Stats. 1920, art. 1906, p. 348 (formerly art. 1265, Tex. Rev. Stats. 1879), where the answer under oath denies such execution. *Tanner v. Ames*, — Tex. Civ. App. —, 37 S. W. 373.

2. Presumption of knowledge.

There is a legal, but not conclusive, presumption that a person who made a new promise knew the facts necessary to establish his exemption from liability before making it.¹

¹ *Taft v. Sergeant*, 18 Barb. 320.

Compare ACQUIESCENCE.

3. Documentary evidence.

A letter from a debtor in reply to a demand of payment, stating that the matter will receive his earliest and best attention, is competent, in connection with other evidence, to show that a new promise by the defendant was more probable than otherwise.¹

¹ *Cole v. Putnam*, 62 N. H. 616.

NEWSPAPERS.

1. Not evidence.
2. Judicial notice.

See also **PRINTING; PUBLICATION.**

1. Not evidence.

A newspaper statement is not evidence without independent authentication.¹

¹ *Downs v. New York C. R. Co.* 47 N. Y. 82 (newspaper account of accident inadmissible, without proof that it was an original memorandum, or that it embodied statements made by the parties at the time); *Child v. Sun Mut. Ins. Co.* 3 Sandf. 26 (foreign newspaper inadmissible to prove deviation, unseaworthiness, etc.); *Fosgate v. Herkimer Mfg. & Hydraulic Co.* 9 Barb. 287. See further decision in 12 Barb. 352 (death notice; compare as to facts of pedigree, *Abbott, Tr. Ev.* 90, 100); *Richardson v. Evans*, 5 Okla. 803, 50 Pac. 85.

A newspaper article charging a water company with distributing poisonous water and charging excessive rates, published months prior to the death of a customer of the water company from fever, is not admissible in an action seeking to hold the company liable for such death. *Green v. Ashland Water Co.* 101 Wis. 258, 43 L.R.A. 117, 70 Am. St. Rep. 911, 77 N. W. 722.

In *Bergman v. Solomon*, 143 Ky. 581, 136 S. W. 1010, it was held that newspaper publications were not admissible in an action by a husband for alienating his wife's affections.

But an article published in a newspaper by defendant pending an action for libel may be admissible as a republication of the libel, to show malice. *Welch v. Tribune Pub. Co.* 83 Mich. 661, 11 L.R.A. 233, 21 Am. St. Rep. 629, 47 N. W. 562.

And if it appears that a trade relies on the market quotations in a newspaper, such newspaper is admissible in evidence to show the market price of an article. *Mt. Vernon Brewing Co. v. Teschner*, 108 Md. 158, 16 L.R.A.(N.S.) 758, 69 Atl. 702.

2. Judicial notice.

Judicial notice is not taken of the meaning of the usual printer's abbreviations of dates for insertion, at the foot of advertisements.¹

¹ *Johnson v. Robertson*, 31 Md. 476, 489. See also **ABBREVIATIONS. § 1**

NOTICE.

1. **Anonymous letter; stranger.**
2. **Possession as notice.**
 - a. General rules as to effect of possession.
 - b. Effect of statutes requiring actual notice as an equivalent of registration.
 - c. Rules as to scope of the inquiry.
 - d. Of what possession is notice.
 - e. Requisites and sufficiency of possession.
 - f. Possession of tenant as notice.
 - g. Possession under contract of purchase.
 - h. Possession of vendee under unrecorded deed.
 - i. Grantor's possession after conveyance.
 - j. Mortgagee or lienor in possession.
 - k. Possession of *cestui que trust*.
 - l. Possession by cotenants.
 - m. Possession by husband and wife.
 - n. Other family relations as affecting possession.
 - o. Application of rules to easements.
 - p. Estoppel of possessor to assert claim.
3. **Notice to charge with fraud.**
4. **Notice to agent.**
 - a. In general.
 - b. Knowledge not acquired in principal's business.
 - c. Where agent is personally interested or is perpetrating a fraud.
 - d. Notice to officers of corporation.
 - e. Agent with conflicting duties.
 - f. Notice to subagent.
5. **Authentication.**
6. **Record and index.**
7. ***Lis pendens*.**

As to proving the actual mental state of knowledge or suspicion, see BELIEF; GOOD FAITH; INTENT; KNOWLEDGE.

As to communication of information, see also CONVERSATION; LETTERS; MAILS; MESSAGE; TELEGRAMS; TELEPHONE.

1. **Anonymous letter; stranger.**

An anonymous letter not sufficient to charge with notice.¹

Otherwise of information from a stranger.²

¹ *Fillo v. Jones*, 2 Abb. App. Dec. 121 (notice to charge city with negligence).

² *Hadencamp v. Second Ave. R. Co.* 1 Sweeney, 490 (defect in railroad vehicle).

2. Possession as notice.

a. General rules as to effect of possession.—The broad rule is laid down by a large number of cases that open, notorious, unequivocal, and exclusive possession of real estate, under an apparent claim of ownership, is constructive notice to all the world of whatever claim the possessor asserts, whether such claim is legal or equitable in its nature,¹ and such possession precludes anyone from being an innocent purchaser as to such possessor.² And this is so, irrespective of the recording acts,³ and without reference to what the record shows,⁴ unless, upon inquiry, the occupant failed to state his rights,⁵ or unless the purchaser derives his title from or through such occupant.⁶ The tendency of the American courts, and the policy of the recording acts, however, is not to extend the doctrine of constructive notice to such length.⁷ Probably a majority of the cases restrict the general rule that possession is notice of the title or claim of the possessor, by holding that proof of possession of land by a third person at the time of a conveyance thereof is not, of itself, decisive of notice of a claim of title upon the part of the purchaser, without regard to the other facts of the case,⁸ and that possession of land is not so much notice of the title of the holder as a circumstance which should put the purchaser or encumbrancer upon inquiry.⁹ The rule as generally asserted is that actual, open, exclusive, and notorious possession of land under a claim of title is constructive notice to a purchaser or encumbrancer, making it his duty to inquire into the nature of such possession, rendering him chargeable with all the information such inquiry would have given him if diligently pursued.¹⁰ Under this rule, a purchaser of land in the possession of a stranger to the vendor's title cannot rely on the record title alone in making the purchase,¹¹ and if he fails to inquire, he is no more protected than if he had inquired and ascertained the fact,¹² and he is affected with all the equitable rights binding on his vendor.¹³ The distinction between these two rules, however, seems to be largely, if not entirely, one of expression.

¹ *Bernstein v. Humes*, 71 Ala. 260; *Atkinson v. Ward*, 47 Ark. 533, 2 S. W. 77; *Bryan v. Ramirez*, 8 Cal. 461, 68 Am. Dec. 340; *Yates v. Hurd*, 8 Colo. 343, 8 Pac. 575; *Gamble v. Hamilton*, 31 Fla. 401, 12 So. 229; *Wyatt v. Elam*, 19 Ga. 337; *Bridger v. Exchange Bank*, 126 Ga. 821.

- 8 L.R.A.(N.S.) 463, 115 Am. St. Rep. 118, 56 S. E. 97; Garbutt v. Mayo, 128 Ga. 269, 13 L.R.A.(N.S.) 58, 57 S. E. 495; Morrison v. Kelly, 22 Ill. 610, 74 Am. Dec. 169; Sutton v. Jervis, 31 Ind. 265, 99 Am. Dec. 631; May v. Sturdivant, 75 Iowa, 116, 9 Am. St. Rep. 463, 39 N. W. 221; Johnson v. Clark, 18 Kan. 157; Knox v. Thompson, 1 Litt. (Ky.) 350, 13 Am. Dec. 246; Beal v. Gordon, 55 Me. 482; Corey v. Smalley, 106 Mich. 257, 58 Am. St. Rep. 474, 64 N. W. 13; Thompson v. Borg, 90 Minn. 209, 95 N. W. 896; Hafter v. Strange, 65 Miss. 323, 7 Am. St. Rep. 659, 3 So. 190; Merrett v. Poulter, 96 Mo. 237, 9 S. W. 586; Mullins v. Butte Hardware Co. 25 Mont. 525, 87 Am. St. Rep. 430, 65 Pac. 1004; Pleasants v. Blodgett, 39 Neb. 741, 42 Am. St. Rep. 624, 58 N. W. 423; Pritchard v. Brown, 4 N. H. 397, 17 Am. Dec. 431; Wanner v. Sisson, 29 N. J. Eq. 141; Phelan v. Brady, 119 N. Y. 587, 8 L.R.A. 211, 23 N. E. 1109; Johnson v. Hauser, 88 N. C. 388; Dickson v. Dows, 11 N. D. 407, 92 N. W. 798; Ranney v. Hardy, 43 Ohio St. 157, 1 N. E. 523; Bohlman v. Coffin, 4 Or. 313; Smith v. Phillips, 9 Okla. 297, 60 Pac. 117; Lance v. Gorman, 136 Pa. 200, 20 Am. St. Rep. 914, 20 Atl. 792; Rapley v. Klugh, 40 S. C. 134, 18 S. E. 680; Betts v. Letcher, 1 S. D. 182, 46 N. W. 193; Smith v. Olsen, 23 Tex. Civ. App. 458, 56 S. W. 568; Toland v. Corey, 6 Utah, 392, 24 Pac. 190; Pinney v. Fellows, 15 Vt. 525; Rorer Iron Co. v. Trout, 83 Va. 397, 5 Am. St. Rep. 285, 2 S. E. 713; Lowther Oil Co. v. Miller-Sibley Oil Co. 53 W. Va. 501, 97 Am. St. Rep. 1027, 44 S. E. 433, 22 Mor. Min. Rep. 656; Fery v. Pfeiffer, 18 Wis. 511; Horbach v. Porter, 154 U. S. 549, and 18 L. ed. 30, 14 Sup. Ct. Rep. 1164; Noyes v. Hall, 97 U. S. 34, 24 L. ed. 909.
- 2 Janes v. Wilkinson, 2 Kan. App. 361, 42 Pac. 735; Rankin Mfg. Co. v. Bishop, 137 Ala. 271, 34 So. 991; Banks v. Allen, 127 Mich. 80, 86 N. W. 383; Spofford v. Manning, 6 Paige, 383; Bank of Orleans v. Flagg, 3 Barb. Ch. 316; Smith v. Reid, 134 N. Y. 568, 31 N. E. 1082; Ellis v. Young, 31 S. C. 322, 9 S. E. 955; Smith v. Olsen, 23 Tex. Civ. App. 458, 56 S. W. 568; Peterson v. Philadelphia Mortg. & T. Co. 33 Wash. 464, 74 Pac. 585; Norman v. Bennett, 32 W. Va. 614, 9 S. E. 914.
- 3 Doyle v. Teas, 5 Ill. 202.
- 4 Toland v. Corey, 6 Utah, 392, 24 Pac. 190; Ayres v. Jack, 7 Utah, 249, 26 Pac. 300.
- 5 Williams v. Brown, 14 Ill. 200.
- 6 Lamoreux v. Huntley, 68 Wis. 24, 31 N. W. 331.
- 7 Smith v. Jackson, 76 Ill. 254.
- 8 Fair v. Stevenot, 29 Cal. 486, 11 Mor. Min. Rep. 11.
- 9 Hunter v. Watson, 12 Cal. 363, 73 Am. Dec. 543; Shumate v. Reavis, 49 Mo. 333.
- 10 Morgan v. Morgan, 3 Stew. (Ala.) 383, 21 Am. Dec. 638; Jowers v. Phelps, 33 Ark. 465; Smith v. Yule, 31 Cal. 180, 89 Am. Dec. 167; Allen v. Moore, 30 Colo. 307, 70 Pac. 682; McRae v. McMinn, 17 Fla.

- 876; *Austin v. Southern Home Bldg. & L. Asso.* 122 Ga. 440, 50 S. E. 382; *Morrison v. Morrison*, 140 Ill. 560, 30 N. E. 768; *Wilson v. Campbell*, 119 Ind. 286, 21 N. E. 893; *Crooks v. Jenkins*, 124 Iowa, 317, 104 Am. St. Rep. 326, 100 N. W. 82; *Fearns v. Atchison, T. & S. F. R. Co.* 33 Kan. 275, 6 Pac. 237; *Long v. Kerrigan*, 15 Ky. L. Rep. 65, 21 S. W. 99; *Border State Sav. Inst. v. Wilcox*, 63 Md. 525; *Farnsworth v. Childs*, 4 Mass. 637, 3 Am. Dec. 249; *McKee v. Wilcox*, 11 Mich. 358, 83 Am. Dec. 743; *Lambert v. Weber*, 83 Mich. 395, 47 N. W. 251; *Freeman v. Moffitt*, 119 Mo. 280, 25 S. W. 87; *Niles v. Cooper*, 98 Minn. 39, 13 L.R.A. (N.S.) 49, 107 N. W. 744; *McHugh v. Smiley*, 17 Neb. 626, 24 N. W. 277; *Haddock v. Wilmarth*, 5 N. H. 181, 20 Am. Dec. 570; *Essex County Nat. Bank v. Harrison*, 57 N. J. Eq. 91, 40 Atl. 209; *Williamson v. Brown*, 15 N. Y. 354; *Tankard v. Tankard*, 79 N. C. 54; *Petrain v. Kiernan*, 23 Or. 455, 32 Pac. 158; *Jamison v. Dimock*, 95 Pa. 52; *Graham v. Nesmith*, 24 S. C. 285; *Watkins v. Edwards*, 23 Tex. 447; *Duke v. Griffith*, 9 Utah, 476, 35 Pac. 512; *Shaw v. Beebe*, 35 Vt. 205; *Orr v. Clark*, 62 Vt. 136, 19 Atl. 929; *Chapman v. Chapman*, 91 Va. 397, 50 Am. St. Rep. 846, 21 S. E. 813; *Smith v. Owens*, 63 W. Va. 60, 59 S. E. 762; *Lea v. Polk County Copper Co.* 21 How. 493, 16 L. ed. 203; *Hughes v. United States*, 4 Wall. 232, 18 L. ed. 303; *Bright v. Buckman*, 39 Fed. 243; *Bailey v. Richardson*, 9 Hare, 723; *Daniels v. Davison*, 16 Ves. Jr. 249, 10 Revised Rep. 171.
- ¹¹ *Security Loan & T. Co. v. Willamette Steam Mills Lumbering & Mfg. Co.* 99 Cal. 636, 34 Pac. 321.
- ¹² *Hunter v. Watson*, 12 Cal. 363, 73 Am. Dec. 543; *Pell v. McElroy*, 36 Cal. 268; *Hyde v. Mangan*, 88 Cal. 319, 26 Pac. 180; *Scroggins v. McDougald*, 8 Ala. 382; *Parker v. Gortatowsky*, 127 Ga. 560, 56 S. E. 846; *Johnson v. Clark*, 18 Kan. 157; *Border State Sav. Inst. v. Wilcox*, 63 Md. 525; *Hommel v. Devinney*, 39 Mich. 522; *English v. Rinear, — N. J. Eq. —*, 55 Atl. 41; *Lamont v. Cheshire*, 65 N. Y. 30; *M'Culloch v. Cowher*, 5 Watts & S. 427; *Stahn v. Hall*, 10 Utah, 400, 37 Pac. 585; *Hughes v. United States*, 4 Wall. 232, 18 L. ed. 303.
- ¹³ *Brewer v. Brewer*, 19 Ala. 481; *Powell v. Allred*, 11 Ala. 318; *Jowers v. Phelps*, 33 Ark. 465; *Palmer v. Bates*, 22 Minn. 532; *Diehl v. Page*, 3 N. J. Eq. 143; *Braman v. Wilkinson*, 3 Barb. 151; *Seymour v. McKinstry*, 106 N. Y. 230, 12 N. E. 348, 14 N. E. 94; *Randall v. Lingwall*, 43 Or. 383, 73 Pac. 1; *Bidwell v. Evans*, 156 Pa. 30, 26 Atl. 817; *Hart v. Farmers' & M. Bank*, 33 Vt. 252.

b. Effect of statutes requiring actual notice as an equivalent of registration.—The rule has been asserted, at least in Massachusetts and Missouri, that actual notice of an unrecorded deed, made by statute the equivalent of constructive notice, which is to be presumed from registry, should be so express and satisfactory

that it would be a fraud in the person receiving it subsequently to purchase, attach, or levy upon the land to the prejudice of the first grantee, though it need not amount to certain knowledge of the deed from the grantor to the party claiming under it.¹ The contrary view has been asserted, however, that the purpose of a statute providing for the recording of conveyances, and agreements to convey, and instruments affecting the title to real estate, but making unrecorded instruments valid and binding between the parties thereto, and as against all other persons who have had actual notice, was not to change the rule that possession was evidence of title and notice to all the world of ownership, but to afford the means of preserving the chain of title and to give notice of the ownership of unoccupied lands; and that the demands of a statutory provision requiring actual notice of an unrecorded conveyance to make it equivalent to a record as notice are answered if a party dealing with the land in question has information of facts which would put a prudent man upon inquiry, and which would, if pursued, lead to actual knowledge of the title.²

¹ *Curtis v. Mundy*, 3 Met. 405; *Parker v. Osgood*, 3 Allen, 487; *Toupin v. Peabody*, 162 Mass. 473, 39 N. E. 280; *Beatie v. Butler*, 21 Mo. 313, 64 Am. Dec. 234.

So, *Clark v. Bosworth*, 51 Me. 528, and *Spofford v. Weston*, 29 Me. 140, hold that by Me. Rev. Stat. 1841, the rule that the visible possession of an improved estate by the grantee under his deed was implied notice of the sale to subsequent purchasers, although his deed had not been recorded, was changed so that actual notice was required, and the doctrine of constructive notice as to all subsequent transactions of that description was done away with. For present statute see Rev. Stats. of Me. 1916, § 14, p. 1115.

² *Toland v. Corey*, 6 Utah, 392, 24 Pac. 190; *Brinkman v. Jones*, 44 Wis. 498.

c. Rules as to scope of the inquiry.—A purchaser or mortgagee of land occupied by someone other than the grantor or mortgagor is bound to inquire of the occupant as to his rights; and if he fails to do so, he is chargeable with notice of them.¹ It is not sufficient to inquire of the grantor,² nor is it material that the grantor represented to the purchaser that the occupant was a tenant at will.³ And he must inquire with respect to every ground, source, and right of the occupant's possession;⁴ but where the record shows a good title he is not bound to look

beyond the record to a former occupancy of it under a deed of which the purchaser is not shown to have had notice;⁵ he is under no duty to search the record to ascertain not only the title of the possessor, but what title he had parted with.⁶ So, he is not bound to inquire, where he finds a third person in possession, whether there is fraud or a trust, where the title and possession give no indication that there is either.⁷ A purchaser is not defeated in his right to the property by the fact that it was then in the possession of a third person, where, after having pursued the inquiry prompted by such possession, with proper diligence, he received no information which would impeach the apparent rights of his grantor.⁸ And a purchaser neglecting to inquire into the title of an occupier of the land is not affected by any other equities than those which such occupier may insist on;⁹ nor does the fact that the property is in the possession of a third party put him upon inquiry, where such possession is consistent with the title appearing of record.¹⁰

¹ Allen v. Cadwell, 55 Mich. 8, 20 N. W. 692; Lestrade v. Barth, 19 Cal. 660; Williams v. Brown, 14 Ill. 200; Bonnell v. Allerton, 51 Iowa, 166, 49 N. W. 857; Deetjen v. Richter, 33 Kan. 410, 6 Pac. 595; Canfield v. Hard, 58 Vt. 217, 2 Atl. 136; Bright v. Buckman, 39 Fed. 243; Miles v. Langley, 1 Russ. & M. 39.

² Canfield v. Hard, 58 Vt. 217, 2 Atl. 136.

³ Moreland v. Lemasters, 4 Blackf. 383.

⁴ Bright v. Buckman, 39 Fed. 243; Williams v. Brown, 14 Ill. 200.

⁵ Hiller v. Jones, 66 Miss. 636, 6 So. 465.

⁶ Losey v. Simpson, 11 N. J. Eq. 246.

⁷ Leach v. Ansbacher, 55 Pa. 85.

⁸ Fair v. Stevenot, 29 Cal. 486, 11 Mor. Min. Rep. 11; Crofton v. Ormsby, 2 Sch. & Lef. 583, 9 Revised Rep. 107; Austin v. Southern Home Bldg. & L. Asso. 122 Ga. 440, 50 S. E. 382.

⁹ Hunt v. Luck [1901] 1 Ch. 45, 70 L. J. Ch. N. S. 30, 49 Week. Rep. 155, 83 L. T. N. S. 479, 17 Times L. R. 3.

¹⁰ Aden v. Vallejo, 139 Cal. 165, 72 Pac. 905; Smith v. Yule, 31 Cal. 180, 89 Am. Dec. 167; Schumacher v. Truman, 134 Cal. 430, 66 Pac. 591; Rogers v. Hussey, 36 Iowa, 664; Fargason v. Edrington, 49 Ark. 207, 4 S. W. 763; McNeil v. Polk, 57 Cal. 323.

d. Of what possession is notice.—Possession of land is notice not only of the right of the possessor, to a person dealing with another with reference thereto, but also of all facts that would

be developed if inquiry were made of the one in possession and a truthful response made.¹ The purchaser is charged with notice of all that he might have learned by due and reasonable inquiry.² But where one is in possession of land under some right which appears of record, or which is consistent with the record title, his possession is not constructive notice of another or different right, but is referable to that right.³

¹ *Austin v. Southern Home Bldg. & L. Asso.* 122 Ga. 440, 50 S. E. 382; *Deetjen v. Richter*, 33 Kan. 410, 6 Pac. 595; *Lambert v. Weber*, 83 Mich. 395, 47 N. W. 251; *Essex County Nat. Bank v. Harrison*, 57 N. J. Eq. 91, 40 Atl. 209; *Edwards v. Thompson*, 71 N. C. 177; *Shaw v. Beebe*, 35 Vt. 205; *Frazer v. Western*, How. App. Cas. 448.

² *Bright v. Buckman*, 39 Fed. 243; *Carter Bros. v. Challen*, 83 Ala. 135, 3 So. 313; *Allen v. Moore*, 30 Colo. 307, 70 Pac. 682; *Mallett v. Kaehler*, 141 Ill. 70, 30 N. E. 549; *Meni v. Rathbone*, 21 Ind. 454; *Crooks v. Jenkins*, 124 Iowa, 317, 104 Am. St. Rep. 326, 100 N. W. 82; *Howatt v. Green*, 139 Mich. 289, 102 N. W. 734; *Northwestern Land Co. v. Dewey*, 58 Minn. 359, 59 N. W. 1085; *Ward v. Metropolitan Elev. R. Co.* 82 Hun, 545, 31 N. Y. Supp. 527, affirmed in 152 N. Y. 39, 46 N. E. 319; *Cornell v. Maltby*, 165 N. Y. 557, 59 N. E. 291; *Tankard v. Tankard*, 79 N. C. 54; *Petrain v. Kiernan*, 23 Or. 455, 32 Pac. 158; *Jamison v. Dimock*, 95 Pa. 52; *Betts v. Letcher*, 1 S. D. 182, 46 N. W. 193; *Orr v. Clark*, 62 Vt. 136, 19 Atl. 929.

³ *May v. Sturdivant*, 75 Iowa, 116, 9 Am. St. Rep. 463, 39 N. W. 221; *Wrede v. Cloud*, 52 Iowa, 371, 3 N. W. 400; *Haft v. Strange*, 65 Miss. 323, 7 Am. St. Rep. 659, 3 So. 190; *Price v. Gray*, — N. J. Eq. —, 34 Atl. 678; *Jaques v. Weeks*, 7 Watts, 261; *Plumer v. Robertson*, 6 Serg. & R. 179; *Kilgore v. Graves*, 2 Tex. App. Civ. Cas. (Willson) 354; *Hamilton v. Ingram*, 13 Tex. Civ. App. 604, 35 S. W. 748.

e. Requisites and sufficiency of possession.—The character of possession which is sufficient to put a person upon inquiry, and which will be equivalent to actual notice of the rights or equities of persons other than those having a record title, must be actual, open, notorious, and visible, and must be distinct, and not equivocal, occasional, or for a special or temporary purpose.¹ The possession should be inconsistent with the title upon which a subsequent purchaser or encumbrancer relies,² and it should also be exclusive,³ and existing at the time of the purchase.⁴ But it need not be of every part of the land, in order to

constitute notice of the possessor's rights both legal and equitable;⁵ as a general rule, actual possession of a part of a tract is notice of the claim of the possessor to the whole.⁶

¹ *Brown v. Volkening*, 64 N. Y. 76; *Holland v. Brown*, 140 N. Y. 344, 34 N. E. 577; *Wells v. American Mortg. Co.* 109 Ala. 430, 20 So. 136; *Havens v. Dale*, 18 Cal. 359; *Hayward v. Mayse*, 1 App. D. C. 133; *Tate v. Pensacola Gulf, Land & Development Co.* 37 Fla. 439, 53 Am. St. Rep. 251, 20 So. 542; *Truesdale v. Ford*, 37 Ill. 210; *Tillotson v. Mitchell*, 111 Ill. 518; *Holcroft v. Hunter*, 3 Blackf. 152; *Elliot v. Lane*, 82 Iowa, 484, 31 Am. St. Rep. 504, 48 N. W. 720; *Greer v. Higgins*, 20 Kan. 420; *Gordon v. Sizer*, 39 Miss. 805; *Atwood v. Bearss*, 47 Mich. 72, 10 N. W. 112; *Masterson v. West End Narrow Gauge R. Co.* 5 Mo. App. 64, affirmed in 72 Mo. 342; *Bell v. Twilight*, 22 N. H. 500; *Patten v. Moore*, 32 N. H. 382; *Rankin v. Coar*, 46 N. J. Eq. 566, 11 L.R.A. 661, 22 Atl. 177; *Bost v. Setzer*, 87 N. C. 187; *Farmers' & M. Nat. Bank v. Wallace*, 45 Ohio St. 152, 12 N. E. 439; *Martin v. Jackson*, 27 Pa. 504, 67 Am. Dec. 489; *Billington v. Welsh*, 5 Binn. 129, 6 Am. Dec. 406; *Betts v. Letcher*, 1 S. D. 182, 46 N. W. 193; *Blankenship v. Douglas*, 26 Tex. 225, 82 Am. Dec. 608; *Ely v. Wilcox*, 20 Wis. 524, 91 Am. Dec. 436; *Townsend v. Little*, 109 U. S. 510, 27 L. ed. 1014, 3 Sup. Ct. Rep. 357.

² *Staples v. Fenton*, 5 Hun, 172; *Pope v. Allen*, 90 N. Y. 298; *Munn v. Achey*, 110 Ala. 628, 18 So. 299; *Havens v. Dale*, 18 Cal. 359; *Schumacher v. Truman*, 134 Cal. 430, 66 Pac. 591; *Martin v. Thomas*, 56 W. Va. 220, 49 S. E. 118.

³ *Wells v. American Mortg. Co.* 109 Ala. 430, 20 So. 136; *Taylor v. Central P. R. Co.* 67 Cal. 615, 8 Pac. 438; *Mason v. Mullahy*, 145 Ill. 383, 34 N. E. 36; *Elliott v. Lane*, 82 Iowa, 484, 31 Am. St. Rep. 504, 48 N. W. 720; *Greer v. Higgins*, 20 Kan. 420; *Ramirez v. Smith*, — Tex. Civ. App. —, 56 S. W. 254; *Boyce v. M'Culloch*, 3 Watts & S. 429, 39 Am. Dec. 35; *Farmers' & M. Nat. Bank v. Wallace*, 45 Ohio St. 152, 12 N. E. 439.

⁴ *Bingham v. Kirkland*, 34 N. J. Eq. 229; *Finch v. Beal*, 68 Ga. 594; *Rous-sain v. Norton*, 53 Minn. 560, 55 N. W. 747; *Patterson v. Mills*, 121 N. C. 258, 28 S. E. 368; *Stiffler v. Retzlaff*, 7 Sadler (Pa.) 232, 20 W. N. C. 303, 11 Atl. 876; *O'Neal v. Prestwood*, 153 Ala. 443, 45 So. 251; *White v. White*, 105 Ill. 313; *New York Life Ins. & T. Co. v. Cutler*, 3 Sandf. Ch. 176.

⁵ *Boyer v. Chandler*, 160 Ill. 394, 32 L.R.A. 113, 43 N. E. 803.

⁶ *Ramirez v. Smith*, 94 Tex. 184, 59 S. W. 258, reversing — Tex. Civ. App. —, 56 S. W. 254; *Watson v. Mancill*, 76 Ala. 600; *Small v. Stagg*, 95 Ill. 39; *Watters v. Connelly*, 59 Iowa, 217, 13 N. W. 82; *Bryant v. Main*, 25 Ky. L. Rep. 1242, 77 S. W. 680; *Calvin v. Shaw*, 79 Hun, 56, 29 N. Y. Supp. 644.

f. Possession of tenant as notice.—The rule would seem to be universal that the occupation by a tenant of lands is notice to subsequent purchasers and encumbrancers of his rights as such,¹ and the rule of the English authorities,² and apparently of a majority of the American courts,³ is that the possession of a tenant is notice not only of his interest as tenant, but also of the whole actual interest he may have therein. As to the effect of possession of a tenant as notice of the landlord's interest, the rule in England has been stated to be that the possession of a tenant is notice simply of his tenancy, or of the interest claimed by the actual occupant,⁴ and that such possession is not notice of the title of the lessor.⁵ Some of the American cases have followed the English rule,⁶ but the majority of American courts have adopted the rule that the possession of a tenant is the possession of his landlord, and that notice of the former is notice of the latter.⁷

¹ *Hunt v. Luck* [1901] 1 Ch. 45, 70 L. J. Ch. N. S. 30, 49 Week. Rep. 155, 83 L. T. N. S. 479, 17 Times L. R. 3; *Bailey v. Richardson*, 15 Eng. L. & Eq. Rep. 218; *Hamilton v. Lyster*, 7 Ir. Eq. Rep. 560; *Greenwood v. Bairstow*, 5 L. J. Ch. N. S. 179; *Hull v. Noble*, 40 Me. 459; *Bost v. Setzer*, 87 N. C. 187; *Hottenstein v. Lerch*, 104 Pa. 454; *Flagg v. Mann*, 2 Sumn. 486, Fed. Cas. No. 4,847; *Baldwin v. Johnson*, 1 N. J. Eq. 441; *James v. Morey*, 2 Cow. 246, 14 Am. Dec. 475; *Howell v. Denton*, — Tex. Civ. App. —, 68 S. W. 1002; *Disbrow v. Jones*, Harr. Ch. (Mich.) 49; *Williams v. Brown*, 14 Ill. 200; *Lafferty v. Schuylkill River East Side R. Co.* 124 Pa. 297, 3 L.R.A. 124, 10 Am. St. Rep. 587, 16 Atl. 869.

² *Allen v. Anthony*, 1 Meriv. 282, 15 Revised Rep. 113; *Daniels v. Davison*, 16 Ves. Jr. 249, 10 Revised Rep. 171; *Hunt v. Luck* [1901] 1 Ch. 45, 70 L. J. Ch. N. S. 30, 49 Week. Rep. 155, 83 L. T. N. S. 479, 17 Times L. R. 3; *Barnhart v. Greenshields*, 9 Moore, P. C. C. 18, 28 Eng. L. & Eq. Rep. 77.

³ *Russell v. Moore*, 3 Met. (Ky.) 436; *Hull v. Noble*, 40 Me. 459; *Disbrow v. Jones*, Harr. Ch. (Mich.) 48; *Chesterman v. Gardner*, 5 Johns. Ch. 29, 9 Am. Dec. 265; *Crooks v. Jenkins*, 124 Iowa. 317, 104 Am. St. Rep. 326, 100 N. W. 82; *Brewer v. Brewer*, 19 Ala. 481; *Coari v. Olsen*, 91 Ill. 273; *Smith v. Gibson*, 25 Neb. 511, 41 N. W. 360; *Baldwin v. Johnson*, 1 N. J. Eq. 441.

But the possession of lands by a tenant is not constructive notice to a purchaser of a claim wholly inconsistent with his tenancy. *Smith v. Miller*, 63 Tex. 72.

⁴ *Brunson v. Brooks*, 68 Ala. 248.

- ⁵ *Hunt v. Luck* [1901] 1 Ch. 45, 70 L. J. Ch. N. S. 30, 49 Week. Rep. 155, 83 L. T. N. S. 479, 17 Times L. R. 3.
- ⁶ *Smith v. Dall*, 13 Cal. 510; *Vaughn v. Tracy*, 22 Mo. 415, 65 Am. Dec. 471; *Beatie v. Butler*, 21 Mo. 313, 64 Am. Dec. 234; *Flagg v. Mann*, 2 Sumn. 486, Fed. Cas. No. 4,847.
- ⁷ *Brunson v. Brooks*, 68 Ala. 248; *Vandiveer v. Stickney*, 75 Ala. 225; *Landers v. Bolton*, 26 Cal. 393; *Morrison v. Kelly*, 22 Ill. 610, 74 Am. Dec. 169; *Haworth v. Taylor*, 108 Ill. 275; *Dickey v. Lyon*, 19 Iowa. 544; *O'Neill v. Wilcox*, 115 Iowa, 15, 87 N. W. 742; *Deetjen v. Richter*, 33 Kan. 410, 6 Pac. 595; *Hanly v. Morse*, 32 Me. 287; *Wolf v. Zabel*, 44 Minn. 90, 46 N. W. 81; *Wilkins v. Bevier*, 43 Minn. 213, 19 Am. St. Rep. 238, 45 N. W. 157; *Bratton v. Rogers*, 62 Miss. 281; *Conlee v. McDowell*, 15 Neb. 184, 18 N. W. 60; *Wanner v. Sisson*, 29 N. J. Eq. 141; *Edwards v. Thompson*, 71 N. C. 177; *Randall v. Lingwall*, 43 Or. 383, 73 Pac. 1; *Hottenstein v. Lerch*, 104 Pa. 454; *Lance v. Gorman*, 136 Pa. 200, 20 Am. St. Rep. 914, 20 Atl. 792; *McCamant v. Roberts*, 80 Tex. 316, 15 S. W. 580, 1054; *Wickes v. Lake*, 25 Wis. 71; *Edwards v. Wray*, 11 Biss. 251, 12 Fed. 45; *United States v. Sliney*, 21 Fed. 894; *Storthz v. Chapline*, 71 Ark. 31, 70 S. W. 465.

g. Possession under contract of purchase.—The rule is general if not universal, that the open, notorious, exclusive, and unequivocal possession of land under a parol or an unrecorded contract for the purchase thereof, or under an unrecorded bond for title, is constructive notice to subsequent purchasers or encumbrancers, and to everyone, of the possessor's interest therein, and of the character and extent of his claim.¹ Or at least such possession of a purchaser of land under an unrecorded contract therefor is sufficient to put all persons upon inquiry as to his right; and they are chargeable with that knowledge of the vendor's title which they would obtain by such inquiry.²

- ¹ *Brewer v. Brewer*, 19 Ala. 481; *Hamilton v. Fowlkes*, 16 Ark. 340; *McRae v. McMinn*, 17 Fla. 876; *Burr v. Toomer*, 103 Ga. 159, 29 S. E. 692; *Doolittle v. Cook*, 75 Ill. 354; *Harris v. McIntyre*, 118 Ill. 275, 8 N. E. 182; *Barnes v. Union School Twp.* 91 Ind. 301; *Everts v. Rose Grove*, 77 Iowa, 37, 14 Am. St. Rep. 264, 41 N. W. 478; *Hart v. Bleight*, 3 T. B. Mon. 273; *Geins v. Allen*, 4 Bush, 608; *Corey v. Smalley*, 106 Mich. 257, 58 Am. St. Rep. 474, 64 N. W. 13; *Taylor v. Lowenstein*, 50 Miss. 278; *Lipp v. Hunt*, 25 Neb. 91, 41 N. W. 143; *Marston v. Osgood*, 69 N. H. 96, 38 Atl. 378; *Pennsylvania R. Co. v. United States Pipe-Line Co.* — N. J. Eq. —, 33 Atl. 809; *Moyer v. Hinman*, 13 N. Y. 180; *Union College v. Wheeler*, 61 N. Y. 88; *Jaeger v. Hardy*, 48 Ohio St. 335, 27 N. E. 863; *Kerr v. Day*, 14 Pa. 112.

53 Am. Dec. 526; James v. Drake, 39 Tex. 145; Ripley v. Yale, 18 Vt. 220; Chapman v. Chapman, 91 Va. 397, 50 Am. St. Rep. 846, 21 S. E. 813; Nuttall v. McVey, 63 W. Va. 380, 60 S. E. 251; School Dist. No. 3 v. Macloon, 4 Wis. 79; Honzik v. Delaglise, 65 Wis. 494, 56 Am. Rep. 634, 27 N. W. 171; Holmes v. Powell, 8 DeG. M. & G. 572.
² Coe v. Manseau, 62 Wis. 81, 22 N. W. 155; Moss v. Atkinson, 44 Cal. 3; Hardy v. Summers, 10 Gill & J. 316, 32 Am. Dec. 167; Baynard v. Norris, 5 Gill, 468, 46 Am. Dec. 647; Bell v. Flaherty, 45 Miss. 694.

h. Possession of vendee under unrecorded deed.—The general and common-law rule is that the possession of a vendee under an unrecorded deed, who is in open, exclusive, and notorious occupancy of real estate, claiming it as his own, is constructive notice of his title, to subsequent purchasers or encumbrancers, and to the world.¹ But the more restricted rule as announced by many of the more modern and best-considered cases is that the possession of a purchaser of real estate under an unrecorded deed is notice to the world that he has some claim, which puts a purchaser upon inquiry and protects the possessor.² Statutes with reference to the registration of deeds and other instruments affecting title to land have to some extent broken in upon and altered the doctrine of possession as notice of an unrecorded deed under which it is held.³ And the rule that open, notorious, and exclusive possession by a vendee holding under an unrecorded deed is notice of the vendee's title, whether it is legal or equitable, does not apply where the possession of the vendor and vendee was joint at the time of the sale. In such case the joint possession does not operate as constructive notice of an unregistered deed.⁴

¹ Brunson v. Brooks, 68 Ala. 248; Strickland v. Nance, 19 Ala. 233; Partidge v. McKinney, 10 Cal. 181, 1 Mor. Min. Rep. 185; Massey v. Hubbard, 18 Fla. 688; Atkins v. Paul, 67 Ga. 97; Cabeen v. Breckenridge, 48 Ill. 91; Simmons v. Church, 31 Iowa, 284; Matthews v. Demeritt, 22 Me. 312; Atwood v. Bearss, 47 Mich. 72, 10 N. W. 112; Jones v. Brenizer, 70 Minn. 525, 73 N. W. 255; Stovall v. Judah, 74 Miss. 747, 21 So. 614; Colby v. Kenniston, 4 N. H. 262; Coleman v. Barklew, 27 N. J. L. 357; Raynor v. Timerson, 46 Barb. 518; Frear v. Sweet, 118 N. Y. 454, 23 N. E. 910; Tate v. Clement, 176 Pa. 550, 35 Atl. 214; Rhine v. Hodge, 1 Tex. Civ. App. 371, 21 S. W. 140; Griswold v. Smith, 10 Vt. 454; Nuttall v. McVey, 63 W. Va. 380, 60 S. E. 337; Roberts v. Decker, 120 Wis. 102, 97 N. W. 519; Henderson v. Wanamaker, 25 C. C. A. 181, 49 U. S. App. 174, 79 Fed. 736.

- ² *Mitchell v. Metropolitan Elev. R. Co.* 56 Hun, 543, 9 N. Y. Supp. 829, affirmed in 134 N. Y. 11, 31 N. E. 260; *Ward v. Metropolitan Elev. R. Co.* 82 Hun, 545, 31 N. Y. Supp. 527, affirmed in 152 N. Y. 39, 46 N. E. 319; *Rankin Mfg. Co. v. Bishop*, 137 Ala. 271, 34 So. 991; *Byers v. Engles*, 16 Ark. 543; *McLaughlin v. Shepherd*, 32 Me. 143, 52 Am. Dec. 646; *Perkins v. Swank*, 43 Miss. 349; *Stewart v. McSweeney*, 14 Wis. 469.
- ³ See, as to effect of registration acts in various states: *Quinnerly v. Quinnerly*, 114 N. C. 145, 19 S. E. 99; *Maddox v. Arp*, 114 N. C. 585, 19 S. E. 665; *Hooker v. Nichols*, 116 N. C. 157, 21 S. E. 207; *Moore v. Jourdan*, 14 La. Ann. 417; *Dooley v. Wolcott*, 4 Allen, 406; *M'Mechan v. Griffing*, 3 Pick. 156, 15 Am. Dec. 198.
- ⁴ *McCarthy v. Nicrosi*, 72 Ala. 332, 47 Am. Rep. 418; *O'Neal v. Prestwood*, 153 Ala. 443, 45 So. 251; *Butler v. Stevens*, 26 Me. 484.

i. Grantor's possession after conveyance.—Some of the cases apply the general rule that possession of land is notice of the right and title of the possessor, to a retention of possession by a vendor after conveyance, holding that, where a grantor of real estate remains in possession thereof after the execution of the deed, a purchaser from the grantee is charged with notice of the right, title, or interest of such occupant.¹ Probably a majority of the cases, however, have taken the position that the possession of a vendor after conveyance is not inconsistent with the title which he has conveyed, and that, therefore, one of the elements of constructive notice is lacking.²

- ¹ *Smith v. Myers*, 56 Neb. 503, 76 N. W. 1084; *Shiff v. Andress*, 147 Ala. 690, 40 So. 824; *Illinois C. R. Co. v. McCullough*, 59 Ill. 166; *Ronan v. Bluhm*, 173 Ill. 277, 50 N. E. 694; *Griffin v. Haskins*, 22 Ill. App. 264; *Bumpas v. Zachary*, — Tex. Civ. App. —, 34 S. W. 672.
- ² *Van Keuren v. Central R. Co.* 38 N. J. L. 165; *Groton Sav. Bank v. Batty*, 30 N. J. Eq. 127; *Galford v. Gillett*, 55 Ill. App. 576; *Sprague v. White*, 73 Iowa, 670, 35 N. W. 751; *May v. Sturdivant*, 75 Iowa, 116, 9 Am. St. Rep. 463, 39 N. W. 221; *McNeil v. Jordan*, 28 Kan. 7; *Hockman v. Thuma*, 68 Kan. 519, 75 Pac. 486; *Kerr v. Kingsbury*, 39 Mich. 150, 33 Am. Rep. 362; *Hafter v. Strange*, 65 Miss. 323, 7 Am. St. Rep. 659, 3 So. 190; *Brophy Min. Co. v. Brophy & D. Gold & S. Min. Co.* 15 Nev. 101, 10 Mor. Min. Rep. 601; *Red River Valley Land & Invest. Co. v. Smith*, 7 N. D. 236, 74 N. W. 194; *Forsha v. Longworth*, 1 Ohio C. C. 271, 1 Ohio C. D. 149, affirmed in 22 Ohio L. J. 354; *Exon v. Dancke*, 24 Or. 110, 32 Pac. 1045; *Smith v. Phillips*, 9 Okla. 297, 60 Pac. 117; *Curry v. Williams*, — Tenn. —, 38 S. W. 278; *Love v. Breedlove*, 75 Tex. 649, 13 S. W. 222; *Eylar v. Eylar*, 60 Tex. 315.

The legal presumption is that such possession is with the permission of the grantee, and subordinate to, and consistent with, the grant. *Jeffersonville, M. & I. R. Co. v. Oyler*, 82 Ind. 394; *Dodge v. Davis*, 85 Iowa, 77, 52 N. W. 2; *Humphrey v. Hurd*, 29 Mich. 44; *Brigham v. Thompson*, 12 Tex. Civ. App. 562, 34 S. W. 358.

j. Mortgagee or lienor in possession.—The rule that possession of land is notice to subsequent purchasers or encumbrancers of the possessor's title applies to possession held under an unrecorded mortgage.¹ An immediate and continuous change of possession of lands into the hands of a mortgagee thereof is the best possible notice of his rights as against all others.² It has been held, however, that, though it may not be usual, it is not inconsistent with a mortgage, that the mortgagee should be let into possession in order to keep down the interest by receipt of profits, and the application of the surplus, if any, toward the discharge of the principal; and that such possession is not notice of a claim of title inconsistent with the record title.³

¹ *Brainard v. Hudson*, 103 Ill. 218; *Rodriguez v. Haynes*, 76 Tex. 225, 13 S. W. 296; *Peterson v. Philadelphia Mortg. & T. Co.* 33 Wash. 464, 74 Pac. 585; *Edwards v. Wray*, 11 Biss. 251, 12 Fed. 42.

² *Parsell v. Thayer*, 39 Mich. 467.

³ *Plumer v. Robertson*, 6 Serg. & R. 179.

k. Possession of cestui que trust.—Where the legal title to lands is in a trustee, actual possession thereof by a *cestui que trust* is notice to a purchaser from the trustee that there is some claim, title, or possession of the property adverse to the vendor.¹ So, a conveyance of land by a trustee will not divest the interest of the beneficiary of the trust estate, when a tenant of the beneficiary was in possession at the time of the conveyance.²

¹ *Johns v. Norris*, 27 N. J. Eq. 485; *First Nat. Bank v. Kurtz*, 22 Ill. App. 213; *Truth Lodge No. 213, A. F. & A. M. v. Barton*, 119 Iowa, 230, 97 Am. St. Rep. 303, 93 N. W. 106; *Petrain v. Kiernan*, 23 Or. 455, 32 Pac. 158; *Pritchard v. Brown*, 4 N. H. 397, 17 Am. Dec. 431; *Hawley v. Geer*, — Tex —, 17 S. W. 914; *Hackett v. Callender*, 32 Vt. 97.

Where a father gave land to his son and put him in possession, and the son fulfilled the conditions precedent attaching to the gift, and, by improvements thereon, acquired the equitable title to it, a court of equity will regard the father as trustee for the son; and the possession of the

son, of itself, conveys notice to the world of his equitable title, and of his right to the legal title. *Frame v. Frame*, 32 W. Va. 463, 5 L.R.A. 323, 9 S. E. 901.

² *Bowman v. Anderson*, 82 Iowa, 210, 31 Am. St. Rep. 473, 47 N. W. 1087.

l. Possession by cotenants.—Possession of a tenant in common of land who has the exclusive right to possession as against all the world but his cotenant is notice of his own title.¹ But the rule has been adopted by many of the cases that a tenant in common in possession is presumed to be in under his own title, and not under the right of his cotenant, and his possession, therefore, is notice only of his own title.² And sole possession of one tenant in common is not presumed to be adverse to a cotenant; the ordinary presumption is that such possession is held in the right of both,³ and the cotenant out of possession is not informed by such possession that it has any adverse character.⁴ Nor is possession by two or three cotenants notice of the claim of the third who holds under an unrecorded deed.⁵ Possession of land by a firm for partnership purposes, at a time when advances were made to one of the partners, who held the legal title, to secure which he afterwards executed a conveyance of the lot, or a mortgage thereon, was notice to the world of the equitable rights of the firm.⁶

¹ *Wilcox v. Leominster Nat. Bank*, 43 Minn. 541, 19 Am. St. Rep. 259, 45 N. W. 1136; *Kirkham v. Moore*, 30 Ind. App. 549, 65 N. E. 1042; *Seawell v. Young*, 77 Ark. 309, 91 S. W. 544.

² *Wilcox v. Leominster Nat. Bank*, 43 Minn. 541, 19 Am. St. Rep. 259, 45 N. W. 1136; *Unger v. Mooney*, 63 Cal. 586, 49 Am. Rep. 100.

³ *Buckmaster v. Needham*, 22 Vt. 617.

⁴ *Unger v. Mooney*, 63 Cal. 586, 49 Am. Rep. 100.

⁵ *McBane v. Wilson* (C. C. W. D. Pa.) 8 Fed. 734.

⁶ *Bergeron v. Richardott*, 55 Wis. 129, 12 N. W. 384; *Reeves v. Ayers*, 38 Ill. 418.

m. Possession by husband and wife.—Where husband and wife are in joint possession, there is a presumption that the possession is that of the husband, and one desiring to purchase the land, or acquire any interest therein, is pointed by this presumption to the husband as the person from whom inquiry should be made as to the actual state of the title.¹ It is a general rule, however, that possession by husband and wife together will im-

part notice of the wife's equity as against all persons other than those claiming under the husband, their possession being regarded as joint by reason of the family relation.² Possession of the husband alone is generally referred to his representative capacity, and must be considered the possession of his wife when it relates to her separate estate, and is therefore considered as notice of her right.³ And a wife's possession of property acquired and held by her while living with her husband, as respects notice to purchasers, has the same effect as is allowed to a possession by the husband of his own property, and, in the absence of a recorded title in her husband, inconsistent with such possession by her, is sufficient to put a purchaser on inquiry.⁴ So, where a husband and wife separate, and the wife is in possession of real estate, claiming to own it, her possession is sufficient to put a purchaser thereof from the husband upon inquiry with reference to her rights.⁵ But a polygamous wife occupying premises of her so-called husband, who is the apparent owner thereof, does not have such possession of the property as will give constructive notice to a bona fide purchaser of any claim she may have thereto by virtue of a secret agreement with the record owner.⁶ Possession by a husband with his wife, of homestead property, he being the head of the family, is presumptively his possession; and the creditor of the wife is chargeable with constructive notice of its homestead character.⁷ So, where a wife lived with her husband on land which they had occupied under a certificate of purchase from the state, which certificate the husband has assigned, without her concurrence, to another person, who obtained a patent to the land and mortgaged it, the mortgagee is chargeable with notice of the wife's homestead rights, and cannot be regarded as bona fide purchaser.⁸

¹ *Austin v. Southern Home Bldg. & L. Asso.* 122 Ga. 440, 50 S. E. 382.

² *Iowa Loan & T. Co. v. King*, 58 Iowa, 598, 12 N. W. 595; *Humphrey v. Moore*, 17 Iowa, 193; *Walker v. Neil*, 117 Ga. 733, 45 S. E. 387; *Kirby v. Tallmadge*, 160 U. S. 379, 40 L. ed. 463, 16 Sup. Ct. Rep. 349.

The doctrine has been asserted, however, that when husband and wife live together upon land, and the husband exercises control over it, the possession is presumptively in him as the head of the family: and such joint residence is not, alone, sufficient to give notice of any claim of interest in the land by the wife. *Garrard v. Hull*, 92 Ga. 787, 20 S. E. 357; *Neal v. Perkerson*, 61 Ga. 346.

³ *Brunson v. Brooks*, 68 Ala. 248; *Butler v. Thweatt*, 119 Ala. 325, 24 So. 545.

And it will prevent the attachment of a lien of an execution against the husband. *Brunson v. Brooks*, 68 Ala. 248.

And no act of purchase or renting by the husband from a third person, in which she did not participate, will oust her from such possession. *Butler v. Thweatt*, 119 Ala. 325, 24 So. 545.

⁴ *Brown v. Carey*, 149 Pa. 134, 23 Atl. 1103.

⁵ *Allen v. Moore*, 30 Colo. 307, 70 Pac. 682.

⁶ *Townsend v. Little*, 109 U. S. 510, 27 L. ed. 1014, 3 Sup. Ct. Rep. 357.

⁷ *Broome v. Davis*, 87 Ga. 584, 13 S. E. 749.

⁸ *Allen v. Cadwell*, 55 Mich. 8, 20 N. W. 692.

n. Other family relations as affecting possession.—Where minor children reside with their father, who is in possession of land to which he has the legal title, his children's residence on the land is not sufficient to put a purchaser from the father upon notice or inquiry as to any secret equity which the children may have in such land.¹ So, where, during the lifetime of the owner of land, his son, with his family, resided with him on the land, and, after the death of the father, the son continued to reside there, the possession of the son was not notice of any claim he might have by verbal agreement between him and his father, as against a purchaser in good faith and for value from another child who was the heir of the father.² And where a mother and daughter occupied property, and together kept boarders in the house, and both worked about the house, there being nothing to indicate to an outsider who the mistress of the house as a residence was, the possession of the daughter was equivocal, and did not constitute notice to a subsequent mortgagee, of an unrecorded deed to her, or of title to the property.³ The joint possession of land by the widow and children of the deceased owner thereof, however, is constructive notice to a purchaser from the widow, who holds the legal title, of the rights of the children as well as of the deceased owner.⁴

¹ *Goodwynne v. Bellerby*, 116 Ga. 901, 43 S. E. 275; *Nagelspach v. Shaw*, 146 Mich. 493, 109 N. W. 843, 111 N. W. 343; *Baldwin v. Golde*, 88 Hun, 115, 34 N. Y. Supp. 587.

² *Stone v. Cook*, 79 Ill. 424.

³ *Powell v. Jenkins*, 14 Misc. 83, 35 N. Y. Supp. 265.

⁴ *Jackson v. McFadden*, 4 W. N. C. 539.

o. Application of rules to easements.—The general rule is that possession of easements in lands is notice to all the world of a claim of the possessor in respect thereto,¹ and purchasers of real estate are chargeable with notice of an evidence of servitude existing thereon,² and they take subject to the burden of the easement.³ The occupation of an easement in land adjacent, which has been conveyed without a reservation, is inconsistent with the grant, and is notice to a purchaser from the grantee in such deed of a parol reservation of the easement.⁴ Easements capable of physical examination are embraced within the recording acts, and subject to the same law of notice, by possession or otherwise, as conveyances of a fee.⁵

¹ *Mitchell v. Metropolitan Elev. R. Co.* 56 Hun, 543, 9 N. Y. Supp. 829, affirmed in 134 N. Y. 11, 31 N. E. 260; *Munson v. Reid*, 46 Hun, 399; *Robinson v. Thrailkill*, 110 Ind. 117, 10 N. E. 647; *Pyer v. Carter*, 1 Hurlst. & N. 916, 26 L. J. Exch. N. S. 258, 5 Week. Rep. 371; *Rollo v. Nelson*, 34 Utah, 116, 26 L.R.A. (N.S.) 315, 96 Pac. 263; *Rock Island & P. R. Co. v. Dimick*, 144 Ill. 628, 19 L.R.A. 105, 32 N. E. 291; *Case v. Hoffman*, 100 Wis. 314, 44 L.R.A. 728, 72 N. W. 390, 74 N. W. 220, 75 N. W. 945.

² *Pierce v. Cleland*, 133 Pa. 189, 7 L.R.A. 752, 19 Atl. 352.

³ *De Luze v. Bradbury*, 25 N. J. Eq. 70.

⁴ *Randall v. Silverthorn*, 4 Pa. 173.

⁵ *Ward v. Metropolitan Elev. R. Co.* 82 Hun, 545, 31 N. Y. Supp. 527, affirmed in 152 N. Y. 39, 46 N. E. 319.

p. Estoppel of possessor to assert claim.—A person in possession of land may, by his own acts, divest his possession of those attributes which cause it to put purchasers upon inquiry.¹ The possessor must refrain from all acts calculated to produce a false impression as to the state of the title, in order to hold a person dealing with the owner of the record title to the duty of inquiring with respect to the interest of the occupant.² And a person having title to land, who stands by silent when he should assert his claim, thus inducing a purchaser to believe that he has none, is estopped afterwards to assert it.³ So, he may be estopped from asserting his claim by refusing information as to his rights when asked in regard thereto by an intending purchaser.⁴ And the surrender of possession, relied upon as notice of a claim of right or title, is an abandonment of the

claim.⁵ A person in possession of land, however, may rest upon notice of his equities, given to all the world by his possession; and, hearing of an intended purchase thereof, or mortgage thereon, he is not obliged to seek out the purchaser or mortgagee, and warn him against taking it.⁶ And a possessor claiming an equitable title is not estopped from asserting it by an acknowledgment of tenancy, obtained by misrepresentations on the part of the lessor.⁷

¹ *Smith v. Miller*, 63 Tex. 72.

² *Lathrop v. Groton Sav. Bank*, 31 N. J. Eq. 273.

³ *Bramble v. Kingsbury*, 39 Ark. 131.

⁴ *Riley v. Quigley*, 50 Ill. 304, 99 Am. Dec. 516; *Yates v. Hurd*, 8 Colo. 343, 8 Pac. 575; *Trumpower v. Marcey*, 92 Mich. 529, 52 N. W. 999.

⁵ *Campbell v. Brackenridge*, 8 Blackf. 471; *Ehle v. Brown*, 31 Wis. 405.

Where a person held lands for some years, claiming under a parol purchase from the record owner, and, when he learned that the record owner had conveyed the lands to another, took a lease from the latter and renounced his claim to the lands, his possession was that of a tenant or lessee, and was not notice to a subsequent purchaser of his original claim under the parol purchase. *Smith v. Miller*, 63 Tex. 72; s. c. 66 Tex. 74, 17 S. W. 399.

And the effect of such acts as a waiver of the possessor's right to assert his title is not affected, so far as the question of notice is concerned, by the fact that he took the leases by mistake, in ignorance of his right. *Ibid*.

⁶ *Jowers v. Phelps*, 33 Ark. 465; *Bramble v. Kingsbury*, 39 Ark. 131.

⁷ *Whitsett v. Miller*, 1 Posey, Unrep. Cas. (Tex.) 203.

For an elaborate note on the question of possession of land as notice of title, with a review of all the authorities, see 13 L.R.A.(N.S.) 49.

3. Notice to charge with fraud.

It is now settled that the rule that facts sufficient to put a party on inquiry, coupled with failure to exercise due diligence in making inquiry, charge the party with notice as matter of law, only applies for the protection of some actual outstanding title, lien, equitable interest, or trust constituting a special equity. It does not apply in the case of one claiming under a fraudulent conveyance who is in fact innocent of any guilty knowledge or actual suspicion.¹

¹ *Parker v. Connor*, 93 N. Y. 119, 45 Am. Rep. 178, and cases cited.

4. Notice to agent.

a. In general.—The rule that a principal is chargeable with knowledge of facts communicated to, or acquired by, his agent in the course of transactions in which the agent represented the principal, unless the communication of such fact to the principal by the agent would involve a positive breach of duty is well established in both England and America.¹ And this rule applies in the case of a continuous agency involving a long series of transactions of the same general character; to knowledge acquired by the agent in any of such transactions so as to affect the principal in any later transaction in which the agent as such is engaged and in which the knowledge is material.² It is well settled, however, that notice to an agent, in order to bind the principal, must relate to the business or transactions in reference to which the agent is authorized to act for and on behalf of his principal and to matters over which his authority extends. If it relates to a matter over which the agent has no authority and concerning which he is not authorized to act for his principal, although he may be an agent for other purposes, it would not affect the principal or be binding on him.³

¹ See articles (and cases collected) in 13 Ohio L. J. 182; Story, Agency, 9th ed. § 140; Bank of Pittsburgh v. Whitehead, 36 Am. Dec. 188, 200, and note (10 Watts, 397); Wade, Notice, 2d ed. § 687; Slattery v. Schwannecke, 44 Hun, 83, and cases cited; Henry v. Allen, 151 N. Y. 1, 36 L.R.A. 658, 45 N. E. 355; Dollard v. Roberts, 130 N. Y. 269, 14 L.R.A. 238, 29 N. E. 104; Jenkins Bros. Shoe Co. v. Renfrow, 151 N. C. 323, 25 L.R.A.(N.S.) 231, 66 S. E. 212; McCormick Harvesting Mach. Co. v. Zakzewski, 220 Ill. 522, 4 L.R.A.(N.S.) 848, 77 N. E. 147; Humphreys v. National Ben. Asso. 139 Pa. 264, 11 L.R.A. 564, 20 Atl. 1047; Hicks v. American Natural Gas Co. 207 Pa. 570, 65 L.R.A. 209, 47 Atl. 55; Distilled Spirits (Harrington v. United States) 11 Wall. 356, 20 L. ed. 167; and notes in 1 L.R.A. 217; 1 L.R.A. 563; 2 L.R.A. 734; 10 L.R.A. 705; and 24 Am. St. Rep. 228.

The failure of an agent to communicate to his principal information acquired by him in the course and within the scope of his agency is a breach of duty to his principal, but the notice has the same effect as to third persons as though his duty had been faithfully performed. Cox v. Pearce, 112 N. Y. 637, 3 L.R.A. 563, 20 N. E. 566.

For the cases on the question of notice to traveling salesman as notice to his employer, see note in 25 L.R.A.(N.S.) 231.

The imputation of attorney's knowledge of facts to his client is discussed in an exhaustive note in 4 A.L.R. 1592.

² Holden v. New York & E. Bank, 72 N. Y. 286. For the application of the

principle to the relation of attorney and client, see *Saffron-Walden Bldg. Second Ben. Soc. v. Rayner*, L. R. 14 Ch. Div. 406, 43 L. T. N. S. 3 (holding that the successive retainers are not a continuous employment within the rule); *Hulbert v. Douglas*, 94 N. C. 122; *Carter v. Ottawa*, 24 Fed. 546 (knowledge of attorney who acted both for buyer and seller of security); *McCormick v. Joseph*, 83 Ala. 401, 3 So. 796.

⁸ *Mechem, Agency*, § 725; *Pennoyer v. Willis*, 26 Or. 1, 46 Am. St. Rep. 594, 36 Pac. 568; *Roach v. Karr*, 18 Kan. 529, 26 Am. Rep. 788; *Congar v. Chicago & N. W. R. Co.* 24 Wis. 157, 1 Am. Rep. 164; *Mechanics' Bank v. Schaumburg*, 38 Mo. 228; *United Firemen's Ins. Co. v. Thomas*, 47 L.R.A. 455, 34 C. C. A. 240, 92 Fed. 127; *Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co.* 27 Fla. 1, 157, 17 L.R.A. 33, 9 So. 661, 689.

Though an attorney or director of a corporation may be its agent, yet knowledge which such an officer has acquired while acting for himself or for a third person, and not for the corporation, is not imputed to the principal,—especially where such knowledge cannot be communicated to the principal without a breach of confidence on the part of the agent. *Akers v. Rowan*, 33 S. C. 451, 10 L.R.A. 705, 12 S. E. 165.

b. Knowledge not acquired in principal's business.—There are two theories in regard to the reason for imputing notice of the agent to the principal. The first theory bases the rule on the legal identity of the principal and agent, on the principle that the agent, while acting within the scope of his authority, is, for the time being, the principal himself. The second theory bases the rule upon the duty of the agent to communicate to his principal the knowledge possessed by him relating to the subject-matter of his agency and material to his principal's protection. The courts which proceed on the first theory hold that only such knowledge as comes to the agent during the agency is binding on the principal, and that the latter is not affected by knowledge acquired prior to the agency, or when the agent is not engaged in the principal's business.¹ The courts which proceed on the second theory hold that the principal will be charged with the agent's knowledge however and whenever acquired, provided the knowledge is present to the agent's mind at the time of the transaction in question.² Where it is not the agent's duty to communicate such knowledge,³ or where it would be wrong for him to do so, as, for example, when it has been acquired confidentially,⁴ the reason for the rule ceases. Nor does the rule apply where it is certainly to be expected that the

agent will not perform his duty to communicate his knowledge to the principal.⁵

¹ *Houseman v. Girard Mut. Bldg. & L. Asso.* 81 Pa. 256; *Martin v. Jackson*, 27 Pa. 508, 67 Am. Dec. 489; *Hood v. Fahenstock*, 8 Watts, 489, 34 Am. Dec. 489; *Satterfield v. Malone*, 1 L.R.A. 35, 35 Fed. 445; *Wheeler v. McGuire*, 86 Ala. 398, 2 L.R.A. 808, 5 So. 190; *Kauffman v. Robey*, 60 Tex. 308, 48 Am. Rep. 264; *Texas Loan Agency v. Taylor*, 88 Tex. 47, 29 S. W. 1057; *Howard Ins. Co. v. Halsey*, 8 N. Y. 271, 59 Am. Dec. 478.

In *Houseman v. Girard Mut. Bldg. & L. Asso.* 81 Pa. 256, the court says that it is a mistake to suppose that the rule depends upon the reason that no man can be supposed always to carry in his mind a recollection of former occurrences, and that if it be proved that he actually had the information in his mind at the time, the rule is different, adding: "It may support the reasonableness of the rule to consider that the memory of man is fallible in the very best and varies in different men, but the true reason of the limitation is a technical one; that it is only during the agency that the agent represents and stands in the shoes of his principal. Notice to him is then notice to his principal. Notice to him twenty-four hours before the relation commenced is no more notice than twenty-four hours after it had ceased would be."

The general question whether the principal is chargeable with knowledge of agent acquired prior to agency is discussed in an extensive note reviewing all the cases in L.R.A.1918B, 929.

² *Dresser v. Norwood*, 17 C. B. N. S. 466, 144 Eng. Reprint, 188, 34 L. J. C. P. N. S. 48, 10 Jur. N. S. 851, 11 L. T. N. S. 111, 12 Week. Rep. 1030; *Rolland v. Hart*, L. R. 6 Ch. 678, 40 L. J. Ch. N. S. 701, 25 L. T. N. S. 191, 19 Week. Rep. 962; *Distilled Spirits (Harrington v. United States)* 11 Wall. 356, 20 L. ed. 167; *German American Mut. Life Asso. v. Farley*, 102 Ga. 720, 29 S. E. 615; *Yerger v. Barz*, 56 Iowa, 77, 8 N. W. 769; *Fairfield Sav. Bank v. Chase*, 72 Me. 226, 39 Am. Rep. 319; *Lebanon Sav. Bank v. Hollenbeck*, 29 Minn. 322, 13 N. W. 145; *Wilson v. Minnesota Farmers' Mut. F. Ins. Asso.* 36 Minn. 112, 1 Am. St. Rep. 659, 30 N. W. 401; *Hovey v. Blanchard*, 13 N. H. 145; *Snyder v. Partridge*, 138 Ill. 173, 32 Am. St. Rep. 130, 29 N. E. 851; *Burton v. Perry*, 146 Ill. 71, 34 N. E. 60; *Constant v. University of Rochester*, 111 N. Y. 604, 2 L.R.A. 734, 7 Am. St. Rep. 769, 19 N. E. 631; *McCutcheon v. Dittman*, 164 N. Y. 357, 58 N. E. 97; *Shafer v. Phoenix Ins. Co.* 53 Wis. 361, 10 N. W. 381; *Harriman v. Queen Ins. Co.* 49 Wis. 71, 5 N. W. 12; *Union Bank v. Campbell*, 4 Humph. 396; *Hart v. Farmers' & M. Bank*, 33 Vt. 252; *Abell v. Howe*, 43 Vt. 403.

Not only the knowledge of an agent acquired during the continuance of his agency must be imputed to his principal, but also that acquired or possessed by him so shortly prior to his employment as necessarily to give rise to the inference that it remained fixed in his memory when the employment began. *Chouteau v. Allen*, 70 Mo. 290,

Information obtained by the agent prior to the transaction from which the principal's rights and liabilities arise must be so precise and definite that it must inevitably be present to his mind and memory while engaged in the later transaction; and a remark made to the agent in a casual conversation cannot be said to be present to his mind five years afterward. *Burton v. Perry*, 146 Ill. 71, 34 N. E. 60.

The notice must be present to the mind of the agent when acting for his principal so fully that it could not have been at the time forgotten; and the agent must himself have no personal interest in the matter which would lead him to conceal his knowledge from his principal, but must be at liberty to communicate it. *Fairfield Sav. Bank v. Chase*, 72 Me. 226, 39 Am. Rep. 319.

There must be clear proof that the knowledge is present in the agent's mind. *Constant v. University of Rochester*, 111 N. Y. 604, 2 L.R.A. 734, 7 Am. St. Rep. 769, 19 N. E. 631; *Slattery v. Schwannecke*, 118 N. Y. 543, 23 N. E. 922; *Equitable Securities Co. v. Sheppard*, 78 Miss. 234, 28 So. 842; *St. Paul F. & M. Ins. Co. v. Parsons*, 47 Minn. 352, 50 N. W. 240; *Foreman v. German Alliance Ins. Asso.* 104 Va. 694, 3 L.R.A.(N.S.) 444, 113 Am. St. Rep. 1071, 52 S. E. 337.

The presumption that an agent who has acquired knowledge of certain facts still retains it and has it present to his mind in a later transaction will depend upon the lapse of time and other circumstances. *Distilled Spirits (Harrington v. United States)* 11 Wall. 356, 20 L. ed. 167.

A statement of the rule somewhat different from that usually found is made in *Union Bank v. Campbell*, 4 Humph. 396, in which a distinction is made between notice and knowledge. The court in this case says: "We do not intend to controvert the general doctrine that 'notice must come to the agent while he is concerned for the principal and in the course of the same transaction;' for notice to a party while he is not acting as agent is certainly no notice to a principal for whom he may afterwards act. But the existence of knowledge in an agent when acting for his principal is notice to the principal, however that knowledge may have been acquired. Thus, if an agent in his own transaction has had notice of a fact, that notice does not reach his principal because he is not then acting for his principal: and before he comes to act as such agent in relation to the subject about which he had notice, he may have forgotten the whole matter, so that it was never present in his mind while discharging the duties of his agency. . . . But certainly if, while an agent is concerned and acting for his principal, he have knowledge of facts in relation to which notice is necessary, there can be no necessity for giving formal notice of the same facts to the individual who already knows them."

See also note in 39 Am. Rep. 322, and article in 16 Am. L. Reg. 1, where many authorities are reviewed.

In some states which ordinarily follow this rule the stricter rule is applied where knowledge of an attorney is sought to be imputed to his client. *McCormick v. Wheeler*, 36 Ill. 114, 85 Am. Dec. 388, and cases cited in note in 57 Am. St. Rep. 916.

³ *Distilled Spirits (Harrington v. United States)* 11 Wall. 356, 20 L. ed. 167; *Fairfield Sav. Bank v. Chase*, 72 Me. 226, 39 Am. Rep. 319; *Wood v. Rayburn*, 18 Or. 3.

The rule does not apply where the conversation was not of such a nature as would naturally require the agent to communicate it to his principal, as, where it was the mere idle talk of parties having no interest in the subject discussed, and not likely to make any impression on the mind of the agent. The notice to the agent to operate as constructive notice to the principal must be such as would reasonably charge the agent, on failure to repeat, with breach of duty to his employer. *Day v. Wamsley*, 33 Ind. 145.

The principal is not charged with notice of rumors or loose information coming to the knowledge of the agent which he is not bound to charge his mind with. *Shafer v. Phoenix Ins. Co.* 53 Wis. 361, 10 N. W. 381.

⁴ *Akers v. Rowan*, 33 S. C. 451, 10 L.R.A. 705, 12 S. E. 165; *Melms v. Pabst Brewing Co.* 93 Wis. 153, 57 Am. St. Rep. 899, 66 N. W. 518; *Hunter v. Watson*, 12 Cal. 377, 73 Am. Dec. 543; *Union Nat. Bank v. German Ins. Co.* 18 C. C. A. 203, 34 U. S. App. 397, 71 Fed. 473; *Distilled Spirits (Harrington v. United States)* 11 Wall. 356, 20 L. ed. 167.

This rule is most frequently applied in the case of attorneys. For note on notice to attorney as notice to client, see 57 Am. St. Rep. 914.

⁵ *Mechem, Agency*, § 723; and cases in following section.

c. Where agent is personally interested or is perpetrating a fraud.—A well-established exception to the rule imputing notice of an agent to his principal is that the principal is not charged with the knowledge of his agent when the latter is committing an independent fraudulent act on his own account, or is acting in his own or another's interest and adversely to that of his principal.¹ Mr. Pomeroy² suggests a doubt whether this exception applies to the managing officers of a corporation, through whom alone the corporation can act. But it has been well said³ that it is not the fact that the principal is a corporation instead of a natural person which affects the application and force of the reason, and the exception has often been applied in cases where the person whose knowledge was sought to be charged to the corporation was a director, president, or other managing officer. Thus, the exception has been applied in the case of a president of

a bank,⁴ in case of the presidents of other kinds of corporations;⁵ where the officer was president and cashier;⁶ promoter of a bank;⁷ director of a bank;⁸ cashier;⁹ superintendent of a zinc and mining corporation;¹⁰ treasurer of a corporation.¹¹ The exception has also been recognized where a bank officer is interested in another company or estate, for which he acts in the transaction with the bank.¹² There is, however, good authority, if not the weight of authority, in favor of a qualification of this exception so as to exclude therefrom and to bring within the general rule, which charges the principal with knowledge possessed by the agent, cases where the officer, though he acts for himself or for a third person, is the sole representative of the corporation in the transaction in question. Thus, banks have been held chargeable with the agent's knowledge where he was the only representative of the bank in the transaction, although he was personally interested, where the representative was the president,¹³ president and general manager,¹⁴ president and cashier,¹⁵ cashier,¹⁶ treasurer,¹⁷ teller.¹⁸

In other cases, the exception seems to have been recognized, notwithstanding the fact that the bank officer was its only representative in the transaction.¹⁹

¹ *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 52 Am. Rep. 710, 1 N. E. 282; *Dillaway v. Butler*, 135 Mass. 479; *Allen v. South Boston R. Co.* 150 Mass. 200, 5 L.R.A. 716, 15 Am. St. Rep. 185, 22 N. E. 917; *Hickman v. Green*, 123 Mo. 165, 29 L.R.A. 39, 22 S. W. 455, 27 S. W. 440; *Shipman v. Bank of State*, 126 N. Y. 318, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371; *Shepard & M. Lumber Co. v. Eldridge*, 171 Mass. 516, 41 L.R.A. 617, 68 Am. St. Rep. 446, 51 N. E. 9; *Foote v. Cotting*, 195 Mass. 55, 15 L.R.A.(N.S.) 693, 80 N. E. 600; *Merchants' Nat. Bank v. Nichols & S. Co.* 223 Ill. 41, 7 L.R.A.(N.S.) 752, 79 N. E. 38; *Mechem, Agency*, § 723; 2 Pom. Eq. Jur. 3d ed. § 675.

² 2 Pom. Eq. Jur. 3d ed. § 675, note 1.

³ *Brookhouse v. Union Pub. Co.* 73 N. H. 368, 2 L.R.A.(N.S.) 993, 111 Am. St. Rep. 623; 62 Atl. 219, 6 Ann. Cas. 675.

⁴ *Lamson v. Beard*, 45 L.R.A. 822, 36 C. C. A. 56, 94 Fed. 30; *American Surety Co. v. Pauly*, 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. Rep. 552, affirming 18 C. C. A. 644, 38 U. S. App. 254, 72 Fed. 470; *People's Bank v. Exchange Bank*, 116 Ga. 820, 94 Am. St. Rep. 144, 43 S. E. 269; *First Nat. Bank v. Babbidge*, 160 Mass. 563, 36 N. E. 462; *People's Sav. Bank v. Hine*, 131 Mich. 181, 91 N. W. 139; *Re Plankinton Bank*, 87 Wis. 378, 58 N. W. 784; *State Bank v. Mathers*, 45 Neb. 659, 50 Am. St. Rep. 565, 63 N. W. 930.

- ⁵ *Frenkel v. Hudson*, 82 Ala. 158, 60 Am. Rep. 736, 2 So. 758; *Seaverns v. Presbyterian Hospital*, 173 Ill. 414, 64 Am. St. Rep. 125, 50 N. E. 1079; *International Wrecking & Transp. Co. v. McMorran*, 73 Mich. 467, 41 N. W. 510; *Barnes v. Trenton Gaslight Co.* 27 N. J. Eq. 33; *Victor Gold & S. Min. Co. v. National Bank*, 15 Utah, 397, 49 Pac. 826.
- ⁶ *Koehler v. Dodge*, 31 Neb. 328, 28 Am. St. Rep. 518, 47 N. W. 913; *Camden Safe Deposit & T. Co. v. Lord*, 67 N. J. Eq. 489, 58 Atl. 607; *Commercial Bank v. Burgwyn*, 110 N. C. 267, 17 L.R.A. 326, 14 S. E. 623.
- ⁷ *Re European Bank*, L. R. 5 Ch. 358, 39 L. J. Ch. N. S. 588, 22 L. T. N. S. 422, 18 Week. Rep. 474.
- ⁸ *Terrell v. Branch Bank*, 12 Ala. 502; *Sebald v. Citizens' Deposit Bank*, 31 Ky. L. Rep. 1244, 14 L.R.A.(N.S.) 376, 105 S. W. 130; *Clarke v. Second Nat. Bank*, 177 Mass. 257, 59 N. E. 121; *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 52 Am. Rep. 710, 1 N. E. 282; *Shaw v. Clark*, 49 Mich. 384, 43 Am. Rep. 474, 13 N. W. 786; *Atlantic State Bank v. Savery*, 82 N. Y. 291; *New York v. Tenth Nat. Bank*, 111 N. Y. 446, 19 N. Y. S. R. 133, 18 N. E. 618; *Wardlaw v. Troy Oil Mill*, 74 S. C. 368, 114 Am. St. Rep. 1004, 54 S. E. 658; *First Nat. Bank v. Lowther-Kaufman Oil & Coal Co.* 66 W. Va. 505, 28 L.R.A.(N.S.) 511, 66 S. E. 713.
- ⁹ *First Nat. Bank v. Bevin*, 72 Conn. 666, 45 Atl. 954; *Hummel v. Bank of Monroe*, 75 Iowa, 689, 37 N. W. 954; *Ft. Dearborn Nat. Bank v. Seymour*, 71 Minn. 81, 73 N. W. 724; *National Bank v. Feeney*, 9 S. D. 550, 46 L.R.A. 732, 70 N. W. 874; *State Bank v. Forsyth*, 41 Mont. 249, 28 L.R.A.(N.S.) 501, 108 Pac. 914; *Bank of Overton v. Thompson*, 56 C. C. A. 554, 118 Fed. 798.
- ¹⁰ *Wickersham v. Chicago Zinc Co.* 18 Kan. 481, 26 Am. Rep. 784, 3 Mor. Min. Rep. 536.
- ¹¹ *Brookhouse v. Union Pub. Co.* 73 N. H. 368, 2 L.R.A.(N.S.) 993, 111 Am. St. Rep. 623, 62 Atl. 219, 6 Ann. Cas. 675.
- ¹² *President of bank*: *Corcoran v. Snow Cattle Co.* 151 Mass. 74, 23 N. E. 727; *Gallery v. National Exch. Bank*, 41 Mich. 169, 32 Am. Rep. 149, 2 N. W. 193; *First Nat. Bank v. Strait*, 75 Minn. 396, 78 N. W. 101; *DeKay v. Hackensack Water Co.* 38 N. J. Eq. 158; *Crooks v. People's Nat. Bank*, 34 Misc. 450, 70 N. Y. Supp. 271; affirmed in 177 N. Y. 8, 69 N. E. 228; *Holm v. Atlas Nat. Bank*, 28 C. C. A. 297, 55 U. S. App. 570, 84 Fed. 119.
- Vice president of bank*: *Merchants' Nat. Bank v. Lovitt*, 114 Mo. 520, 35 Am. St. Rep. 770, 21 S. W. 825; *Commercial Bank v. Burgwyn*, 110 N. C. 267, 17 L.R.A. 326, 14 S. E. 623; *Gunster v. Scranton Illuminating, H. & P. Co.* 181 Pa. 328, 59 Am. St. Rep. 650, 37 Atl. 550.
- Directors*: *Benton v. German-American Nat. Bank*, 122 Mo. 332, 26 S. W. 975; *First Nat. Bank v. Christopher*, 40 N. J. L. 435, 29 Am. Rep. 262; *Casco Nat. Bank v. Clark*, 139 N. Y. 307, 36 Am. St. Rep. 705, 34 N. E. 908; *Manufacturers' Nat. Bank v. Newell*, 71 Wis. 314, 37 N. W. 420.

- Cashier:** National Bank v. Fitze, 76 Mo. App. 358; Hadden v. Dooley, 34 C. C. A. 338, 63 U. S. App. 173, 92 Fed. 274, reversed on other grounds in 179 U. S. 646, 45 L. ed. 357, 21 Sup. Ct. Rep. 259.
- ¹³ Brobston v. Penniman, 97 Ga. 527, 25 S. E. 350; Holden v. New York & E. Bank, 72 N. Y. 286; Cook v. American Tubing & Webbing Co. 28 R. I. 41, 9 L.R.A. (N.S.) 193, 63 Atl. 641; Smith v. Wilson & B. Sav. Bank, 1 Tex. Civ. App. 115, 20 S. W. 1119; Ditty v. Dominion Nat. Bank, 22 C. C. A. 376, 43 U. S. App. 613, 75 Fed. 769.
- ¹⁴ First Nat. Bank v. Blake, 60 Fed. 78.
- ¹⁵ Hardy v. First Nat. Bank, 56 Kan. 493, 43 Pac. 1125.
- ¹⁶ Lowndes v. City Nat. Bank, 82 Conn. 8, 22 L.R.A. (N.S.) 408, 72 Atl. 150; Morris v. Georgia Loan, Sav. & Bkg. Co. 109 Ga. 12, 46 L.R.A. 506, 34 S. E. 378; Tilden v. Barnard, 43 Mich. 376, 38 Am. Rep. 197, 5 N. W. 420; Fishkill Sav. Inst. v. National Bank, 80 N. Y. 162, 36 Am. Rep. 595; Loring v. Brodie, 134 Mass. 453; National Bank v. Feeney, 9 S. D. 550, 46 L.R.A. 732, 70 N. W. 874; Emerado Farmers' Elevator Co. v. Farmers' Bank, 20 N. D. 270, 29 L.R.A. (N.S.) 567, 127 N. W. 522.
- ¹⁷ Oak Grove & S. V. Cattle Co. v. Foster, 7 N. M. 650, 41 Pac. 522.
- ¹⁸ Atlantic Bank v. Merchants' Bank, 10 Gray, 532; City Nat. Bank v. Martin, 70 Tex. 643, 8 Am. St. Rep. 632, 8 S. W. 507.
- ¹⁹ Findley v. Cowles, 93 Iowa, 389, 61 N. W. 998; Seneca County Bank v. Neass, 5 Denio, 329; Indian Head Nat. Bank v. Clarke, 166 Mass. 27, 43 N. E. 912.
- The knowledge of an officer of a bank, who is also a member of its discount committee, and who offers the bank a note which he had secured by fraud, but who withdraws from the committee meeting while the question of the acceptance of the note is under consideration, is not imputable to the bank so as to prevent its enforcing the note. Lilly v. Hamilton Bank, 29 L.R.A. (N.S.) 558, 102 C. C. A. 1, 178 Fed. 53.
- See also notes in 2 L.R.A. (N.S.) 993 and 29 L.R.A. (N.S.) 558.

d. Notice to officers of corporation.—The general rule that notice of a fact to an agent as to a matter within the scope of his authority is notice to the principal is applicable to corporations as well as to natural persons.¹ But not every agent of a corporation is to be considered an agent for all purposes, and therefore the rule that the notice must be as to a matter within the scope of the agent's authority should be strictly observed.² It is well settled that notice to the board of directors of a corporation is notice to the corporation.³ But the knowledge of an individual director, which he does not communicate to the board, cannot be imputed to the corporation, where he does not act with the board on the matter to which the notice relates.⁴ But the corporation

is held to be bound by notice to an individual director, whether communicated to the board of directors or not, where he acts as a member of the board upon the matter to which his knowledge relates.⁵ And it has been held that notice communicated to a director officially for the express purpose of being communicated to the board of directors is notice to the board, although the information is in fact not communicated.⁶ And if the board of directors or trustees makes a single director or any person its officer or agent to act for it, notice to such officer or agent, who was at the time acting for the corporation within the range of his authority, is notice to the corporation.⁷ Where the director or other agent having notice has a personal interest in the transaction, or is engaged in perpetrating a fraud, the corporation is not bound by his knowledge.⁸

¹ Mechem, Agency, § 729; Elliott, Corp. 4th ed. § 534; 3 Cook, Corp. 6th ed. § 727, p. 2366; 2 Thompson, Corp. 2d ed. § 1645; Farmers' & C. Bank v. Payne, 25 Conn. 444, 68 Am. Dec. 362; Mechanic's Bank v. Schaumburg, 38 Mo. 244; National Newark Bkg. Co. v. Delaware, L. & W. R. Co. (N. J. Err. & App.) 70 N. J. L. 774, 66 L.R.A. 595, 108 Am. St. Rep. 825, 58 Atl. 311; Indiana, I. & I. R. Co. v. Swannell, 157 Ill. 616, 30 L.R.A. 290, 41 N. E. 989; Quincy Coal Co. v. Hood, 77 Ill. 68, 12 Mor. Min. Rep. 148; Pittsburgh, Ft. W. & C. R. Co. v. Ruby, 38 Ind. 294, 10 Am. Rep. 111; Conro v. Port Henry Iron Co. 12 Barb. 27; Holden v. New York & E. Bank, 72 N. Y. 286.

Notice to the cashier of a bank as to all matters within the scope of his business will be imputed to the bank. Duncan v. Jaudon, 15 Wall. 165, 21 L. ed. 142; New Hope & D. Bridge Co. v. Phenix Bank, 3 N. Y. 156.

² Congar v. Chicago & N. W. R. Co. 24 Wis. 157, 1 Am. Rep. 164; Elliott, Corp. § 534, p. 729; Thompson, Corp. 2d ed. § 1647, p. 733.

Even where notice to a director or other officer is not equivalent to notice to the corporation by reason of relating to a matter not under his charge, it is competent as a fact from which notice to the corporation may be found; because the jury may presume that he did his duty by communicating to the corporation the knowledge he had obtained and which it was material that the corporation should know. Winne v. Ulster County Sav. Inst. 37 Hun, 349, 351.

³ Toll Bridge Co. v. Bettsworth, 30 Conn. 380; First Nat. Bank v. Christopher, 40 N. J. L. 435, 29 Am. Rep. 262; Fulton Bank v. New York & S. Canal Co. 4 Paige, 127; Bank of Pittsburgh v. Whitehead, 10 Watts. 397, 36 Am. Dec. 186

- ⁴ *Farmers' & C. Bank v. Payne*, 25 Conn. 444, 68 Am. Dec. 362; *Wilson v. McCullough*, 23 Pa. 440, 62 Am. Dec. 347; *General Ins. Co. v. United States Ins. Co.* 10 Md. 517, 69 Am. Dec. 174; *United States Ins. Co. v. Shriver*, 3 Md. Ch. 381; *First Nat. Bank v. Christopher*, 40 N. J. L. 435, 29 Am. Rep. 262; *National Bank v. Norton*, 1 Hill, 572; *Getman v. Second Nat. Bank*, 23 Hun, 498; *Memphis Nat. Bank v. Sneed* (*Memphis Nat. Bank v. Neely*) 97 Tenn. 120, 34 L.R.A. 274. 56 Am. St. Rep. 788, 36 S. W. 716.
- ⁵ *Union Bank v. Campbell*, 4 Humph. 394; *Bank of United States v. Davis*, 2 Hill, 451; *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 52 Am. Rep. 710, 1 N. E. 282; *National Security Bank v. Cushman*, 121 Mass. 490.
- ⁶ *United States Ins. Co. v. Shriver*, 3 Md. Ch. 381; *Boyd v. Chesapeake & O. Canal Co.* 17 Md. 195, 79 Am. Dec. 646.
- ⁷ *Fairfield Sav. Bank v. Chase*, 72 Me. 226, 39 Am. Rep. 319; *Fulton Bank v. New York & S. Canal Co.* 4 Paige, 127; *General Ins. Co. v. United States Ins. Co.* 10 Md. 517, 69 Am. Dec. 174.
- ⁸ See cases in the preceding section.

e. Agent with conflicting duties.—Where an agent owes conflicting duties to two principals who have not knowledge of the double relation, notice to him, received in his transactions for one, is not notice to the other.¹

¹ *Constant v. University of Rochester*, 111 N. Y. 604, 2 L.R.A. 734, 19 N. E. 631 (*dictum*).

f. Notice to subagent.—The question of the effect of a notice given to a subagent, upon the principal, must in all cases depend upon the power of the agent to appoint a subordinate. It is well settled that, in the absence of any authority to employ a subagent, the trust given to the agent is exclusively personal, and cannot be delegated by him so as to affect the rights of the principal; if in such a case the agent employs a substitute, he does it at his own risk, and the principal cannot be held liable for the acts of the subagent.¹ Where, however, the agent has power to employ a subagent, the act of such subagent, or notice given to him in the transaction of the business, is binding on the principal.² And notice to a subagent is imputable to the principal where the intermediate agent is not an independent

employer, both performing their respective parts in the one transaction under the general direction of the principal.³

¹ *Appleton Bank v. McGilvray*, 4 Gray, 518, 64 Am. Dec. 92.

² *Hoover v. Wise*, 91 U. S. 308, 23 L. ed. 392; *Boyd v. Vanderkemp*, 1 Barb. Ch. 273; *Lincoln v. Battelle*, 6 Wend. 475; *Storrs v. Utica*, 17 N. Y. 104, 72 Am. Dec. 437; *Rourke v. Story*, 4 E. D. Smith, 54. See also cases in note in 21 L.R.A. 340.

³ *Bates v. American Mortg. Co.* 37 S. C. 88, 21 L.R.A. 340, 16 S. E. 883.

5. Authentication.

Where the effect of an express notice depends upon its manifesting an intent or election on the part of the person from whom it proceeds, it must, if in writing, be signed and addressed sufficiently to show that fact.¹

¹ *Abbott*, New Pr. & F. 223, 225, and cases cited; *Payn v. Mutual Relief Soc.* 17 Abb. N. C. 53, 56 (holding that a card circular with printed signature of the general secretary, but filled out, addressed and sent by a local secretary, was not sufficient notice from the general secretary to sustain a forfeiture).

6. Record and index.

Under the recording acts, record is notice from the time of the delivery of the instrument to the recording officer; and the fact that it is omitted or misstated in the index does not impair the effect of the notice,¹ unless the statute so provides.

But after actual record it is notice only of the instrument as it appears upon the record; and an error therein will in so far impair the effect of the notice.²

So where a statute requires that a certain public record be made of notice of publication and posting, failure to fulfil such statutory requirements cannot be cured by parol evidence of such notice.³

The record of a lease has been held to be constructive notice even to a transferee of the reversion.⁴ So the recording of a chattel mortgage on fixtures as personalty is by the weight of authority held constructive notice to a subsequent purchaser or

mortgagee of the realty⁵ although a number of jurisdictions hold otherwise.⁶

¹ Mutual L. Ins. Co. v. Dake, 87 N. Y. 257 (record of mortgage); Hamilton v. Whitney, 19 Neb. 303, 27 N. W. 125 (record of judgment).

² Devlin, Deeds, § 649, and cases cited.

Compare Manhattan Co. v. Laimbeer, 21 Abb. N. C. 27 (reversing 17 Abb. N. C. 128, and holding that the county clerk's omission to record a partnership certificate left with him does not, under the statute, impair its effect as notice).

³ Cook v. Manasquan, 80 N. J. L. 206, 76 Atl. 310; Allen v. Gilkison, — Ind. App. —, 132 N. E. 12.

⁴ Garber v. Gianella, 98 Cal. 527, 33 Pac. 458; Toupin v. Peabody, 162 Mass. 473, 39 N. E. 280; and for additional cases see L.R.A.1915C, 195.

⁵ Sword v. Low, 122 Ill. 487, 13 N. E. 826; Eaves v. Estes, 10 Kan. 314, 15 Am. Rep. 345; Keeler v. Keeler, 31 N. J. Eq. 181; Empire Cotton Oil Co. v. Continental Gin Co. 21 Ga. App. 16, 93 S. E. 525; Colwell Lead Co. v. Home Title Ins. Co. 154 App. Div. 83, 138 N. Y. Supp. 738, affirmed without opinion in 208 N. Y. 591, 102 N. E. 1100; Re Atlantic Beach Corp. 244 Fed. 828; Sowden v. Craig, 26 Iowa, 164, 96 Am. Dec. 125.

⁶ Elliott v. Hudson, 18 Cal. App. 642, 124 Pac. 103, s. c. on rehearing in 18 Cal. App. 654, 124 Pac. 108; Tibbetts v. Horne, 65 N. H. 242, 15 L.R.A. 56, 23 Am. St. Rep. 31, 23 Atl. 145; Case Mfg. Co. v. Garven, 45 Ohio St. 289, 13 N. E. 493; Phillips v. Newsome, — Tex. Civ. App. —, 179 S. W. 1123. For additional cases both ways see note in 13 A.L.R. 484.

7. *Lis pendens*.

For the history and limits of the rule, and the effect of the *lis pendens* statutes¹—

¹ See 2 Abbott, New Pr. & F. 12, and cases cited.

OATH.¹

1. To document or instrument.
 - a. Oral evidence.
 - b. Presumption of authority.
2. Oath of office.
 - a. Oral evidence.
 - b. Time when taken.
 - c. How taken.

¹ In affidavit, see cases collected in 1 Abbott, New Pr. & F. 20, 45; in open court, or before officer, Id. 230-232.

1. To document or instrument.

a. *Oral evidence.*—Where a document is required by statute to be in writing on oath, as a condition of its being recorded, extrinsic evidence is not admissible to show that a document, the affidavit attached to which does not show that the necessary oath was taken, was in fact sworn to before the officer signing the affidavit.¹

¹ Thus, a Montana statute requires that notice of the location of a mining claim must be in writing on oath, and filed for record on oath; and in *Metcalf v. Prescott*, 10 Mont. 283, 25 Pac. 1037, oral evidence was held inadmissible to supply the necessary oath. See Rev. Codes of Mont. 1921, § 7366, vol. 2, p. 524.

b. *Presumption of authority.*—The presumption is that a notary of another state is authorized to administer oath.¹

¹ *Pinkham v. Cockell*, 77 Mich. 265, 43 N. W. 921; *Conolly v. Riley*, 25 Md. 402; *Wood v. St. Paul City R. Co.* 42 Minn. 411, 7 L.R.A. 149, 44 N. W. 308; *Barhydt v. Alexander*, 59 Mo. App. 188; *Stroheim v. Pack & Sons Mfg. Co.* 10 Pa. Dist. R. 668; *Denmead v. Maack*, 2 Mac Arth. (D. C.) 475; *Singletary v. Watson*, 136 Ga. 241, 71 S. E. 162. *Contra*: *Chandler v. Hanna*, 73 Ala. 390; *Bell v. Farwell*, 189 Ill. 414, 59 N. E. 955; *Berkery v. Reilly*, 82 Mich. 160, 46 N. W. 436; and for additional cases and full explanation, see L.R.A.1916A, 1169.

2. Oath of office.

a. *Oral evidence.*—As to the admissibility of oral evidence to show that a public officer had duly qualified by taking the necessary oath of office, see ¹.

¹ *Dallas, P. & S. E. R. Co. v. Day*, 3 Tex. Civ. App. 353, 22 S. W. 538 (ad-

missible to show that a condemnation commissioner in right of way proceedings was sworn, where the statute under which he was appointed did not require the oath to be in writing); *Rhodes v. Ward*, 17 Ky. L. Rep. 875, 32 S. W. 950 (admissible to show that arbitrators appointed by the court had taken the required oath, although a statute provided the manner in which it should be shown that the oath had been taken); *State v. Stewart*, 45 La. Ann. 1164, 14 So. 143 (admissible to show that a jury commissioner had taken the oath of office where the original oath had been lost); *Whiting v. Ellsworth*, 85 Me. 301, 27 Atl. 177 (admissible to show that tax assessors had taken the oath of office where the record of the city clerk before whom they had qualified omitted to show that fact).

b. Time when taken.—The rule permitting the contradiction of the date of a paper by other proof of the time of its execution permits, the introduction of oral evidence to show the true time when an officer took the oath of office.¹

¹ *Wilmot v. Lathrop*, 67 Vt. 671, 32 Atl. 861.

c. How taken.—The taking of an official oath is sufficiently proved by a record, without showing before whom it was taken or in what official capacity he administered the oath.¹

¹ *Drew v. Morrill*, 62 N. H. 23.

OFFICIAL CHARACTER AND ACTS.

1. Judicial notice.
2. Performance of duty.
3. Meeting.
4. Reports of subordinates.
5. Presumption from act.
6. Recitals in official instruments.
7. Declarations
8. Official records and registers.

See also *Abbott, Tr. Ev.* (3d ed.) pp. 546 et seq.

For an exhaustive review of cases illustrative of the question of judicial notice of official character and acts, see notes to *Olive v. State*, 4 L.R.A. 33 et seq.; 67 L.R.A. 33; 34 L.R.A. (N.S.) 261; 38 L.R.A. (N.S.) 40.

1. Judicial notice.

The court may take judicial notice of regulations prescribed by a department of the executive, for the conduct of members of the community at large in matters affecting the state.¹

¹ *United States v. Williams*, 6 Mont. 379, 12 Pac. 851 (regulations of the Interior Department as to cutting timber on public lands); *People ex rel. Garling v. Van Allen*, 55 N. Y. 31 (general regulations for military forces of the state); *Burke v. Miltenberger*, *Burke v. Tregre*, 19 Wall. 519, 22 L. ed. 158 (but not of the various orders issued by a military commander); *United States v. The Three Friends*, 166 U. S. 1, 41 L. ed. 897, 17 Sup. Ct. Rep. 495 (proclamations and messages by the President as to the existence of actual conflict of arms in Cuba in resistance of the authority of the Spanish government, although acknowledgment of the insurgents as belligerents by the political department has not taken place); *Caba v. United States*, 152 U. S. 211, 38 L. ed. 415, 14 Sup. Ct. Rep. 513 (department rules and regulations for transaction of business in which the public is interested, such as contests before the land office); *Apis v. United States*, 88 Fed. 931 (orders of the general government withdrawing public lands from sale, and reserving them for the use of Indians); *Southern P. R. Co. v. Wood*, 124 Cal. 475, 57 Pac. 388 (order of Secretary of the Interior revoking the withdrawal from settlement of railroad indemnity lands); *Prather v. United States*, 9 App. D. C. 82 (regulations by internal revenue commissioner as to brand or stamp to be used on oleomargarin packages); *People v. Ackerman*, 80 Mich. 588, 45 N. W. 367 (proclamation appointing days of fast and prayer, or thanksgiving); *Wells v. Missouri P. R. Co.* 110 Mo. 286, 15 L.R.A. 847, 19 S. W. 530 (executive proclamations and messages); *Manor Casino v. State*, — Tex. Civ. App. —, 34 S. W. 769 (executive proclamations, messages, and public communications).

But that the court cannot judicially notice the regulations of the commissioner of internal revenue under the act of Congress respecting the sale of oleomargarin, see *Com. v. Crane*, 158 Mass. 218, 33 N. E. 388.

2. Performance of duty.

The presumption that a public officer did his duty is enough, between third persons, to cast the burden on him who impeaches the act.¹ But it is only available in aid of evidence of the substantive fact; and cannot supply the want of such evidence.² An

officer is not presumed in his own favor to have done his duty correctly.³

¹ *Ensign v. McKinney*, 12 Abb. N. C. 463, 30 Hun, 249; *Hayes v. United States*, 170 U. S. 637, 42 L. ed. 1174, 18 Sup. Ct. Rep. 735; *Wallace v. Hood*, 89 Fed. 11; *Marks v. Hastings*, 101 Ala. 165, 13 So. 297; *Harney v. Benson*, 113 Cal. 314, 45 Pac. 687; *People ex rel. Engley v. Martin*, 19 Colo. 565, 24 L.R.A. 201, 36 Pac. 543; *State v. Main*, 69 Conn. 123, 36 L.R.A. 623, 37 Atl. 80; *English v. State*, 31 Fla. 340, 12 So. 689; *Dooley v. Van Hohenstein*, 170 Ill. 630, 49 N. E. 193; *Collins v. Valleau*, 79 Iowa, 631, 43 N. W. 284, 44 N. W. 904; *Rierson v. St. Louis & S. F. R. Co.* 59 Kan. 32, 51 Pac. 901; *Fleugel v. Lards*, 108 Mich. 682, 66 N. W. 585; *Abel v. Minneapolis*, 68 Minn. 89, 70 N. W. 851; *Barber Asphalt Paving Co. v. Ullman*, 137 Mo. 543, 38 S. W. 458; *Green v. Barber*, 47 Neb. 934, 66 N. W. 1032. See also cases cited in note to *Douglass v. Bishop* (Kan.) 10 L.R.A. 857. And see **NEGATIVE**, note to § 1; **PRESUMPTION OF INNOCENCE**.

This presumption does not apply where there is positive uncontradicted evidence tending to show noncompliance with his duties. *Befay v. Wheeler*, 84 Wis. 135, 53 N. W. 1121.

Nor will it warrant a court in presuming an independent jurisdictional fact. *Hannah v. Chase*, 4 N. D. 351, 61 N. W. 18, and cases cited.

² *Hilton v. Bender*, 69 N. Y. 75, reversing 2 Hun, 1; *United States v. Ross*, 92 U. S. 281, 23 L. ed. 707; *Twin City Gas Works v. People*, 156 Ill. 387, 40 N. E. 950; *Befay v. Wheeler*, 84 Wis. 135, 53 N. W. 1121.

³ *O'Brien v. McCann*, 58 N. Y. 373 (action against sheriff for recovery of money collected by him on execution, wherein he sought to invoke the presumption that he had paid it over).

The rule is otherwise, however, in an action which, although the officer is a party thereto, is really against him in his official capacity; as, for instance, petition for certiorari to review his official acts (*Beals v. James*, 173 Mass. 591, 54 N. E. 245); or for mandamus to compel him to do a duty imposed by law upon him. *Enos v. State ex rel. Goder* 131 Ind. 560, 31 N. E. 357; *Baird v. Kings County*, *People ex rel. Baird v. Broom*, 138 N. Y. 95, 20 L.R.A. 81, 33 N. E. 827.

3. Meeting.

A meeting of a board of officers appearing by its record is presumed, in the absence of evidence to the contrary, to have been regularly called.¹

It may be otherwise in the absence of evidence of jurisdiction.

where the object is to justify what would otherwise be a trespass.²

¹ *Astor v. New York*, 62 N. Y. 567; *Torr v. State ex rel. Corcoran*, 115 Ind. 188, 17 N. E. 286; *Splaine v. School Dist. No. 122*, 20 Wash. 74, 54 Pac. 766.

² *Miller v. Brown*, 56 N. Y. 383.

4. Reports of subordinates.

As against a public officer or corporation, a report made by a subordinate officer or other person appointed by him or them to examine and report upon a question of fact is competent evidence.¹

¹ *Trial of Dorn*, 485, 494 (impeachment; report of a person appointed by defendant to examine into the condition of the canals and report to the canal board admissible in evidence against defendant in proof of his knowledge of condition); *Vicksburg & M. R. Co. v. Putnam*, 118 U. S. 545, 30 L. ed. 257, 7 Sup. Ct. Rep. 1 (reports of superintendent to board of directors competent as to the condition of the road); *St. Louis Gaslight Co. v. St. Louis*, 86 Mo. 485 (record of the civil engineer, and register by the gas inspector, competent in action against city for price of gas, etc.) To the same effect: *Williams v. Walton & W. Co.* 9 *Houst. (Del.)* 322, 32 *Atl.* 726; *Lorig v. Davenport*, 99 *Iowa*, 479, 68 *N. W.* 717.

But a pamphlet purporting to be a printed copy of a report of a committee of the House of Representatives, which is in no way authenticated or certified to by an officer, nor in any way identified, is not admissible in evidence. *Marks v. Orth*, 121 *Ind.* 10, 22 *N. E.* 668.

5. Presumption from act.

A person who signs an instrument in an official capacity, or is shown to have acted as a public officer, will be presumed at the time to have been duly appointed to that office,¹ in the absence of proof to the contrary.²

¹ *Keyser v. Hitz*, 133 U. S. 138, 33 L. ed. 531, 10 Sup. Ct. Rep. 290; *Ingraham v. United States*, 155 U. S. 434, 39 L. ed. 213, 15 Sup. Ct. Rep. 148; *State v. Row*, 81 *Iowa*, 138, 46 *N. W.* 872, citing 1 *Greenl. Ev.* § 92; 1 *Phill. Ev.* 642; *Starkie, Ev.* § 646.

It will be presumed from the recital in the probate of a deed that the justice of the peace taking the same was a justice of the peace of the county in which the land lay, that he was a justice of the peace

of such county and took the acknowledgment within the same. *Williams v. Kerr*, 113 N. C. 306, 18 S. E. 501.

² But evidence that a specified person was clerk, and another person deputy clerk, of the court, in 1818, raises no presumption that they were such ten years before that time. *Jarvis v. Vanderford*, 116 N. C. 147, 21 S. E. 302.

6. Recitals in official instruments.

A recital in an official instrument is evidence of the fact of official character or act so recited as against the parties thereto, and those who claim some right or interest under them, by privity in blood, estate, or law; ¹ but not as against strangers, ² unless made so by express statute, ³ or unless accompanied with evidence of the ancient existence of the instrument and of possession in accordance therewith. ⁴

¹ *First M. E. Church v. Fadden*, 8 N. D. 162, 77 N. W. 615 (that maker of affidavit of sale under foreclosure is deputy sheriff); *McGee v. Fleming*, 82 Ala. 276, 3 So. 1 (recitals in decree of sale by probate judge for taxes of requisite service of notice of motion for an order of sale); *Farrior v. Houston*, 100 N. C. 369, 6 S. E. 72 (sheriff's levy and sale of lands under execution).

Recitals in legislative act are evidence against the party in whose favor the act was passed. *Fox v. Fort Edward*, 48 Hun, 363, 1 N. Y. Supp. 81 (incorporating village).

² *Lawless v. Stamp*, 108 Iowa, 601, 79 N. W. 365 (appointment of receiver and authority to execute a deed. And an indorsement of approval on the deed by a judge does not dispense with the necessity of making proof of those facts); *Taylor v. Winona & St. P. R. Co.* 45 Minn. 66, 47 N. W. 453; *Ward v. Necedah Lumber Co.* 70 Wis. 445, 35 N. W. 929 (resolution of supervisors authorizing county clerk to convey lands owned by the county); *Hill v. Draper*, 10 Barb. 454 (recital in tax deed of due notice of sale not evidence against owner's grantee); *Henderson v. White*, 69 Tex. 103, 5 S. W. 374 (recital in tax deed of notice of place of sale); *Befay v. Wheeler*, 84 Wis. 135, 53 N. W. 1121 (recital in letter from United States Land Commissioner to register of land office referring to statement of register that he had given an official notification to a third person, not evidence against that person); *Ladd v. Dickey*, 84 Me. 190, 24 Atl. 813 (recital in tax deed of due notice of sale not evidence against owner of land); *Downer v. Tarbell*, 61 Vt. 530, 17 Atl. 482 (recital in tax deed of preliminary steps taken not evidence against the owner).

But where an official act does not impair any private rights, and can be questioned only by the public at large,—as, for example, a grant of a privilege,—the presumption that a public official has done his duty may

be invoked, and a recital in the instrument, evidencing that act of doing something necessary to its validity is prima facie evidence of that fact, even as against one whose interests may be incidentally and remotely affected. *Geneva & W. R. Co. v. New York C. & R. R. Co.* 24 App. Div. 335, 48 N. Y. Supp. 842.

8 In some states there are express statutes making recitals in tax deeds prima facie evidence of the facts recited. Thus, in California, the tax collector's deed is made prima facie evidence of the regularity of the proceedings, and that the necessary steps were all taken. See *O'Grady v. Barnhisel*, 23 Cal. 287. See also *Bernhard v. Wall*, 184 Cal. 612, 194 Pac. 1040; *Kerr's Cyc. Codes of Cal. 1920*, Political Code, Part 2, § 3788, vol. 2, p. 1428. Compare other local statutes on this question. And see *Blackwell, Tax Titles*, §§ 1140 et seq.

N. Y. Civil Prac. Act, § 748; *Parson's Prac. Manual of N. Y. 1921*, p. 272, (formerly § 1471 of the Code of Civ. Proc.) provides that after a sheriff's deed of property sold under execution "shall have been recorded for twenty years in the county where the real estate is situated, it shall be presumptive evidence of the facts therein stated."

Section 3347, subd. 10 (not included in the present revision of the Code) formerly limited the application of this act to executions issued and sales made after September 1, 1877. And as to exceptions issued prior to that date, a recital in the sheriff's certificate and deed of execution duly issued was no evidence of that fact. *Hume v. Fleet*, 23 App. Div. 185, 48 N. Y. Supp. 889, and cases cited.

N. Y. Civil Prac. Act, § 376; *Parson's Prac. Manual of N. Y. 1921*, p. 155 (formerly chap. 158, N. Y. Laws 1890) provides that "whenever it shall appear that at least twenty years theretofore real property has been sold by a sheriff for enforcement of the valid lien thereon of a duly docketed judgment, and that a certificate of the sale had been duly made by the sheriff and filed, and that a sheriff's deed has been executed and recorded, but that the execution or writ by virtue of which the sale has so been made cannot be found in the office of the clerk with whom the same should have been filed, the recital of, or reference to, such execution or writ contained in the said certificate, or in the deed, or in the record thereof, shall be prima facie evidence of the said execution or writ and of the issue of the same, as against any party whose claim of title is not shown to have been accompanied or supported by peaceable possession of the premises in controversy for at least three years immediately preceding the commencement of the action." But it must affirmatively appear that the property had been "sold for enforcement of the valid lien thereon of a duly docketed judgment;" and, in the absence of this proof, recitals of an execution and of its issue in a sheriff's certificate and deed are not evidence of that fact. *Hume v. Fleet*, 23 App. Div. 185, 48 N. Y. Supp. 889.

4 *Proprietors' School Fund v. Jessup*, 6 Kulp, 251, and cases cited; *Baeder v. Jennings*, 40 Fed. 199.

7. Declarations.

The declarations of individual members of a board of public officials, not made in the line of their official duty or within the scope of their authority, are not legal evidence to prove official acts of the corporate body.¹

¹ *West Jersey Traction Co. v. Camden Horse R. Co.* 53 N. J. Eq. 163, 35 Atl. 49; *Downie v. Passaic County Freeholders*, 54 N. J. L. 223, 23 Atl. 954; *Knights of Pythias Benev. Asso. v. Leadbeter*, 2 Pa. Super. Ct. 461.

8. Official records and registers.

Official records or registers kept by public officers,¹ in which they are required, either by statute or by the nature of their office, to record particular transactions occurring in the course of their public duties, or under their personal observation, are admissible in evidence.²

¹ Resolutions adopted by private corporations are not entitled to be received in the office of the recorder of deeds; and the fact that they are so recorded does not make the record evidence. *Mullanphy Sav. Bank v. Schott*, 133 Ill. 655, 26 N. E. 640.

² *United States v. Cross*, 9 Mackey, 365; *Greeley v. Hamman*, 17 Colo. 30, 28 Pac. 460; *Bell v. Kendrick*, 25 Fla. 778, 6 So. 868; *Daly v. Webster*, 4 C. C. A. 10, 1 U. S. App. 573, 56 Fed. 483; *Re Madera Irrig. Dist. Bonds*, 92 Cal. 296, 14 L.R.A. 755, 28 Pac. 272, 675; *Columbus v. Ogle-tree*, 102 Ga. 293, 29 S. E. 749; *Logansport v. Shirk*, 129 Ind. 352, 28 N. E. 538 (but they are not conclusive of the facts stated); *King v. Hyatt*, 51 Kan. 504, 32 Pac. 1105; *Lease v. Clark*, 55 Kan. 621, 40 Pac. 1002; *Mason v. Belfast Hotel Co.* 89 Me. 384, 36 Atl. 624 (and their admissibility is not affected by the fact of an irregularity in the official oath of the officer having custody of them); *People v. Kemp*, 76 Mich. 410, 43 N. W. 439; *Scott v. Chope*, 33 Neb. 41, 49 N. W. 949; *Grafton v. Reed*, 34 W. Va. 172, 12 S. E. 767.

The records or minutes of the proceedings of a town board of audit, made by the town clerk, not being required by law to be kept by him, are not admissible as evidence,—especially where the meeting is one irregularly held. *Jackson v. Collins*, 41 N. Y. S. R. 590, 16 N. Y. Supp. 651.

OPINIONS.

I. Opinions of nonexperts.

1. Opinions on nontechnical subject because of impossibility of reproducing the data.
 - a. In general.
 - b. Description of objects.
 - c. Human conduct.
 - d. Habits of conduct.
 - e. Animal conduct.
 - f. Estimates.
 - g. Identity.
 - h. Miscellaneous nontechnical matters.
2. Opinions in libel and slander cases.
3. Proof of future sufferings.

II. Expert opinions.

4. Distinction between opinion and observation with judgment.
5. Questions preliminary to opinion.
6. Qualification of expert.
7. Party as expert.
8. On what questions competent.
9. Direct testimony on the fact.
10. Basis of fact for opinion.
11. Doubtful facts may be assumed.
12. Assuming fact without evidence.
13. Preponderance of evidence not necessary.
14. Written question.
15. Critical opinion of other testimony incompetent.
16. Reason.
17. Doubt.
18. Cross-examination.
19. Impugning expert's examination.
20. Weight and conclusiveness of expert's opinion.

For the various facts which may be proved by opinion, see the titles of the fact in question, as, for example, AGE; CARE; CAUSE; DUTY; FINGER PRINTS; HANDWRITING; HEALTH; INSANITY; QUALITY; TYPE-WRITING, ETC.

For application of rule in criminal case, see Criminal Trial Brief, also note in 28 Harvard L. Rev. 708, as to opinion of witness in a murder case.

I. OPINIONS OF NONEXPERTS.

1. Opinions on nontechnical subject because of impossibility of reproducing the data.
 - a. *In general.*—Opinions of nonprofessional men are admis-

sible upon a great variety of unscientific questions arising every day in judicial inquiries, which opinions are held admissible because of the difficulty or impossibility of reproducing the data observed by the witness.¹ Most courts require the witness to describe the data as well as he is able before stating his opinion,² while others leave this matter to be raised on cross-examination by way of testing the value of the opinion.³

¹ *Com. v. Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401; *State v. Pruett*, 22 N. M. 223, L.R.A.1918A, 656, 160 Pac. 362.

² *People v. Davidson*, 240 Ill. 191, 88 N. E. 565; *Foster v. East Jordan Lumber Co.* 141 Mich. 316, 104 N. W. 617; *Lincoln Reserve L. Ins. Co. v. Morgan*, 126 Ark. 615, 191 S. W. 236.

³ *Schultz v. Frankfort Marine Acci. & Plate Glass Ins. Co.* 151 Wis. 537, 43 L.R.A.(N.S.) 520, 139 N. W. 386; *Craig v. State*, 171 Ind. 317, 86 N. E. 397.

b. Description of objects.—Opinions as to the appearance of animate objects are admissible under this rule, as that a person was nice looking,¹ or that cattle were in bad condition,² or that trees were dead.³

So, too, opinions as to inanimate objects are admissible, as that a break in a bolt was an old one,⁴ or that automobile tracks looked fresh.⁵

¹ *Childs v. Muckler*, 105 Iowa, 279, 75 N. W. 100.

² *Gulf, C. & S. F. R. Co. v. Kimble*, 49 Tex. Civ. App. 622, 109 S. W. 234.

³ *Brooks v. Chicago, M. & St. P. R. Co.* 73 Iowa, 179, 34 N. W. 805.

⁴ *Illinois C. R. Co. v. Prickett*, 210 Ill. 140, 71 N. E. 435; *Woods v. Chicago & G. T. R. Co.* 108 Mich. 396, 66 N. W. 328.

⁵ *Young v. Bacon*, — Mo. App. —, 183 S. W. 1079.

c. Human conduct.—Opinions as to human conduct by non-experts are admissible where a dependable picture of what happened cannot be given without such opinions, but the courts differ widely in applying this principle to given sets of facts.

An opinion that an act was sneaky,¹ or that two persons “used to treat each other pretty nice”² has been held admissible while an opinion that a man treated a woman like a sweetheart has been excluded.³

¹ *Com. v. Borasky*, 214 Mass. 313, 101 N. E. 377.

² *Sullivan v. Truszkowski*, 185 Mich. 17, L.R.A.1918A, 617, 151 N. W. 665.

³ *State v. Evans*, 267 Mo. 163, 183 S. W. 1059.

d. Habits of conduct.—Opinion evidence by nonexperts as to habits is also admissible according to the weight of authority. So opinions that a person's disposition was wilful, unpleasant and domineering,¹ that a workman was competent,² and that an automobile driver was careful,³ have been held properly admitted.

¹ *Mathewson v. Mathewson*, 81 Vt. 173, 18 L.R.A.(N.S.) 300, 69 Atl. 646.

² *Lewis v. Emery*, 108 Mich. 641, 66 N. W. 569.

Contra: *Johnson v. Caughren*, 55 Wash. 125, 104 Pac. 170, 19 Ann. Cas. 1148.

³ *Riley v. Fisher*, — Tex. Civ. App. —, 146 S. W. 581. So an opinion that a railroad flagman was careful was held admissible. *Gahagan v. Boston & L. R. Co.* 1 Allen, 187, 79 Am. Dec. 724.

But an opinion that a driver of horses was careful was held improper in *Morris v. East Haven*, 41 Conn. 252.

e. Animal conduct.—Opinions of nonexperts as to animal conduct and habits are also held admissible. So opinions as to the disposition of horses are admitted as that a horse was a "bad actor"¹ or nervous and high strung,² or "safe."³ An opinion that a dog was fierce has been held proper in one jurisdiction⁴ and improper in another.⁵

¹ *Dyer v. People's Ice Co.* 188 Mich. 203, 154 N. W. 135.

² *Shiver v. Tift*, 143 Ga. 791, L.R.A.1918A, 622, 85 S. E. 1031.

³ *Noble v. St. Joseph & B. H. Street R. Co.* 98 Mich. 249, 57 N. W. 126,

⁴ Am. Neg. Cas. 159; *Sydelman v. Beckwith*, 43 Conn. 9.

Contra: *Fletcher v. Dixon*, 107 Md. 420, 68 Atl. 875.

⁵ *Mattison v. State*, 55 Ala. 224.

⁶ *Chicago & A. R. Co. v. Kuckkuck*, 197 Ill. 304, 64 N. E. 358.

f. Estimates.—The justification for admitting nonexpert opinions because of the impossibility of reproducing the data on which such opinions are based applies with particular force to estimates. So opinions have been admitted estimating the ability of a person to do a particular thing,¹ or the possibility of a certain thing being done.² So opinions estimating a per-

son's age,⁸ the area of a particular tract of land,⁴ or the capacity of a bridge or irrigation ditch,⁵ have been admitted. Opinions as to cause and effect are also competent, as what caused a train wreck,⁶ or a building to fall,⁷ or rock strata to slip.⁸ So opinions are admissible as to dimensions,⁹ direction,¹⁰ distance,¹¹ force,¹² grade and elevation,¹³ light,¹⁴ location,¹⁵ number,¹⁶ position,¹⁷ and quantity.¹⁸ So opinions estimating the speed of trains,¹⁹ street cars,²⁰ and automobiles,²¹ may be given. Estimates of strength,²² temperature,²³ time²⁴ and weight,²⁵ are also competent.

¹ *Credille v. Credille*, 131 Ga. 40, 61 S. E. 1042; *Wood v. State*, 80 Tex. Crim. Rep. 398, 189 S. W. 474.

² *Dix v. Union Ice Co.* 76 N. J. L. 178, 68 Atl. 1101; *McRorie v. Monroe*, 203 N. Y. 426, 96 N. E. 724, Ann. Cas. 1913B, 94; *Curtright v. Ruehmann*, 181 Mo. App. 544, 164 S. W. 701.

³ *Poulter v. State*, 70 Tex. Crim. Rep. 197, 157 S. W. 166. See also topic AGE, herein, § 5.

Contra, unless facts are given on which opinion is based. *People v. Davidson*, 240 Ill. 191, 88 N. E. 565; *Tuite v. Supreme Forest*, W. C. 193 Mo. App. 619, 187 S. W. 137.

⁴ *Dashiel v. Harshman*, 118 Iowa, 283, 85 N. W. 85.

⁵ *Harford County v. Wise*, 71 Md. 43, 18 Atl. 31; *Denver, T. & Ft. W. R. Co. v. Pulaski Irrigating Ditch Co.* 19 Colo. 367, 35 Pac. 910.

⁶ *Gulf, C. & S. F. R. Co. v. John*, 9 Tex. Civ. App. 342, 29 S. W. 558.

⁷ *Walker v. Strosnider*, 67 W. Va. 39, 67 S. E. 1087, 21 Ann. Cas. 1.

⁸ *Kunst v. Grafton*, 67 W. Va. 20, 26 L.R.A. (N.S.) 1201, 67 S. E. 74.

⁹ *Beverley v. Boston Elev. R. Co.* 194 Mass. 450, 80 N. E. 507; *State v. Deslovers*, 40 R. I. 89, 246, 100 Atl. 64, 399.

¹⁰ Direction of a fire: *Galveston, H. & S. A. R. Co. v. Brune*, — Tex. Civ. App. —, 181 S. W. 547. Direction of shots: *Ford v. State*, 96 Ark. 582, 132 S. W. 995.

¹¹ *State v. Laster*, 71 N. J. L. 586, 60 Atl. 361.

¹² *Kansas City Southern R. Co. v. Clinton*, 140 C. C. A. 340, 224 Fed. 896; *Daniels v. St. Louis, I. M. & S. R. Co.* — Mo. App. —, 181 S. W. 599.

¹³ *Lincoln v. Central Vermont R. Co.* 82 Vt. 187, 137 Am. St. Rep. 998, 72 Atl. 821; *Downey Bros. v. Pennsylvania R. Co.* 219 Pa. 32, 67 Atl. 916.

¹⁴ *Lamb v. Southern R. Co.* 86 S. C. 106, 138 Am. St. Rep. 1030, 67 S. E. 958.

¹⁵ *Com. v. Karamarkovic*, 218 Pa. 405, 67 Atl. 650.

¹⁶ *Dolby v. Laramore*, 121 Md. 618, 89 Atl. 442, where an opinion estimating the number of tomatoes which had rotted in a field was admitted. *Wilmarth v. Pacific Mut. L. Ins. Co.* 168 Cal. 536, 143 Pac. 780, Ann.

Cas. 1915B, 1120, admitting opinion as to number of trips taken by an elevator.

¹⁷ Nesbit v. Crosby, 74 Conn. 554, 51 Atl. 550.

¹⁸ Cvitanovich v. Bromberg, 169 Iowa, 736, 151 N. W. 1073, Ann. Cas. 1917B, 309.

¹⁹ Rothe v. Pennsylvania Co. 114 C. C. A. 627, 195 Fed. 21.

²⁰ Millette v. Detroit United R. Co. 186 Mich. 634, 153 N. W. 10; United R. & Electric Co. v. Mantik, 127 Md. 197, 96 Atl. 261. See also note to Tecklenburg v. Everett R. Light & Water Co. 34 L.R.A.(N.S.) 784.

²¹ Creedon v. Galvin, 226 Mass. 140, 115 N. E. 307; Daly v. Curry, 128 Minn. 449, 151 N. W. 274.

²² State v. Rainsbarger, 71 Iowa, 746, 31 N. W. 865.

²³ Peterson v. Chicago, M. & St. P. R. Co. 19 S. D. 122, 102 N. W. 595.

²⁴ Schwantes v. State, 127 Wis. 160, 106 N. W. 237.

²⁵ Western U. Teleg. Co. v. Gorman, — Tex. Civ. App. —, 174 S. W. 925.

g. Identity.—Opinions of nonexperts are admissible as to the identity of persons ¹ and such opinions need not be positive.² So opinions as to the identity of animals³ or of inanimate objects⁴ are competent.

¹ People v. Jennings, 252 Ill. 534, 43 L.R.A.(N.S.) 1206, 96 N. E. 1077.

² People v. Hammond, 177 Mich. 416, 143 N. W. 244.

³ Lawton v. Shepard, 36 Okla. 772, 130 Pac. 135.

⁴ Winding Gulf Colliery Co. v. Campbell, 72 W. Va. 449, 78 S. E. 384.

h. Miscellaneous nontechnical matters.—Nonexpert opinions are admissible on questions of resemblance to persons,¹ animals,² or inanimate objects,³ and on the question of mental state as deduced from the appearance of a person,⁴ or animal.⁵ So opinions have been held competent as to the nature of a sound,⁶ as to tracks, marks and impressions,⁷ as to financial condition,⁸ and as to odor⁹ and color.¹⁰

¹ Schwartz v. Wood, 67 Hun, 648, 51 N. Y. S. R. 4, 21 N. Y. Supp. 1053.

² Brady v. Shirley, 18 S. D. 608, 101 N. W. 886, 5 Ann. Cas. 972.

³ Tilghman v. Seaboard Air Line R. Co. 167 N. C. 163, 83 S. E. 315, 1090.

⁴ State v. Cooley, 19 N. M. 91, 52 L.R.A.(N.S.) 230, 140 Pac. 1111.

⁵ Bartlesville Interurban R. Co. v. Quaid, 51 Okla. 166, L.R.A.1918A, 653, 151 Pac. 891.

⁶ Ray v. State, 142 Ga. 655, 83 S. E. 518; Com. v. Best, 180 Mass. 492, 62 N. E. 748.

ABB. FACTS—55.

⁷ *State v. Pruett*, 22 N. M. 223, L.R.A.1918A, 656, 160 Pac. 362, admitting opinion as to a knee print. *Patterson v. Blatti*, 133 Minn. 23, L.R.A. 1916E, 896, 157 N. W. 717, Ann. Cas. 1918D, 63, admitting an opinion as to marks of teeth on a thumb. *Weber v. Chicago, R. I. & P. R. Co.* 175 Iowa, 358, L.R.A.1918A, 626, 151 N. W. 852.

⁸ *Kirkman v. Ashford*, 145 Ga. 452, 89 S. E. 411.

⁹ *Adler v. Pruitt*, 169 Ala. 213, 32 L.R.A. (N.S.) 889, 53 So. 315.

¹⁰ *Com. v. Owens*, 114 Mass. 252.

2. Opinions in libel and slander cases.

The opinion of a witness is ordinarily admissible as to whom an alleged libelous or slanderous statement referred.¹

¹ *Colbert v. Journal Pub. Co.* 19 N. M. 156, 142 Pac. 146; *Goldsborough v. Orem*, 103 Md. 671, 64 Atl. 36; *Enquirer Co. v. Johnston*, 18 C. C. A. 628, 34 U. S. App. 607, 72 Fed. 443; note in 14 Columbia L. Rev. 684. *Contra*: *Stokes v. Morning Journal Asso.* 66 App. Div. 569, 73 N. Y. Supp. 245.

3. Proof of future sufferings.

Ordinarily expert testimony is necessary to establish that there will be future suffering from an injury and how great such suffering will be.¹ Where, however, a lay witness can tell with reasonable certainty what is going to happen his testimony is admissible and expert testimony is unnecessary.²

¹ *Shawnee-Tecumseh Traction Co. v. Griggs*, 50 Okla. 566, 151 Pac. 230.

² *Southern R. Co. v. Clariday*, 124 Ga. 958, 53 S. E. 461; *Lake Shore & M. S. R. Co. v. Johnsen*, 135 Ill. 641, 26 N. E. 510, 11 Am. Neg. Cas. 392; *Ayres v. Delaware L. & W. R. Co.* 158 N. Y. 254, 53 N. E. 22, 5 Am. Neg. Rep. 683.

II. EXPERT OPINIONS.

4. Distinction between opinion and observation with judgment.

A fact of observation depending on minutiae such as cannot be described to the jury with the same effect as they justly produce in the mind of an intelligent observer may be proved by the testimony of the witness directly to the conclusion formed from such minutiae, provided that conclusion is not mere matter of opinion deduced from facts observed, but is itself a fact

discerned by the witness in the act of observation, though it may be in part by the exercise of judgment.¹

This rule allows a witness to state the result of a comparison without being confined to describing his observation of each thing compared.²

¹ *Burnett v. Great Northern R. Co.* 76 Minn. 461, 79 N. W. 523; *Missouri P. R. Co. v. Palmer*, 55 Neb. 551, 76 N. W. 169; *First Nat. Bank v. Fire Asso. of Philadelphia*, 33 Or. 172, 53 Pac. 8, 50 Pac. 568, and cases cited; *Vermillion Artesian Well, Electric Light, Min. I. & Improv. Co. v. Vermillion*, 6 S. D. 466, 61 N. W. 802, and cases cited. And for numerous illustrations, see ABILITY; FEELING; HEALTH, ETC.

² *Collins v. New York, C. & H. R. R. Co.* 109 N. Y. 243, 16 N. E. 50, reversing judgment in 23 N. Y. Week. Dig. 154, because engineer was not allowed to answer whether one engine discharged more sparks than the other, but was required to state what he observed.

5. Questions preliminary to opinion.

Whether one offered as an expert is qualified as such is a question to be determined by the court.¹

Before a witness will be permitted to give his opinion as an expert, his qualification as such must be established by a preliminary examination.² And the court may, in its discretion, allow the objector to interpose with preliminary cross-examination upon the facts material to competency.³

¹ *Nelson v. Sun Mut. Ins. Co.* 71 N. Y. 453, affirming 8 Jones & S. 417; *Lynch v. Grayson*, 5 N. M. 487, 25 Pac. 992, and cases cited. And see *Civil Trial Brief* (4th ed.) pp. 356, 550.

² *Little Rock & Ft. S. R. Co. v. Bruce*, 55 Ark. 65, 17 S. W. 363; *Fairbank v. Hughson*, 58 Cal. 314; *Tyler v. Todd*, 36 Conn. 218; *Sandwich Mfg. Co. v. Nicholson*, 32 Kan. 666, 5 Pac. 164; *Lincoln v. Barre*, 5 Cush. 590; *State v. Secrest*, 80 N. C. 450; *Koons v. State*, 36 Ohio St. 195; *Delaware & C. Steam Towboat Co. v. Starrs*, 69 Pa. 36; *Buffam v. New York & B. R. Co.* 4 R. I. 221; *Carpenter v. Corinth*, 58 Vt. 214, 2 Atl. 170. And see *Civil Trial Brief* (4th ed.) pp. 190 et seq.

³ *Sarle v. Arnold*, 7 R. I. 582; *Fort Wayne v. Coombs*, 107 Ind. 75, 57 Am. Rep. 82, 7 N. E. 743; *Finch v. Chicago, M. & St. P. R. Co.* 46 Minn. 250, 48 N. W. 915; *Re Gorkow*, 20 Wash. 563, 56 Pac. 385.

(Mr. Abbott, in his first edition, stated the rule to be, as to this question, that it was matter of right, citing *First Nat. Bank v. Wirebach*, 12 W. N. C. 150, and criticizing *Fort Wayne v. Coombs*, 107 Ind. 75, 57 Am. Rep. 82, 7 N. E. 743, as unsound, saying: "For though the ap-

pellate court may regard the question of qualification discretionary; the objector has a right to have the facts put upon the record by cross-examination, in order that the appellate court may see that there has been no abuse of that discretion." But, as will be seen, the weight of authority is to the effect that the privilege of such a preliminary cross-examination is discretionary with the court).

Though held to be a right in *Woodworth v. Brooklyn Elev. R. Co.* 22 App. Div. 501, 48 N. Y. Supp. 80, and the case reversed for its denial, it was said that in civil cases, at least, the denial of the right is not error where the objector has not been prejudiced thereby.

6. Qualification of expert.

Either professional study or actual experience is enough to qualify; both are not necessary.¹ But there must be one or the other.² The professional study and experience of an allopathic physician is not sufficient to qualify him as an expert in the field of homeopathy.³ Testimony of other witnesses is admissible in determining the competency of an alleged expert.⁴ And the burden of showing that an alleged expert is qualified rests on the party calling him.⁵

The determination as to the competency of an alleged expert witness rests very largely in the discretion of the trial judge⁶ or master,⁷ but where the trial judge excludes the expert's evidence on some ground other than the court's discretion his decision is subject to review.⁸

¹ *Hand v. Church*, 39 Hun, 303 (one not a practising lawyer, but admitted to the bar, and with much experience in litigation and in paying for legal services, competent to testify to value); *Fort Wayne v. Coombs*, 107 Ind. 75, 57 Am. Rep. 82, 7 N. E. 743 (study without practical experience sufficient); *Wheeler & W. Mfg. Co. v. Buckhout*, 60 N. J. L. 102, 36 Atl. 772; *Glover v. Gentry*, 104 Ala. 222, 16 So. 38 (one having long experience in handling notes, etc., although not an "expert in ink," competent to testify whether different parts of note were written with same ink); *First Nat. Bank v. Fire Asso. of Phila.* 33 Or. 172, 50 Pac. 568, 53 Pac. 8 (skilled firemen competent to testify as to whether fire was burning naturally, or whether something inflammable had been distributed to accelerate the fire); *Pearson v. Zehr*, 138 Ill. 48, 29 N. E. 854 (witness although not veterinary surgeon, having had for many years personal care of, and extensive practical experience with, horses and a particular disease, and ample opportunity to observe the symptoms, competent to testify to existence of symptoms and disease in given case); *Pendleton v. Saunders*, 19 Or.

9, 24 Pac. 506, 512; *Com. v. Farrell*, 187 Pa. 408, 41 Atl. 382; *Fort Worth & D. C. R. Co. v. Thompson*, 75 Tex. 501, 12 S. W. 742.

The opinion of a witness formerly practising a particular trade or profession is not rendered incompetent upon a question relating to such art or trade or profession, by the fact that he has abandoned its practice and is engaged in other business. *Bearss v. Copley*, 10 N. Y. 93; *Stone v. Moore*, 83 Iowa, 186, 49 N. W. 76; *s. p. Robertson v. Knapp*, 35 N. Y. 91, 33 How. Pr. 309.

² *American Acci. Co. v. Fidler*, 18 Ky. L. Rep. 161, 163, 36 S. W. 528, 35 S. W. 905.

That mere observation without study or practice is not enough, see *Wheeler & W. Mfg. Co. v. Buckhout*, 60 N. J. L. 102, 36 Atl. 772.

³ *Van Sickie v. Doolittle*, 184 Iowa, 885, 169 N. W. 141.

⁴ *Wright v. Schnaier*, 35 Misc. 37, 70 N. Y. Supp. 128.

⁵ *Dolan v. Herring-Hall-Marvin Safe Co.* 105 App. Div. 366, 94 N. Y. Supp. 241.

⁶ *Old Colony Trust Co. v. Di Cola*, 233 Mass. 125, 123 N. E. 454.

⁷ *Cook v. Fall River*, 239 Mass. 95, 18 A.L.R. 119, 131 N. E. 346.

⁸ *Moraski v. T. A. Gillespie Co.* 239 Mass. 44, 131 N. E. 441, holding expert opinion admissible as to what should have been done in exercise of ordinary care in constructing a tunnel.

7. Party as expert.

A party to the action may, as an expert, testify to his own opinion.¹

¹ *Dickenson v. Fitchburg*, 13 Gray, 546.

8. On what questions competent.

Superior knowledge or skill on the part of a witness does not make a case for expert opinion; but the question itself must be one relating to some trade, profession, science, or art in which persons instructed therein, by study or experience, may be supposed to have more skill and knowledge than jurors of average intelligence may be presumed generally to have.¹

¹ *Ferguson v. Hubbell*, 97 N. Y. 507, 49 Am. Rep. 544, and cases cited; *First Nat. Bank v. Fire Asso. of Phila.* 33 Or. 172, 50 Pac. 568, 53 Pac. 8 (where a number of authorities are reviewed); *Stead v. Worcester*, 150 Mass. 241, 22 N. E. 893; *Armstrong v. Chicago, M. & St. P. R. Co.* 45 Minn. 85, 47 N. W. 459. And for cases recognizing this rule, but holding the evidence not admissible because the question was not one for expert testimony, see: *American Oak Extract Co. v. Ryan*, 112

Ala. 337, 20 So. 644; North Kankakee Street R. Co. v. Blatchford, 81 Ill. App. 609; Briggs v. Minneapolis Street R. Co. 52 Minn. 36, 53 N. W. 1019; St. Louis, A. & T. R. Co. v. Jones, — Tex. —, 14 S. W. 309; Schneider v. Second Ave. R. Co. 133 N. Y. 583, 30 N. E. 752; Overby v. Chesapeake & O. R. Co. 37 W. Va. 524, 16 S. E. 813; Kircher v. Milwaukee Mechanics' Mut. Ins. Co. 74 Wis. 470, 5 L.R.A. 779, 43 N. W. 487.

And that the mere fact that the opinion may be upon a question which the jury is to decide is not sufficient to justify the exclusion of the testimony, so long as the question is a proper one for expert testimony, see New York Electric Equipment Co. v. Blair, 25 C. C. A. 216, 51 U. S. App. 81, 79 Fed. 896; Van Wycklen v. Brooklyn, 118 N. Y. 424, 24 N. E. 179.

9. Direct testimony on the fact.

When the knowledge of the expert as to the particular fact in question is derived from his own observations, whether made in or out of court, he may be asked his opinion directly upon the fact.¹

When his knowledge is derived from hearing the testimony of witnesses he cannot be asked his opinion directly on the fact, but a hypothetical question must be put.²

But it is not error to allow a direct question founded on what the expert has heard a previous witness state, if such statements are unquestioned, and the jury understand that the opinion of the expert is given on the assumption of their truth.³

The mere fact that a question put to an expert is based in part upon the personal knowledge of the witness, and in part upon an hypothesis, does not make it objectionable.⁴ But an answer to an hypothetical question, which is based, not only on the facts assumed, but on the personal knowledge of the witness, is improper, and should not be allowed.⁵

Mathematical calculation of probability has been held to be inadmissible as expert testimony,⁶ although there would seem to be reason for admitting it in certain cases.⁷

¹ State v. Leabo, 89 Mo. 247, 1 S. W. 288; Louisville, N. A. & C. R. Co. v. Wood, 113 Ind. 547, 14 N. E. 572, 16 N. E. 197; Green v. Ashland

Water Co. 101 Wis. 258, 43 L.R.A. 117, 77 N. W. 722. And see Civil Trial Brief (4th ed.) p. 216.

2 Reynolds v. Robinson, 64 N. Y. 589.

To call for the opinion of a witness it is not competent, if the evidence is conflicting, to ask him whether he, having heard the evidence, and supposing it to be true, is or is not of a specified opinion; but he should be asked if specified facts, assumed by the question to be established, are found by the jury to be true, what would, on such facts, be his opinion on the question. Woodbury v. Obear, 7 Gray, 467, 471, approved in Com. v. Mullins, 2 Allen, 295. To the same effect: Chicago & A. R. Co. v. Glenney, 175 Ill. 238, 51 N. E. 896; Sauntman v. Maxwell, 154 Ind. 114, 54 N. E. 397; Wichita v. Coggsall, 3 Kan. App. 540, 43 Pac. 842; McCarthy v. Boston Duck Co. 165 Mass. 165, 42 N. E. 568; Sebrell v. Barrows, 36 W. Va. 212, 14 S. E. 996; Green v. Ashland Water Co. 101 Wis. 258, 43 L.R.A. 117, 77 N. W. 722. And see Civil Trial Brief (4th ed.) p. 216.

Decisions are in conflict as to whether an expert can give an opinion based on past conditions as narrated to him outside the court room by an injured party for the express purpose of qualifying such expert to testify at the trial. Hintz v. Wagner, 25 N. D. 110, 140 N. W. 729, holds that he cannot. St. Louis & S. F. R. Co. v. McFall, 63 Okla. 124, 163 Pac. 269, holds that if his opinion is based both on past conditions and a present examination it is admissible. See also notes in 11 Mich. L. Rev. 605 and 15 Mich. L. Rev. 670.

3 Seymour v. Fellows, 77 N. Y. 178, affirming 12 Jones & S. 124; Yaeger v. Southern California R. Co. — Cal. —, 51 Pac. 190; Abbott v. Dwinell, 74 Wis. 514, 43 N. W. 496; s. p., Yardley v. Cuthbertson, 108 Pa. 395, 56 Am. Rep. 218, 1 Atl. 765; Gates v. Fleischer, 67 Wis. 504, 30 N. W. 674 (question based partly on hypothetical statement, and partly on assumption of what expert had heard testified by previous witness in the same cause). But the question must require the witness to assume the truth of the testimony. Jones v. Chicago, St. P. M. & O. R. Co. 43 Minn. 279, 45 N. W. 444. And the expert must be shown to have heard such other previous testimony. Howland v. Oakland Consol. Street R. Co. 115 Cal. 487, 47 Pac. 255.

Hypothetical question, how framed, see, generally, Civil Trial Brief (4th ed.) p. 218; Criminal Trial Brief.

4 Selleck v. Janesville, 100 Wis. 157, 41 L.R.A. 563, 75 N. W. 975; Louisville, N. A. & C. R. Co. v. Falvey, 104 Ind. 410, 3 N. E. 389. And in Tebo v. Augusta, 90 Wis. 405, 63 N. W. 1045, such a question was approved as against the objection that it invaded the province of the jury in submitting to the expert the question to be determined by the jury.

To the effect that a hypothetical case and personal examination cannot be joined in the same question, where the facts disclosed at the examination constitute little or no evidence of the fact in issue, see State v. Welsor, 117 Mo. 570, 21 S. W. 443.

⁵ *Fuller v. Jackson*, 92 Mich. 197, 52 N. W. 1075.

⁶ *People v. Risley*, 214 N. Y. 75, 108 N. E. 200, Ann. Cas. 1916D, 775.

See also note in 13 Mich. L. Rev. 702.

⁷ *Wigmore, Ev.* § 1923. See also note in 28 Harvard L. Rev. 693.

10. Basis of fact for opinion.

The facts assumed in a hypothetical question as the basis for an opinion must have some support in the evidence.¹ The question must not embrace all the facts in evidence,² although it must not omit a material fact essential to an intelligent opinion.³ Whether or not the facts assumed are true or are established by the evidence is for the jury,⁴ and constitutes no available objection to the question.⁵

The opinion of an expert can be called for, although it was formed on hearsay, if the question put states the facts on which the opinion is based in hypothetical form, and they may fairly be claimed to be supported by evidence already received.⁶

An answer to a hypothetical question, which the witness states is based upon the facts stated in the question and upon reading the evidence in a former trial, should be stricken out.⁷

¹ *People v. Harris*, 136 N. Y. 423, 33 N. E. 65; *Hurst v. Chicago, R. I. & P. R. Co.* 49 Iowa, 76; *Haish v. Payson*, 107 Ill. 365. For a more comprehensive treatment of this question, see *Abbott's Civil Trial Brief* (4th ed.) p. 218; *Burt v. State*, 39 L.R.A. 305, with note, s. c. 38 Tex. Crim. Rep. 397, 40 S. W. 1000, 43 S. W. 344. See also § 9, *infra*, this title.

² *People v. Durrant*, 116 Cal. 179, 48 Pac. 75; *Gulf, C. & S. F. R. Co. v. Compton*, 75 Tex. 667, 13 S. W. 667; *Bowen v. Huntington*, 35 W. Va. 682, 14 S. E. 217.

³ *Vosburg v. Putney*, 80 Wis. 523, 14 L.R.A. 226, 50 N. W. 403.

⁴ *Gottlieb v. Hartman*, 3 Colo. 53; *Grand Lodge, I. O. M. A. v. Wieting*, 168 Ill. 408, 48 N. E. 59.

⁵ *Deig v. Morehead*, 110 Ind. 451, 11 N. E. 458.

⁶ *Cushman v. United States L. Ins. Co.* 70 N. Y. 72 (holding that the error in allowing a question expressly based on hearsay was not available on appeal, where only a general objection was made at the trial. The opinion was that of one physician founded on what another in attendance had told him).

⁷ *Commercial Travelers' Mut. Acci. Asso. v. Fulton*, 35 C. C. A. 493, 93 Fed. 621.

11. Doubtful facts may be assumed.

Counsel may assume facts as they claim them to exist; and an error in the assumption does not make the question objectionable, if it is within the possible or probable range of evidence.¹

Hypothetical questions need not state facts as they exist. Each side may shape questions according to its theory.²

¹ Harett v. Garvey, 66 N. Y. 641; Jackson v. Burnham, 20 Colo. 532, 39 Pac. 577.

² Cowley v. People, 83 N. Y. 464, 38 Am. Rep. 464, affirming 8 Abb. N. C. 1, 21 Hun, 415; Filer v. New York C. & H. R. R. Co. 49 N. Y. 42, 10 Am. Rep. 327; Jackson v. New York C. R. Co. 2 Thomp. & C. 653, affirmed in 58 N. Y. 623, on opinions of lower court; Cole v. Fall Brook Coal Co. 159 N. Y. 59, 53 N. E. 670. And see Abbott's Civil Trial Brief (4th ed.) pp. 218 et seq.

By a hypothetical question on facts suggesting several hypotheses, an expert may be asked what would have been the indications on one or another hypothesis, without first proving it to be the true one. Erickson v. Smith, 2 Abb. App. Dec. 64.

12. Assuming fact without evidence.

On direct examination, a question which assumes any material fact which there is no evidence to support must be excluded.¹

¹ State v. Cross, 68 Iowa, 180, 26 N. W. 62; State v. Hanley, 34 Minn. 430, 26 N. W. 397; People v. Augsbury, 97 N. Y. 501; Davis v. Travelers' Ins. Co. 59 Kan. 74, 52 Pac. 67; Chalmers v. Whitmore Mfg. Co. 164 Mass. 532, 42 N. E. 98; Burnett v. Wilmington, N. & N. R. Co. 120 N. C. 517, 26 S. E. 819 (error to admit question). See also Civil Trial Brief (4th ed.) pp. 218 et seq.

But that there is no direct evidence to support the fact assumed is no objection; circumstantial evidence is sufficient. Smith v. Chicago & A. R. Co. 119 Mo. 246, 23 S. W. 784.

13. Preponderance of evidence not necessary.

If the facts assumed by the hypothetical question are not unsupported by evidence in the case, the question cannot be ex-

cluded merely on the ground that in the opinion of the judge the facts are not established by a preponderance of evidence.¹

¹ *Quinn v. Higgins*, 63 Wis. 664, 53 Am. Rep. 305, note, 24 N. W. 482 (malpractice; judgment reversed for error in this respect, among others). And that they need not be proved to a certainty or with any degree of certainty, see *Baxter v. Knox*, 19 Ky. L. Rep. 1973, 44 S. W. 972.

The test is whether, on the state of the evidence already in, a finding by the jury of such facts would be sustained; in other words, the facts assumed must be supported by sufficient evidence to go to the jury. *People v. Augsbury*, 97 N. Y. 501. To similar effect, *Morrisett v. Wood*, 123 Ala. 384, 26 So. 307.

14. Written question.

The court may require counsel to reduce his hypothetical question to writing.¹

¹ *Mayo v. Wright*, 63 Mich. 32, 29 N. W. 832.

Length of question not alone ground for exclusion. *Mayo v. Wright*, 63 Mich. 32, 29 N. W. 832.

15. Critical opinion of other testimony incompetent.

A question calling for expert opinion upon evidence given by other witnesses, which covers a great variety of facts, is not competent if it calls for a comprehensive and critical view of the testimony given and the inferences to be drawn from the evidence of the witnesses.¹

¹ *Guiterman v. Liverpool, N. Y. & P. S. S. Co.* 83 N. Y. 358 (error to allow question to a nautical man: "Under the circumstances detailed by these witnesses, and on the protest, and when [stating further details] what in your opinion should have been done by the persons in charge?" Miller, J., says: "In order properly to form an opinion, the witness should have had full information as to the ascertained or supposed state of facts upon which his opinion is based; and he could not be called upon to determine the truth of the facts sworn to before giving such opinion. Nor could the witness be called upon to testify, unless a clear state of facts appeared; and it is not his province to draw inferences from the evidence of other witnesses, or to take in such facts as he can recollect, and thus form an opinion. . . . The rule, after an examination of the authorities, we think, is that, in a case of this kind, a nautical man cannot be called upon to testify as to his opinion upon evidence given by other witnesses, which covers a great variety of facts,

and calls for a comprehensive and critical view of the testimony given and the inferences to be drawn from the evidence of the witnesses. In this case, there was a discrepancy between the protest and some of the sworn testimony, perhaps not very important, yet at the same time of sufficient consequence to call for the discrimination of the witness as to the bearing of different parts [facts] upon the case, and which might not have been fully appreciated or understood without the attention of the witness being especially directed to the subject and the various facts connected therewith"). *Link v. Sheldon*, 136 N. Y. 1, 32 N. E. 696. And see *Abbott's Civil Trial Brief* (4th ed.) pp. 217, 218.

16. Reason.

The expert's reason for his opinion may be called for on his examination in chief.¹

¹ *Lewiston Steam Mill Co. v. Androscoggin Water Power Co.* 78 Me. 274, 4 Atl. 555.

17. Doubt.

Where a witness has testified to a fact as to which opinion is competent, as for instance, identity, he may be asked whether he has any doubt.¹

Otherwise if he has declined to express an opinion.²

¹ *King v. New York C. & H. R. R. Co.* 72 N. Y. 607.

² *Sanchez v. People*, 22 N. Y. 147, 154. Compare *BELIEF*, § 2.

18. Cross-examination.

On cross-examination abstract questions, and hypothetical questions not founded on evidence in the case, may be put for the purpose of testing the witness.¹

This does not make him the witness of the cross-examiner within the rule against contradicting one's own witness.²

Where a medical expert bases his opinion on medical books of standard repute and cites a certain authority in support of his opinion, such authority may always be used on cross-examination,³ or may even be introduced in evidence⁴ to discredit the witness. Where such expert bases his opinion solely on his own experiences and observations, he cannot be cross-examined as to

statements of particular authors.⁵ When however, he testifies as to what the authorities show, or bases his opinion on his general reading, but mentions no particular author, some courts permit particular statements from the books to be used in cross-examination,⁶ while other courts refuse such permission.⁷

¹ *People v. Augsbury*, 97 N. Y. 501 (holding this discretionary with the court) *Bever v. Spangler*, 93 Iowa, 576, 61 N. W. 1072; *Kansas City v. Marsh Oil Co.* 140 Mo. 458, 41 S. W. 943; s. p., *Louisville, N. A. & C. R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389. And see more fully on this question, *Civil Trial Brief* (4th ed.) p. 246.

² *Tucker v. Ely*, 20 N. Y. Week. Dig. 66.

³ *Baldwin v. Gaines*, 92 Vt. 61, 102 Atl. 338 and cases there cited; *Foley v. Grand Rapids & I. R. Co.* 157 Mich. 69, 121 N. W. 257; *Eggart v. State*, 40 Fla. 527, 25 So. 144; *Clark v. Com.* 111 Ky. 443, 63 S. W. 740.

⁴ *Union P. R. Co. v. Yates*, 40 L.R.A. 553, 49 U. S. App. 241, 25 C. C. A. 103, 79 Fed. 584. For additional cases and discussion of admissibility of medical books as evidence see note in 40 L.R.A. 553.

⁵ *State v. Brunette*, 28 N. D. 539, 150 N. W. 271, Ann. Cas. 1916E, 340 and cases there cited; *Enos v. St. Paul F. & M. Ins. Co.* 4 S. D. 639, 57 N. W. 919, 46 Am. St. Rep. 796.

⁶ *Baldwin v. Gaines*, and *State v. Brunette* supra; *Wittenberg v. Onsgard*, 78 Minn. 342, 47 L.R.A. 141, 81 N. W. 14; *Scullin v. Vining*, 127 Ark. 124, 191 S. W. 924.

⁷ *Bloomington v. Schrock*, 110 Ill. 219, 51 Am. Rep. 678; *Hall v. Murdock*, 114 Mich. 233, 72 N. W. 150; *Butler v. South Carolina & G. Extension R. Co.* 130 N. C. 15, 40 S. E. 770; *State v. Summers*, 173 N. C. 775, 92 S. E. 325.

See also note in 15 *Columbia L. Rev.* 360.

19. Impugning expert's examination.

When an expert has given testimony founded upon his own examination, the party affected has a right to give evidence that adequate examination was not made.¹

¹ *Laughlin v. Street R. Co.* 62 Mich. 220, 28 N. W. 873 (reversing judgment for excluding such evidence).

20. Weight and conclusiveness of expert's opinion.

The general rule adopted by the courts is that the opinions of expert witnesses are not, as a matter of law, to be accepted by the jury in the place of their own judgment,¹ though they are entitled to respectful consideration.² The question as to just what weight shall be given to expert opinions has given rise to some conflict, and to numerous and varied expressions of judicial opinion. But the rule generally stated would seem to be that the evidence of experts is to be received and treated by the jury precisely as other testimony, and that its weight will be determined by the character, capacity, skill, and opportunities for observation and the state of mind of the experts themselves, as seen and heard and estimated by the jury, and by the nature of the case and of its developed facts.³

The weight that is to be given to the opinion of a witness must largely depend upon the opportunity the witness had to form a correct opinion, and the reasons which influence him in coming to it.⁴ And the value of the opinion of an expert depends very largely upon the facts upon which it is based.⁵ So, the opinions of experts are not to be allowed to outweigh established facts, or the positive, corroborated, and uncontradicted testimony of unimpeached witnesses to a fact.⁶ And an expert is to be judged from the same standpoint as any other witness, and, if the jury find his conclusions or opinions to be the result of a biased or interested judgment, or of self-serving or improper motives, they have a right to reject them, partially or entirely.⁷

¹ *Head v. Hargrave*, 105 U. S. 45, 26 L. ed. 1028; *Lawlor v. French*, 14 Misc. 497, 35 N. Y. Supp. 1077; *Shanley v. Laclede Gaslight Co.* 63 Mo. App. 132; *Leitensdorfer v. King*, 7 Colo. 436, 4 Pac. 37; *Alabama G. S. R. Co. v. Hill*, 93 Ala. 514, 30 Am. St. Rep. 65, 9 So. 722.

It is strictly within the province of the jury to disregard each and every opinion uttered by experts. *People v. Barberi*, 2 N. Y. Crim. Rep. 89, 47 N. Y. Supp. 168.

The rule that a jury has no right arbitrarily to ignore or discredit the testimony of unimpeached witnesses so far as they testify to facts, and that a wilful disregard of such testimony will be ground for a new trial, does not apply to the testimony of witnesses who testify merely to their opinions, and the jury may deal with them as they please, giving them credence or not, as their own experience or general knowl-

edge of the subject may dictate. *The Conqueror*, 166 U. S. 110, 41 L. ed. 937, 17 Sup. Ct. Rep. 510.

2 *Com. v. Moss*, 6 Kulp, 31; *Chandler v. Barrett*, 21 La. Ann. 58, 99 Am. Dec. 701; *Leitensdorfer v. King*, 7 Colo. 436, 4 Pac. 37; *Kilpatrick v. Haley*, 6 Colo. App. 407, 41 Pac. 508; *The Conqueror*, 166 U. S. 110, 41 L. ed. 937, 17 Sup. Ct. Rep. 510.

3 *Louisville, N. O. & T. R. Co. v. Whitehead*, 71 Miss. 451, 42 Am. St. Rep. 472, 15 So. 890; *Chandler v. Thompson*, 30 Fed. 38; *State v. Miller*, 9 *Houst. (Del.)* 564, 32 *Atl.* 137.

It is for the jury to say what weight shall be given to expert testimony in general. *Bever v. Spangler*, 93 Iowa, 576, 61 N. W. 1072; *Humphries v. Johnson*, 20 Ind. 190; *Snyder v. State*, 70 Ind. 349; *State v. Miller*, 9 *Houst. (Del.)* 564, 32 *Atl.* 137; *Wells v. Leek*, 151 Pa. 431, 25 *Atl.* 101; *Gunter v. State*, 83 Ala. 96, 3 So. 600; *Anderson v. Barksdale*, 77 Ga. 86; *Templeton v. People*, 3 Hun, 357; *The Conqueror*, 166 U. S. 110, 41 L. ed. 937, 17 Sup. Ct. Rep. 510.

The evidence of experts as to the value of services is merely advisory, and may be given by the jury such weight as they deem it entitled to, or be altogether disregarded if the jury, from all the facts and circumstances in evidence, believe the testimony of the experts to be unreasonable. *Hull v. St. Louis*, 138 Mo. 618, 42 L.R.A. 753, 40 S. W. 89.

4 *William Hamilton Mfg. Co. v. Victoria Lumber & Mfg. Co.* 26 Can. S. C. 96; *Green v. Terwilliger*, 56 Fed. 384; *Flynt v. Bodenhamer*, 80 N. C. 205; *Snyder v. State*, 70 Ind. 349; *State v. Miller*, 9 *Houst. (Del.)* 564, 32 *Atl.* 137; *State v. Hinkle*, 6 Iowa, 380; *Wells v. Leek*, 151 Pa. 431, 25 *Atl.* 101; *Lehigh Valley Coal Co. v. Chicago*, 26 Fed. 415; *People v. Kemmler*, 119 N. Y. 580, 24 N. E. 9; *Com. v. Rogers*, 7 Met. 500, 41 Am. Dec. 458; *McGowan v. American Pressed Tan Bark Co.* 121 U. S. 585, 30 L. ed. 1027, 7 Sup. Ct. Rep. 1315.

5 *Hitchcock v. Burgett*, 38 Mich. 504; *First Nat. Bank v. Wirebach*, 106 Pa. 37; *Hovey v. Chase*, 52 Me. 304, 83 Am. Dec. 514; *Louisville, N. A. & C. R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; *Haight v. Vallet*, 89 Cal. 245, 23 Am. St. Rep. 465, 26 Pac. 897; *Re New York Elev. R. Co.* 35 N. Y. S. R. 947, 12 N. Y. Supp. 857; *Harrison v. Rowan*, 3 Wash. C. C. 580, Fed. Cas. No. 6,141.

6 *Kelley v. Cable Co.* 8 Mont. 440, 20 Pac. 669; *Stone v. Chicago & W. M. R. Co.* 66 Mich. 76, 33 N. W. 24; *Laughlin v. Street R. Co.* 62 Mich. 220, 28 N. W. 873; *Atlanta & C. Air Line R. Co. v. Gravitt*, 93 Ga. 369, 26 L.R.A. 553, 44 Am. St. Rep. 145, 20 S. E. 550; *Hall v. Fond du Lac*, 42 Wis. 274.

7 *People v. Vanderhoof*, 71 Mich. 158, 39 N. W. 28; *The Armstrong, Brown. Adm.* 130, Fed. Cas. No. 540; *Chicago & A. R. Co. v. Shannon*, 43 Ill. 339.

For a full discussion of the question of the conclusiveness of experts, see note in 42 L.R.A. 753

ORDER OF COURT.

1. Copy.
2. Order in special proceeding.
3. Jurisdictional facts.
4. Best and secondary.
5. Informal order.
6. What is a court order.
7. Date and term.
8. Entry for purpose of proving.
9. Ground.
10. Impeaching.

1. Copy.

An order of another court may be proved by an exemplified copy;¹ or by a copy proved or formally certified under seal of the court to be an examined copy;² or by producing the judgment roll containing a copy of the order.³

¹ Robert v. Good, 36 N. Y. 408. Compare Wilson v. Conine, 2 Johns, 280, where the original of an order after decree was required.

For distinction between exemplified and certified copies, see 1 Abbott, New. Pr. & F. 79, 80.

If the jurisdiction and pendency of the action are not proved or admitted they must, of course, be shown.

² Robert v. Good, 36 N. Y. 408; Mahoney v. Gunter, 10 Abb. Pr. 431 (holding that an order of court cannot be proved by a copy signed and sealed by the judge).

³ Eighmy v. People, 79 N. Y. 546 (so holding on indictment for perjury in swearing before a referee appointed by the order).

At common law the minutes were not deemed a record; and an order only entered on the minutes could not be received as evidence that a judgment had been vacated. Crosswell v. Byrnes, 9 Johns, 287, Followed in McKnight v. Dunlop, 4 Barb. 36; Waldron v. Green, 4 Wend. 409.

2. Order in special proceeding.

An order made in a special proceeding is not admissible in evidence without the production of the roll or record of the proceedings in which the order was made.¹

¹ Mayer v. New York, 67 Barb. 323, Reaffirming 2 Hun, 306. s. c. 4 Thomp. & C. 488 (*dictum*), affirmed in 63 N. Y. 455.

3. Jurisdictional facts.

Recitals in the order, of the pendency of the action of the jurisdictional facts, are evidence thereof, but not conclusive.¹

¹ *Potter v. Merchants' Bank*, 28 N. Y. 641, 86 Am. Dec. 273 (supreme court. order appointing receiver. Leading case); *Dayton v. Johnson*, 69 N. Y. 419 (order revoking letters, reciting due service of citation).

Contra. In the case of a receiver's petition, referred to in an order directing assessment of premium notes for losses when offered in evidence against a third person. *Thomas v. Whallon*, 31 Barb. 172.

4. Best and secondary.

The nonexistence of any order on file does not preclude giving secondary evidence, after proof of loss or destruction.¹

But it is not alone sufficient evidence of loss or destruction to let in secondary evidence.²

¹ *Fisher v. New York*, 67 N. Y. 73, reversing 6 Hun, 64.

Parol evidence is admissible to show that a temporary restraining order had been made and signed by the judge at chambers, and that it had been lost or mislaid, so that it could not be produced in evidence. *Kiser v. Lovett*, 106 Ind. 325, 6 N. E. 816.

While orders made by a judge in vacation may be proved without the record, the record is the best evidence of the order; and, when the order is not recorded, strict proof should be exacted, if admissible at all. *Bristol Sav. Bank v. Judd*, 116 Iowa, 26, 89 N. W. 93.

If the purpose of proof is to ascertain the judgment in legal proceedings, such fact cannot be proved by parol, but only by the record. *Gambrell v. Schooley*, 95 Md. 260, 63 L.R.A. 427, 52 Atl. 500.

² *Eakin v. Doe ex dem. Vance*, 10 Smedes & M. 549, 48 Am. Dec. 770; *Wright v. Nostrand*, 15 Jones & S. 441; *Josuez v. Conner*, 7 Daly, 448 (holding so, especially of a judge's order, which need not be filed).

5. Informal order.

An oral order cannot be proved,¹ except in the few cases where a direction or decision given orally may be enforced.

But the formal entry of an order of a court, as actually declared, may be made at any time when necessary for the purpose of evidence.²

And entries in the common rule book, where the practice of

the court allows them,³ and entries in the minutes before the record has been made up, are competent evidence.

¹ *Medlin v. Platte County*, 8 Mo. 235, 40 Am. Dec. 135 (not error to reject testimony of one of the judges of a lower court, that they verbally ordered an act done, where no written order or entry thereof was made in the records. Here a county court had orally assented that the name of a surety might be struck from a bond to the county).

² *People v. Myers*, 2 Hun, 6.

³ *Arundell v. White*, 14 East, 216 (entry of "withdrawn by plaintiff's order," to show termination of suit). Compare *Coopwood v. Prewett*, 30 Miss. 206.

6. What is a court order.

An order entitled as made in court, or reciting a hearing before the court, is a court order.¹

¹ *Re Rhinebeck*, 19 Hun, 346 (recital conclusive).

See further, as to the distinction, and indicia, and amending, 1 Abbott, New Pr. & F. 240, 243.

That a judge's order made in the city of New York is equivalent to a court order (with few exceptions), Id. 245.

7. Date and term.

An order will not be presumed to have been made at an irregular term.¹

¹ *People ex rel. Brooklyn Park. Comrs. v. Brooklyn*, 3 Hun, 596, affirmed, it seems, in 60 N. Y. 642, without opinion.

For the significance of the date of an order, see 1 Abbott, New Pr. & F. 393, 394.

Presumption that term was regularly held, *Dallas County v. McKenzie*, 110 U. S. 680, 28 L. ed. 285, 4 Sup. Ct. Rep. 184.

8. Entry for purpose of proving.

An order in a former cause may be entered now for the purpose of proving it on the trial of the present cause; and the present trial may be adjourned to enable such order to be entered that it may thereupon be proved.¹

¹ *Territory v. Christensen*, 4 Dak. 410, 31 N. W. 849, and cases cited.

9. Ground.

An order not reciting the ground may be presumed, in support of it when collaterally in question, to have been made on any ground which might have availed under the papers on which it was made.¹

An order reciting the ground will be presumed made on that ground alone.

¹ *Re Valentine*, 3 Abb. N. C. 285, 72 N. Y. 184, reversing 10 Hun, 83. Compare 1 Abbott, New Pr. & F. 252.

10. Impeaching.

An order of court may be impeached for fraud and collusion in obtaining it.¹

¹ *Mandeville v. Reynolds*, 68 N. Y. 528, affirming 5 Hun, 338. See also *Stilwell v. Carpenter*, 2 Abb. N. C. 238; *Wilmerdings v. Fowler*, 15 Abb. Pr. N. S. 86.

ORDINANCES.

1. Judicial notice.
2. Mode of proving generally.
3. Parol evidence.

1. Judicial notice.

Courts do not take judicial notice of municipal ordinances.¹

¹ *Chicago v. Municipal Engineering & Contracting Co.* 292 Ill. 614, 127 N. E. 65. See also cases cited under topic JUDICIAL NOTICE.

2. Mode of proving generally.

Municipal ordinances, when relevant to the inquiry, are admissible in evidence.¹ Proof may be made as to the contents and passage of an ordinance by the introduction of the original record thereof after proper identification.²

¹ *Grafton v. St. Paul, M. & M. R. Co.* 16 N. D. 313, 22 L.R.A. (N.S.) 1, 113 N. W. 598, 15 Ann. Cas. 10; *Green v. Ashland Water Co.* 101 Wis.

258, 43 L.R.A. 117, 70 Am. St. Rep. 911, 77 N. W. 722, 5 Am. Neg. Rep. 265.

² Bugg v. Houlka, 122 Miss. 400, 9 A.L.R. 480, 84 So. 387; Porter v. State, 124 Ga. 297, 2 L.R.A. (N.S.) 730, 52 S. E. 283.

3. Parol evidence.

Parol evidence is admissible to show whether the city had power to pass a particular ordinance.¹

¹ People ex rel. Webber v. Atkins, 295 Ill. 165, 128 N. E. 913.

OWNERSHIP.

1. Direct testimony.

2. Possession.

a. In general.

b. Of written instrument.

3. Hearsay.

4. Marks, signs, etc.

5. Entries in account.

6. Source of ownership.

a. In general.

b. Producing document.

7. Continuance.

For kindred topics, see ASSIGNMENT; CLAIM; DELIVERY; GIFT; POSSESSION.

1. Direct testimony.

Where ownership is incidentally involved, a witness may testify directly to it as a fact, subject to cross-examination.¹

¹De Wolf v. Williams, 69 N. Y. 622; Nelson v. Iverson, 24 Ala. 9, with note to 60 Am. Dec. 442; Chicago, St. P. M. & O. R. Co. v. Gilbert, 3 C. C. A. 264, 10 U. S. App. 375, 52 Fed. 711; Murphy v. Olberding, 107 Iowa, 547, 78 N. W. 205; Wolfe v. Underwood, 97 Ala. 375, 12 So. 234. And see Abbott, Tr. Ev. (3d ed.) pp. 1567, 1661.

So as to whether goods "belonged" to a specified person. *Rocke v. Meiner*, 2 Jones & S. 158.

For the contrary rule, see *Dunlap v. Berry*, 4 Ill. 327, 39 Am. Dec. 413.

But that a witness cannot do so where that is the principal fact to be proved, see *Hite v. Stimmell*, 45 Kan. 469, 25 Pac. 852.

The plaintiff in an action for conversion was permitted to testify that she was the owner of the property in question. *Pichler v. Reese*, 171 N. Y. 577, 64 N. E. 441, affirming 50 App. Div. 621, 63 N. Y. Supp. 1116.

2. Possession.

a. In general.—When ownership is incidentally involved, evidence of possession is sufficient to go to the jury, in the absence of evidence tending to explain the possession otherwise.¹ Possession is *prima facie* proof of ownership.²

¹ *Fish v. Skut*, 21 Barb. 333 (action for sheep killed by defendant's dog; proof that they were killed on plaintiff's premises, sufficient); *State v. Boone*, 70 Mo. 649 (possession in seller justifies buyer, as against charge of larceny); *People v. Nelson*, 56 Cal. 77 (possession sufficient, as against thief, on trial for robbery or larceny); *Nicholls v. State*, 68 Wis. 416, 32 N. W. 543, 547 (exclusive possession, occupancy, and control of railroad car by express company, *prima facie* shows ownership; on indictment for breaking and entering); *Ross v. Lawson*, 105 Ala. 351, 16 So. 890 (possession in execution defendant; claimant has burden); *Stockwell v. Robinson*, 9 Houst. (Del.) 313, 32 Atl. 528 (plaintiff in replevin for goods in possession of another has burden to show better right); *Mayer v. Wilkins*, 37 Fla. 244, 19 So. 632; *Southern Min. Co. v. Brown*, 107 Ga. 264, 33 S. E. 73 (possession in claimant at time of levy; plaintiff in execution has burden to show ownership in defendant); *Gilbert v. National Cash Register Co.* 176 Ill. 288, 52 N. E. 22; *Barton v. People*, 135 Ill. 405, 10 L.R.A. 302, 25 N. E. 776 (possession of agent sufficient to show ownership in principal); *James v. Wood*, 82 Me. 173, 8 L.R.A. 448, 19 Atl. 160 (possession of animals reclaimed from a wild state); *Com. v. Blanchette*, 157 Mass. 486, 32 N. E. 658 (possession sufficient as against one charged with obtaining goods under false pretenses).

² *Laporte v. Henry*, 41 Ind. App. 197, 83 N. E. 655; *Teass v. St. Albans*, 38 W. Va. 1, 19 L.R.A. 802, 17 S. E. 400.

See same rule as to personal property; *State v. Patton*, 1 Marv. (Del.) 552, 41 Atl. 193; *James v. Wood*, 82 Me. 173, 8 L.R.A. 448, 19 Atl. 160.

One who has in his possession money which he deposits in a bank in his wife's name is presumed to be its owner. *First Nat. Bank v. Taylor*, 142 Ala. 456, 37 So. 695.

b. Of written instrument.—In case of a written instrument, even when ownership is directly in issue, possession is sufficient

without showing how it was acquired, if the instrument be payable to the person producing it, or to bearer,¹ in the absence of evidence tending to explain the possession otherwise,² or raising suspicion as to how it was acquired.³

If not so payable, possession is not alone evidence of ownership.⁴

¹ As showing the general rule thus stated, see: *Anniston Pipe Works v. Mary Pratt Furnace Co.* 94 Ala. 606, 10 So. 259; *Bank of California v. J. L. Mott Iron Works*, 113 Cal. 409, 45 Pac. 674; *Reed v. First Nat. Bank*, 23 Colo. 380, 48 Pac. 507; *Magel v. Milligan*, 150 Ind. 582, 50 N. E. 564; *American Exch. Nat. Bank v. Crooks*, 97 Iowa, 244, 66 N. W. 168; *Ames & F. Co. v. Smith*, 65 Minn. 304, 67 N. W. 999; *Saunders v. Bates*, 54 Neb. 209, 74 N. W. 578; *Newmarket Sav. Bank v. Hanson*, 67 N. H. 501, 32 Atl. 774; *Halsted v. Colvin*, 51 N. J. Eq. 387, 26 Atl. 928; *J. D. Spreckels & Bros. Co. v. Bender*, 30 Or. 577, 48 Pac. 418, and cases cited. And see cases reviewed in notes to *Commercial Bank v. Burgwyn*, 17 L.R.A. 326, and *Canajoharie Nat. Bank v. Diefendorf*, 10 L.R.A. 677.

The rule that possession of a note indorsed in blank is prima facie evidence of ownership does not apply to a note not possessing the qualities of commercial paper. *Mitchell v. St. Mary*, 148 Ind. 111, 47 N. E. 224.

Where the question is whether an agent suing on a note owns the note individually, or it belongs to the principal, and there is evidence tending to show ownership in the principal, the agent has the burden of showing ownership. *Barnes v. Peet*, 77 Mich. 391, 43 N. W. 1025.

Possession of coupons is not proof of ownership of the bonds from which they are cut. *Huston v. Harrison*, 168 Pa. 136, 31 Atl. 987.

² *Gibson v. National Park Bank*, 98 N. Y. 87 (possession of check payable to order of possessor, explainable by evidence of fiduciary capacity). For other illustrative cases, see note to *Commercial Bank v. Burgwyn*, 17 L.R.A. 326.

³ See DELIVERY. And see note to *Commercial Bank v. Burgwyn*, 17 L.R.A. 327.

As to the rights of a holder of negotiable paper transferred after maturity, see cases reviewed in notes to *Young Men's Christian Assn. Gymnasium Co. v. Rockford Nat. Bank*, 46 L.R.A. 753 et seq; 50 L.R.A. (N.S.) 83, and L.R.A. 1915E, 395.

⁴ *Brown v. Taylor*, 32 Gratt. 135, overruled, in effect, by *Bell v. Moon*, 79 Va. 341. (If A writes an obligation to B on the fly leaf of a book belonging to C the paper belongs to C, but this fact, even in addition to the possession, is no evidence that the obligation belongs to C.)

But an executor's possession of unindorsed negotiable paper in terms payable to the order of the testator is evidence of ownership. *Scoville v. Landon*, 50 N. Y. 686.

And in *Martin v. Martin*, 174 Ill. 371, 51 N. E. 691, it is held that possession of an unindorsed note is prima facie evidence of ownership in the holder, notwithstanding that it is payable to the order of a third person.

3. Hearsay.

Neither general reputation, nor evidence of whose the thing was called in the family,¹ is competent as tending to show ownership, unless in connection with evidence bringing the fact home specifically to the person against whom it is offered.

¹ *Curtis v. Packer*, 4 N. Y. Week. Dig. 12; *Panty v. Wahle*, 16 N. Y. Week. Dig. 462; *Stevens v. William Deering & Co.* 6 S. D. 200, 60 N. W. 739 (talk and conversation of a family, all living together, that one of the members owned certain property, incompetent).

The title to engines cannot be proved by evidence of general reputation as to who owns them. *Louisville & N. Terminal Co. v. Jacobs*, 109 Tenn. 727, 61 L.R.A. 188, 72 S. W. 954.

4. Marks, signs, etc.

The existence of the usual indicia, such as brands upon cattle¹ (if recorded), log marks,² marks upon packages of goods,³ and inscriptions of names on signboards,⁴ is competent as tending to show possession and ownership.

They may be proved by one who has read them, without producing the thing itself.⁵

¹ The general rule is that a cattle brand is admissible as evidence of ownership, only when it has been recorded. *Territory v. Smith*, 12 N. M. 229, 78 Pac. 42; *State v. Dunn*, 13 Idaho, 9, 88 Pac. 235; *Brill v. Christy*, 7 Ariz. 217, 63 Pac. 757; *Chesnut v. People*, 21 Colo. 512, 42 Pac. 656; *Allen v. State*, 42 Tex. 517; *Poag v. State*, 40 Tex. 151; and other cases in note in 11 L.R.A. (N.S.) 87.

Evidence of marks and brands was held competent in *Hurst v. Territory*, 16 Okla. 600, 86 Pac. 280, to prove ownership, although such marks and brands were not recorded, as the laws of that territory did not make unrecorded brands incompetent evidence of ownership.

And an earmark used by the alleged owner of hogs was held in *People v. Bolanger*, 71 Cal. 17, 11 Pac. 799, to be some evidence of ownership, although the same had not been recorded.

And in *State v. Wolfley*, 75 Kan. 406, 11 L.R.A. (N.S.) 87, 89 Pac. 1046, 93 Pac. 337, 12 Ann. Cas. 412, it was held that the jury had a right to consider the fact that cattle alleged to have been stolen bore the brand of the complaining witness, as some evidence that they were owned by him.

And although unrecorded marks and brands may be inadmissible to prove ownership, they are, nevertheless, admissible to establish identity. *Brooke v. People*, 23 Colo. 375, 48 Pac. 502; *State v. Cardelli*, 19 Nev. 319, 10 Pac. 433; *Poage v. State*, 43 Tex. 454; *Gregory v. Nunn*, — Tex. Civ. App. —, 25 S. W. 1083.

In numerous cases, where an alleged theft took place before the brand had been recorded, it has been held that while, under the law of Texas, the record of such brand would not be admissible of itself on the question of ownership, it would be admissible in connection with other evidence tending to prove the ownership. *Priesmuth v. State*, 1 Tex. App. 480; *Spinks v. State*, 8 Tex. App. 125; *Harvey v. State*, 21 Tex. App. 178, 17 S. W. 158.

That the properly recorded brand upon the cow was admissible to prove the ownership of a calf was decided in *Dickson v. Territory*, 6 Ariz. 199, 56 Pac. 971.

In *Debord v. Johnson*, 11 Colo. App. 402, 53 Pac. 255, it was held that the recorded brand was only prima facie evidence, which might be rebutted by proof that the owner of the brand had received the cow in question from the true owner for pasturage.

And in *Dawson v. Susong*, 1 Heisk. 243, it was held that the brand of the United States, when shown to have been made upon horses by officers of the Army, had no other effect than to furnish prima facie evidence that the government had possession of the property as a claimant, and, of itself, communicated no title. And to the same effect were *Peoples v. Devault*, 11 Heisk. 431; *Plummer v. Newdigate*, 2 Duv. 3, 87 Am. Dec. 479; *Richardson v. Tipton*, 2 Bush, 202.

To show mistake in brand, evidence is competent that by accident brands are sometimes inverted, which may give the character used a different significance or value. *Boren v. State*, 23 Tex. App. 28, 4 S. W. 463.

² *Watson v. E. E. Naugle Tie Co.* 148 Mich. 675, 112 N. W. 752.

³ *Taylor v. United States*, 3 How. 197; 11 L. ed. 559 (on a question of fraudulent importation of goods, an invoice of other goods entered at another port, but marked like those seized, is proper to strengthen the evidence of the true ownership of packages with this mark).

⁴ *Smith v. Axe*, 14 Pa. Co. Ct. 532. And see *Abbott, Tr. Ev.* (3d ed.) p. 1554.

⁵ Criminal Trial Brief.

5. Entries in account.

The entries in the account of the alleged possessor or owner

are not competent in his own favor, as evidence of ownership or possession,¹ unless made as part of the *res gestæ* of an act already properly in evidence, or otherwise regularly proved in connection with testimony of a witness.²

¹ *Brown v. Thurber*, 58 How. Pr. 95.

² See ACCOUNTS.

6. Source of ownership.

a. In general.—Where ownership is directly involved, evidence of sale and delivery to the alleged owner by one who was in possession raises a legal presumption of ownership,¹ in the absence of anything to impair the presumption of the seller's ownership or power to sell, arising from his possession.²

If the sale was on execution,³ or attachment,⁴ the process must be proved, and, as against a party to the action, is enough.⁵ As against a stranger the judgment must be proved.⁶

¹ *McKeage v. Hanover F. Ins. Co.* 81 N. Y. 38, 37 Am. Rep. 471, with note, affirming 16 Hun, 239 (movable fixtures sold by one in possession of them and of the realty); *Holbrook v. New Jersey Zinc Co.* 57 N. Y. 616 (transfer of stock).

As to ownership as dependent on instalment sales, see note to *Marvin Safe Co. v. Emanuel*, 21 Abb. N. C. 189; and on conditional sales, *Puffer v. Reeve*, 15 Abb. N. C. 394, note.

² *Atkins v. Hosley*, 3 Thomp. & C. 322 (judgment against seller competent to disprove his title).

³ *Yates v. St. John*, 12 Wend. 74; *s. p. Dane v. Mallory*, 16 Barb. 46.

⁴ *Goodman v. Moss*, 64 Miss. 303, 1 So. 241.

⁵ *Yates v. St. John*, 12 Wend. 74.

⁶ *Ibid.*

b. Producing document.—To prove a bill of sale¹ or mortgage² as the source of title, the instrument must be produced or a foundation laid for secondary evidence.

Otherwise of a bill of parcels or receipt accompanying an oral sale.³

¹ *Dunn v. Hewitt*, 2 Denio, 637.

Otherwise, however, where the controversy is not between parties to the bill of sale, and the fact of ownership is only collaterally involved *Archer v. Hooper*, 119 N. C. 581, 26 S. E. 143.

² *George v. Toll*, 39 How. Pr. 497; s. p. *Bray v. Flicklinger*, 69 Iowa, 167, 28 N. W. 492.

³ *Abbott, Tr. Ev.* (3d ed.) p. 1663.

7. Continuance.

The presumption that a fact shown once to have existed continues, applies to ownership.¹

¹ *Hagar v. Clark*, 78 N. Y. 45, reversing 12 Hun, 524 (general owner of ship presumed to continue such during voyage under charter party); *Fry v. Bennett*, 28 N. Y. 324, affirming 3 Bosw. 200 (proprietor of a newspaper in 1848 and 1849 presumed to continue such in 1851); *Chapman v. Taylor*, 136 N. Y. 663, 32 N. E. 1063; *Simon v. Richard*, 42 La. Ann. 842, 8 So. 629; *Paige v. Broadfoot*, 100 Ala. 610, 13 So. 426; *Laubenheimer v. Bach, C. & Co.* 19 Mont. 177, 47 Pac. 803; *Barron v. Burrill*, 86 Me. 72, 29 Atl. 938. And see cases reviewed in note to *Huss v. Hochhausen*, 12 L.R.A. 620.

Proof of title by deed on a certain day raises a presumption of title a month later. *Badger Lumber Co. v. Muehlebach*, 109 Mo. App. 646, 83 S. W. 546.

But the owner of land at a particular time cannot be presumed to have been its owner at a time one or two years before. *Gibson v. Clark*, 131 Iowa, 325, 108 N. W. 527.

PATERNITY.

1. Presumption that a married man is the father of a child born to his wife in wedlock, and character of evidence necessary to overcome such presumption.

2. Inspection.

3. Testimony of physical resemblance between child and putative parent.

1. Presumption that a married man is the father of a child born to his wife in wedlock, and character of evidence necessary to overcome such presumption.

A married man is presumed to be the father of a child born or begotten to his wife during wedlock and such child is pre-

sumed to be legitimate.¹ Such a presumption, however, may be rebutted by any evidence material to the issue,² other than testimony of the husband and wife as to access.³ But such rebutting evidence must be greater than is needed to overcome the ordinary presumption of fact, because prevention of bastardy benefits society as a whole.⁴ The courts differ as to just what degree of proof will be required. Some courts require a showing of natural impossibility.⁵ It is more frequently stated that such evidence must be strong, distinct, satisfactory, and conclusive,⁶ although perhaps a more practical rule is that proof beyond a reasonable doubt is necessary.⁷

It is generally held that the presumption is not weakened by proof of antenuptial conception.⁸ Where a child is born before marriage some courts hold there is a presumption that the husband is the father,⁹ while other courts hold there is no such presumption.¹⁰

¹ *Powell v. State*, 84 Ohio St. 165, 36 L.R.A. (N.S.) 255, 95 N. E. 660. See also notes in 8 L.R.A. 102, 10 L.R.A. 662, 36 L.R.A. (N.S.) 255, 7 A.L.R. 329, and *Wigmore, Ev.* § 2527.

² *Powell v. State*, *supra*. See also note in 33 *Harvard L. Rev.* 306.

As to the effect on the presumption of a lapse of more than a normal period of gestation see note in 7 A.L.R. 329.

In California the Code provides that only the husband or wife or descendants of both may dispute the legitimacy of the child. *Re Madalina*, 174 Cal. 693, 1 A.L.R. 1629, 164 Pac. 348.

As to who may dispute the presumption of legitimacy see note in 1 A.L.R. 1632.

³ *People v. Case*, 171 Mich. 282, 137 N. W. 55; *Wallace v. Wallace*, 137 Iowa, 37, 14 L.R.A. (N.S.) 544, 126 Am. St. Rep. 253, 114 N. W. 527, 15 Ann. Cas. 761. See also notes in 2 L.R.A. (N.S.) 619, and 14 L.R.A. (N.S.) 544.

⁴ *Powell v. State*, *supra*. See also note in 36 L.R.A. (N.S.) 253, discussing generally the proof necessary to rebut the presumption.

⁵ *Adger v. Ackerman*, 52 C. C. A. 568, 115 Fed. 124.

⁶ *Powell v. State*, *supra*; *People v. Case*, *supra*; *Bethany Hospital Co. v. Hale*, 64 Kan. 367, 67 Pac. 848.

⁷ *Re McNamara*, 181 Cal. 82, 97, 7 A.L.R. 313, 324, 183 Pac. 558; *State v. Shaw*, 89 Vt. 121, L.R.A. 1915F, 1087, 94 Atl. 434; *Timmann v. Timmann*, 142 N. Y. Supp. 298.

⁸ *Zachmann v. Zachmann*, 201 Ill. 380, 94 Am. St. Rep. 180, 66 N. E. 256; *Rabeke v. Baer*, 115 Mich. 328, 69 Am. St. Rep. 567, 73 N. W.

242; *Re Mancini*, 108 Misc. 102, 178 N. Y. Supp. 57. See also note in 8 A.L.R. 427.

⁹ *Hall v. Gabbert*, 213 Ill. 208, 72 N. E. 806; *Stein v. Stein*, 32 Ky. L. Rep. 664, 106 S. W. 860.

¹⁰ *State ex rel. Burkhart v. Ferguson*, 187 Iowa, 1073, 8 A.L.R. 426, 174 N. W. 934; *Janes's Estate*, 147 Pa. 527, 23 Atl. 892.

2. Inspection.

As to whether, on an issue of paternity, the court should allow the child to be shown to the jury, the decisions are not harmonious. Some of the courts allow it to be done,¹ irrespective of the child's age.² Others have, however, refused to do so when the child was a mere infant,³ but allowed it to be done if the child had attained an age when its features had assumed some degree of maturity and permanency.⁴ Still others go to the extent of excluding the child, irrespective of its age.⁵ The rule is well established that the child may be exhibited at any age for the purpose of proving that it is of the same race or color as the putative father.⁶

¹ It is allowed for the purpose of having the jury by inspection trace any possible resemblance between the child and its alleged father, the court proceeding on the theory that any such resemblance, if traceable, is relevant to the issue, and the best evidence of it is produced by an inspection. *Scott v. Donovan*, 153 Mass. 378, 26 N. E. 871; *Gaunt v. State*, 50 N. J. L. 490, 14 Atl. 600; *Crow v. Jordan*, 49 Ohio St. 655, 32 N. E. 750. And that, although taken by itself, proof of such resemblance would be insufficient to establish paternity, it clearly is a circumstance to be considered in connection with other facts tending to prove the issue on which the jury are to pass. *Finnegan v. Dugan*, 14 Allen, 197 (where the judge's charge that the jury might consider whether there was any resemblance between the child, who was in court, and the defendant, was upheld). And the same court, in *Eddy v. Gray*, 4 Allen, 435, sustained a ruling rejecting testimony upon the same subject, upon the ground that it did not come within the rule of expert testimony.

In *State v. Woodruff*, 67 N. C. 89, the charge of the court that the resemblance of a child to its alleged father was relevant was held good.

And in *State v. Horton*, 100 N. C. 443, 6 S. E. 238, a prosecution for seduction, the child was exhibited to the jury on the theory that the resemblance traceable was corroborative of the fact of sexual intercourse between the prosecutrix and the defendant.

In *Jones v. Jones*, 45 Md. 144, the court permitted the jury to judge as to a personal resemblance, but not to hear testimony on that subject, on the ground that where the parties are before the jury whatever resemblance there is will be directly apparent, capable of being traced by the jurors themselves; but to permit third persons to give their opinions would be raising a class of experts where opinions would mislead.

In the New York cases which prohibit testimony upon resemblances the question of inspection by the jury does not arise. But in *Petrie v. Howe*, 4 Thomp. & C. 85, the court, in rejecting testimony, says: "If this species of physiological evidence is admissible, . . . it should not be covertly given." In that case, which was for crim. con., the court had received testimony as to the color of the hair of plaintiff's other children, the illegitimate child having hair of a different color.

In *Gilmanton v. Ham*, 38 N. H. 108, counsel commented on the resemblance of the child to defendant, and his right to do so was sustained on the ground that the matter was relevant and the parties before the jury. See also *People v. Wing*, 115 Mich. 698, 74 N. W. 179.

State v. Maloney, 154 N. C. 200, 69 S. E. 786; *Anderson v. Aupperle*, 51 Or. 556, 95 Pac. 330; *Adams v. State*, 93 Ark. 260, 137 Am. St. Rep. 87, 124 S. W. 766; *Watts v. State*, 8 Ala. App. 264, 63 So. 18.

In bastardy proceedings portrait may be made of the child for the purpose of showing a resemblance of features between it and the alleged father. *Kelly v. State*, 133 Ala. 195, 91 Am. St. Rep. 25, 32 So. 56; *Land v. State*, 84 Ark. 199, 120 Am. St. Rep. 25, 105 S. W. 90; *Higley v. Bostick*, 79 Conn. 97, 63 Atl. 786; *Sims v. State*, 16 Ga. App. 211, 84 S. E. 976; *Smith v. Hawkins*, 93 Miss. 588, 47 So. 429; *Com. v. Pearl*, 33 Pa. Super. Ct. 97; *State ex rel. Berge v. Patterson*, 18 S. D. 251, 100 N. W. 162; *State ex rel. Rison v. Browning*, 96 Kan. 540, 152 Pac. 672.

² *Scott v. Donovan*, 153 Mass. 378, 26 N. E. 871, and cases cited (its youth going rather to the weight of the evidence).

³ *State v. Harvey*, 112 Iowa. 416, 52 L.R.A. 500, 84 Am. St. Rep. 350, 84 N. W. 535 (child nine months old); *Overlock v. Hall*, 81 Me. 348, 17 Atl. 169 (child six months old); *Clark v. Bradstreet*, 80 Me. 454, 15 Atl. 56 (child six weeks old, a well-considered case in which many cases are collated and classified).

State v. Hunt, 144 Iowa, 257, 122 N. W. 902; *Gleason v. State*, 77 Tex. Crim. Rep. 300, 178 S. W. 506; *State v. Teal*, 108 S. C. 455, 95 S. E. 69; *Jordan v. Com.* 180 Ky. 379, 1 A.L.R. 617, 202 S. W. 896; and for additional cases and full explanation see 1 A.L.R. 622.

Flores v. State, 72 Fla. 302, L.R.A.1917B, 1143, 73 So. 234; *State v. Brathovde*, 81 Minn. 501, 84 N. W. 340; *State ex rel. Mundt v. Meier*, 140 Iowa, 540, 118 N. W. 792.

And in *Copeland v. State*, — Tex. Crim. Rep. —, 40 S. W. 589, the profer of a child six weeks old was held to have been properly refused, in the absence of any offer to prove a resemblance as to features.

4 *Shorten v. Judd*, 56 Kan. 43, 42 Pac. 337. Even though the comparison is to be made with a photograph of the putative father, who is dead. *Ibid*.

Thus, an infant two years old may be exhibited to the jury (*State v. Smith*, 54 Iowa, 104, 37 Am. Rep. 192, 6 N. W. 153), while an infant three months old cannot (*State v. Danforth*, 48 Iowa, 45, 30 Am. Rep. 387).

This discrimination was disapproved in 22 Alb. L. J. 43; and in *Gaunt v. State*, 50 N. J. L. 490, 14 Atl. 600, was said to rest "upon a physiological notion adopted by the court, which can scarcely find justification as a rule of evidence."

State ex rel. Rison v. Browning, 96 Kan. 540, 152 Pac. 672, and for additional cases and full explanation see L.R.A.1917B, 1148.

5 *Robnett v. People*, 16 Ill. App. 299; *Hanawalt v. State*, 64 Wis. 84, 54 Am. Rep. 588, 24 N. W. 489.

In *Ingram v. State ex rel. McIntosh*, 24 Neb. 33, 37 N. W. 943, the prosecuting attorney's request that the prosecutrix turn the child's face to the jury for inspection was denied by the court, and the child at once removed from the jury's presence.

In *Risk v. State ex rel. Vestal*, 19 Ind. 152, a child three months old was put in evidence, but the court held that, as there had been no objection to the evidence, the jury had a right to consider it.

In *Reitz v. State ex rel. Holden*, 33 Ind. 187, while showing the child was regarded as improper, the error was cured by the court charging the jury that they must regard only the oral evidence on the question of resemblance.

In *La Matt v. State ex rel. Lucas*, 128 Ind. 123, 27 N. E. 346, while this question was not directly involved, it was held that any misconduct of the jury in inspecting the child during a recess of court was not ground for new trial, where the court subsequently instructed the jury that they must consider only the oral testimony given.

6 *United States v. Hung Chang*, 67 C. C. A. 93, 134 Fed. 19; *State v. Harvey*, 112 Iowa, 416, 52 L.R.A. 500, 84 Am. St. Rep. 350, 84 N. W. 535; *Hanawalt v. State*, 64 Wis. 84, 54 Am. Rep. 588, 24 N. W. 489, 6 Am. Crim. Rep. 65; *State v. Saidell*, 70 N. H. 174, 85 Am. St. Rep. 627, 46 Atl. 1083; *Warlick v. White*, 76 N. C. 175; *People v. Kingcannon*, 276 Ill. 251, 114 N. E. 508.

3. Testimony of physical resemblance between child and putative parent.

The weight of authority is against the admission of parol evidence to show a resemblance of the child to the putative parent,¹ either because it is held to be opinion evidence² or because its probative force is believed uncertain.³ Nevertheless, parol evi-

dence may be admitted to show that the child had the same abnormality possessed by the alleged parent ⁴ and that such abnormality is a hereditary trait.⁵

¹ *People v. Kingcannon*, 276 Ill. 251, 114 N. E. 508; notes in 52 L.R.A. 500, and 17 Columbia L. Rev. 247.

Contra: *State v. Britt*, 78 N. C. 439.

² *United States v. Collins*, 1 Cranch, C. C. 592, Fed. Cas. No. 14,835; *Keniston v. Rowe*, 16 Me. 38; *Shorten v. Judd*, 56 Kan. 43, 54 Am. St. Rep. 587, 42 Pac. 337; *Re Jessup*, 81 Cal. 408, 6 L.R.A. 594, 21 Pac. 976, 22 Pac. 742, 1028; *Young v. Makepeace*, 103 Mass. 50.

Contra: *Sheehan's Estate*, 139 Pa. 168, 20 Atl. 1003.

³ *Slingsby v. Atty.-Gen.* 32 Times L. R. 364, affirmed in House of Lords, 33 Times L. R. 120; *Paulk v. State*, 52 Ala. 427, 1 Am. Crim. Rep. 67.

⁴ *People v. Kingcannon*, *supra*, where, without exhibition of child, evidence was admitted to show that child and putative father each had supernumerary fingers.

⁵ *People v. Kingcannon*, *supra*. Expert permitted to testify that appearance of supernumerary fingers in child was hereditary abnormality.

PAYMENT.

1. Receipts.
2. Entry in bank books.
3. Burden of proof.
4. Presumption.
 - a. From possession of instrument.
 - b. From lapse of time.
5. Oral evidence to vary receipt.

For other points, see *Abbott, Tr. Ev*; **ACCOUNTS.**

1. Receipts.

Payment may be proved by exchange of receipts or setting off one debt against another without passing cash.¹ But as against third persons, the general rule is that an ordinary receipt is not evidence of payment, and that direct evidence of payment must be given by the person giving the receipt.² Cases exist, however, where a receipt by a third party may be

competent evidence in connection with other facts, as where the person to whom the payment is made is pointed out by law, as in case of the payment of taxes to a public officer; and so when the person to whom the payment is to be made is designated by the contract of the defendant, as in case of an order on the plaintiff in favor of such person.³ It has been held that the receipt in a deed for the purchase money paid is not evidence of payment as against third persons,⁴ but only as against parties to the deed or persons deriving title from the grantor.⁵

¹ See *James v. Cowing*, 82 N. Y. 449, reversing 17 Hun, 256; *Spargo's Case*, L. R. 8 Ch. 407, 412; *The Heinrich Bjorn*, 49 L. T. N. S. 405; *Brant v. Ehlen*, 59 Md. 1; *Holcomb v. Campbell*, 42 Hun, 398. *Contra*: Of mere set-off when relied on to satisfy Statute of Frauds. *Mattice v. Allen*, 3 Abb. App. Dec. 248, reversing 33 Barb. 543; *Walrath v. Richie*, 5 Lans. 362.

² *Elison v. Albright*, 41 Neb. 93, 29 L.R.A. 737, 59 N. W. 703; *Cutbush v. Gilbert*, 4 Serg. & R. 551; *Ferris v. Boxell*, 34 Minn. 262, 25 N. W. 592; *Morton v. Morton*, 13 Serg. & R. 108; *Murphy v. Richardson*, 33 Pa. 235; *Wilcox v. Pearman*, 9 Leigh, 144; *Ford v. Smith*, 5 Cal. 314; *Printup v. Mitchell*, 17 Ga. 558, 63 Am. Dec. 258; *Davidson v. Berthoud*, 1 A. K. Marsh, 353; *Davis v. Shreve*, 3 Litt. (Ky.) 260, 14 Am. Dec. 66; *Dunn v. Woodward*, 11 La. Ann. 265.

So it has been stated that the receipts of third persons are not evidence of the payment of money, unless such persons are either officers of the law or agents of the parties against whom they are offered. *Lloyd v. Lynch*, 28 Pa. 419, 70 Am. Dec. 137.

³ *Ferris v. Boxell*, 34 Minn. 263, 25 N. W. 592.

So, in *Hammond v. Hannin*, 21 Mich. 374, 4 Am. Rep. 490, in an action of assumpsit brought to recover damages for breach of contract in the sale and conveyance of land, the plaintiff was allowed to produce in evidence the official receipts for taxes paid by him upon the property.

⁴ *Lloyd v. Lynch*, 28 Pa. 419, 70 Am. Dec. 137; *Clark v. Depew*, 25 Pa. 509, 64 Am. Dec. 717; *Sillyman v. King*, 36 Iowa, 207; *Shehy v. Cunningham*, 81 Ohio St. 289, 25 L.R.A. (N.S.) 1194, 90 N. E. 805; *Stauffer v. Martin*, 43 Ind. App. 675, 88 N. E. 363.

⁵ *Lloyd v. Lynch*, 28 Pa. 419, 70 Am. Dec. 137; *Minneapolis & St. L. R. Co. v. Chicago, M. & St. P. R. Co.* 116 Iowa, 681, 88 N. W. 1082; *King v. Mead*, 60 Kan. 539, 57 Pac. 113; *Ely v. Pace*, 139 Ala. 293, 35 So. 877; *Adams Oil & Gas Co. v. Hudson*, 55 Okla. 386, 155 Pac. 220; note in 16 Columbia L. Rev. 521.

Contra: *McConnell v. Citizens' State Bank*, 130 Ind. 127, 27 N. E. 616; *Doody v. Hollwedel*, 22 App. Div. 456, 48 N. Y. Supp. 93.

2. Entry in bank books.

Payment may be proved by the entry of a charge of a check and corresponding credit in the books of the bank, with the same effect as if the money had been actually paid and repaid.¹ But a payment by check is not a sufficient payment to satisfy the Statute of Frauds concerning an oral contract until the check is actually cashed or a charge has been entered on the books of the bank.²

¹ Pratt v. Foote, 9 N. Y. 463, 468.

² Bates v. Dwinnell, 101 Neb. 712, L.R.A.1918B, 900, 164 N. W. 722; Groomer v. McMillan, 143 Mo. App. 612, 128 S. W. 285.

Contra: McLure v. Sherman, 70 Fed. 190.

3. Burden of proof.

The burden of proof is upon the party alleging payment;¹ and if he asserts that he paid in anything other than money, he assumes the additional burden of proving that what was received was taken in payment and at the risk of the creditor,² nor is this burden shifted by affirmative allegations of the opposing party.³

¹ Sampson v. Fox, 109 Ala. 662, 19 So. 896; Lakeside Press & Photo-Engraving Co. v. Campbell, 39 Fla. 523, 22 So. 878; First Nat. Bank v. Hellyer, 53 Kan. 695, 37 Pac. 130; McIver v. Smith, 118 N. C. 73, 23 S. E. 971; Willis v. Holmes, 28 Or. 265, 42 Pac. 989; Ford v. Lawrence, — Tenn. —, 51 S. W. 1023; Lasswell v. Gahan, 122 Ill. App. 513; Connecticut Mut. L. Ins. Co. v. Dunscomb, 108 Tenn. 724, 58 L.R.A. 694, 91 Am. St. Rep. 769, 69 S. W. 345; Fein v. Meier, 71 N. J. L. 12, 58 Atl. 114, affirmed in 74 N. J. L. 597, 65 Atl. 1117; Marx v. Marx, 132 Wis. 113, 111 N. W. 1103; Barrett-Hicks Co. v. Glas, 14 Cal. App. 289, 111 Pac. 760.

² Godfrey v. Crisler, 121 Ind. 203, 22 N. E. 999; Denver Brewing Co. v. Barets, 9 Colo. App. 341, 48 Pac. 834; Bradley v. Harwi, 43 Kan. 314, 23 Pac. 566.

A note taken for, or in renewal of, an antecedent debt is, according to Stevens v. Wiley, 165 Mass. 402, 43 N. E. 177, presumed to have been received in payment. Hall v. Stevens, 116 N. Y. 201, 5 L.R.A. 802, 22 N. E. 374, holds that a bank draft received for a present debt is presumed to have been taken in payment; but not if received for a precedent debt.

• **Illinois Steel Bridge Co. v. Wayland**, 107 Kan. 532, 192 Pac. 752. Defendant alleged payment and set out a receipt in full and a letter acknowledging full payment. Plaintiff filed reply alleging receipt and letter were given by mistake, and court held burden of proof remained on defendant to establish payment.

As to the confusion of two uses of the phrase burden of proof in such cases see note in 19 Mich. L. Rev. 347.

4. Presumption.

a. From possession of instrument.—Possession by the payee or one claiming under him, of a written instrument evidencing an indebtedness due from the maker thereof, raises a presumption that the debt has not been paid.¹ On the other hand, possession of the instrument by the maker raises the presumption that it has been paid.²

¹ **Northrop v. Knott**, 114 Cal. 612, 46 Pac. 599; **Brown v. Morgan**, 56 Mo. App. 382; **Hauxhurst v. Ritch**, 119 N. Y. 621, 23 N. E. 176; **Fitzmahony v. Caulfield**, 25 App. Div. 119, 49 N. Y. Supp. 196; **Melink v. Coman**, 111 Ill. App. 583.

² **Excelsior Mfg. Co. v. Owens**, 58 Ark. 556, 25 S. W. 868; **Perez v. Bank of Key West**, 36 Fla. 467, 18 So. 590; **Shirts v. Rooker**, 21 Ind. App. 420, 52 N. E. 629; **Parks v. Smith**, 155 Mass. 26, 28 N. E. 1044; **Poston v. Jones**, 122 N. C. 536, 29 S. E. 951; **First Nat. Bank v. Harris**, 7 Wash. 139, 34 Pac. 466.

The force of the presumption thus raised depends upon the circumstances of the particular case. **Smith v. Gardner**, 36 Neb. 741, 55 N. W. 245. Thus, mutilated appearance of the bond, its production without the mortgage, the omission to offer a satisfaction piece, and the absence of an indorsement of payment on the bond, will rebut any presumption of payment from possession. **Anderson v. Culver**, 127 N. Y. 377, 28 N. E. 32.

The mere possession of a canceled note after maturity, by one of the joint makers, does not create a presumption of the payment thereof by him, in an action by him for contribution by the other makers. **Bates v. Cain**, 70 Vt. 144, 40 Atl. 36, and cases cited.

Nor is there such a presumption from the fact of possession by the maker where the payee is a member of the maker's family, and the maker has access to the payee's papers, and it is possible that he may have acquired it as well without as with payment, and the note is not found with the payee's other notes and papers after his death. **Grimes v. Hilliary**, 150 Ill. 141, 36 N. E. 977.

Nor does the presumption obtain where the maker has previously made an assignment of his property, and the value of the property reserved by

him is less than the amount due on the note, unless it be shown that subsequent to the assignment he acquired the means to pay it. *Excelsior Mfg. Co. v. Owens*, 58 Ark. 556, 25 S. W. 868.

b. From lapse of time.—The presumption of payment arising from the lapse of twenty years¹ applies to any obligation which can be extinguished by the act of payment, whether under seal or not,² such as bonds or coupons,³ notes, bills of exchange or other negotiable paper,⁴ sealed awards,⁵ mortgages, or deeds of trust,⁶ and judgments.⁷

The doctrine is also applicable to legacies and distributive shares.⁸ So a settlement and an accounting by an administrator will be presumed after the lapse of twenty years, in the absence of proof to the contrary.⁹ The payment of taxes or assessments due the state or other governmental body will also be presumed after the lapse of a certain period of time, usually twenty years.¹⁰ This doctrine has also been applied in many cases of indebtedness of a miscellaneous nature.¹¹

The presumption of payment does not arise, however, as a matter of law from the lapse of any time short of twenty years.¹²

The presumption is not available in support of an allegation of payment as a ground for affirmative relief.¹³

At common law this presumption may be rebutted by evidence, not only of part payment,¹⁴ or acknowledgment, but by other circumstances;¹⁵ but if the presumption is a statutory one, usually only part payment or written acknowledgment is available.¹⁶

¹ For the rule generally as to this presumption, both at common law and under the statutes, see cases reviewed in notes to *Beekman v. Hamlin*, 10 L.R.A. 454; *Dixon v. Gourdin*, 1 L.R.A. 628; and *Kellogg v. Dickinson*, 1 L.R.A. 346. And see cases cited in succeeding notes to this section.

If, however, notwithstanding that the time is less than the statutory period, there are attending circumstances from which payment may be inferred, the presumption of payment may be raised. As where most of the parties are dead, ten years or more having elapsed, and there are other circumstances tending to show payment. *West v. Brison*, 99 Mo. 684, 13 S. W. 95. That the debtor has been solvent and accessible. *Husky v. Maples*, 2 Coldw. 25, 88 Am. Dec. 588. And that the creditor had been pressed for money, *Levers v. Van Buskirk*, 4 Pa. 309; *Bean v. Tonnele*, 94 N. Y. 381, 46 Am. Rep. 153; *Phillips v. Adams*, 78 Ala. 225.

That the presumption has the same force and legal effect as evidence, as though the fact were proved in any other way, see *Martin v. Stoddard*, 127 N. Y. 61, 27 N. E. 285.

2 For example, see *Inglis v. Webb*, 117 Ala. 387, 23 So. 125 (purchase money chargeable upon land); *O'Connor v. Waterbury*, 69 Conn. 206, 37 Atl. 499; *Courtney v. Staudenmayer*, 56 Kan. 392, 43 Pac. 758 (note); *Clendenning v. Thompson*, 91 Va. 518, 22 S. E. 233. See also cases cited in note to *Dixon v. Gourdin*, 1 L.R.A. 628.

3 *Goldhawk v. Duane*, 2 Wash. C. C. 323, Fed. Cas. No. 5,511; *Lynde v. Denison*, 3 Conn. 387; State use of *Lobb v. Lobb*, 3 Harr. (Del.) 421; *Rogers v. Bishop*, 5 Blackf. (Ind.) 108; *Shields v. Pringle*, 2 Bibb, 387; *Boyd v. Harris*, 2 Md. Ch. 210; *Smith v. Benton*, 15 Mo. 371; *Bartlett v. Bartlett*, 9 N. H. 398; *Mease v. Stevens*, 1 N. J. L. 433; *Arden v. Arden*, 1 Johns. Ch. 313; *Ridley v. Thorpe*, 3 N. C. (2 Hayw.) 343; *M'Bride v. Moore*, Wright (Ohio) 524; *McDowell v. North Side Bridge Co.* 247 Pa. 190, 93 Atl. 280; *Gibson v. Lowndes*, 28 S. C. 285, 5 S. E. 727; *Rogers v. Judd*, 5 Vt. 236, 26 Am. Dec. 301; *Doyle v. Beasley*, 99 Va. 428, 39 S. E. 152.

4 *Denniston v. McKeen*, 2 McLean, 253, Fed. Cas. No. 3,803; *Daggett v. Tallman*, 8 Conn. 168; *Parsons v. Cannon*, 4 Boyce (Del.) 298, 88 Atl. 470; *Langworthy v. Baker*, 23 Ill. 484; *Waters v. Waters*, 1 Met. (Ky.) 519; *Sawyer v. Smith*, 5 Dane, Abr. (Mass.) 405, 6 Mass. Dig. 1804, 1905 col. 11,810; *Clark v. Clement*, 33 N. H. 563; *Ayres v. Ayres*, 69 N. J. Eq. 343, 60 Atl. 422; *Bean v. Tonnele*, 94 N. Y. 381, 46 Am. Rep. 153; *Jackson v. Utz*, 18 Pa. Dist. R. 163; *Wilson v. Wilson*, 29 S. C. 260, 7 S. E. 490; *Perez v. Maverick*, — Tex. Civ. App. —, 202 S. W. 199; *Taylor v. Carter*, 117 Va. 845, 86 S. E. 120; *Holway v. Sanborn*, 145 Wis. 151, 130 N. W. 95.

5 *Smith v. Lockwood*, 7 Wend. 241.

6 *Porter v. Wheeler*, 105 Ala. 451, 17 So. 221; *Knight v. McKinney*, 84 Me. 107, 24 Atl. 744; *Stimis v. Stimis*, 54 N. J. Eq. 17, 33 Atl. 468; *Staples v. Staples*, 20 R. I. 264, 38 Atl. 498; *King v. King*, 90 Va. 177, 17 S. E. 894; *Pickens v. Love*, 44 W. Va. 725, 29 S. E. 1018. And see cases reviewed in note to *Kellogg v. Dickinson*, 1 L.R.A. 346; *Hughes v. Edwards*, 9 Wheat. 489, 6 L. ed. 142; *Spencer v. Hurd*, 201 Ala. 269, 1 A.L.R. 761, 77 So. 683; *Gage v. Downey*, 79 Cal. 140, 21 Pac. 527, 855; *Blaisdell v. Smith*, 3 Ill. App. 150; *Courtney v. Staudenmayer*, 56 Kan. 392, 54 Am. St. Rep. 592, 43 Pac. 758; *Murray v. Fishback*, 5 B. Mon. (Ky.) 403; *Abbott v. Fellows*, 116 Me. 173, 100 Atl. 657; *Cacy v. Slay*, 127 Md. 493, 1 A.L.R. 764, 96 Atl. 690; *Crowley v. Adams*, 226 Mass. 582, 116 N. E. 241; *Cowie v. Fisher*, 45 Mich. 629, 8 N. W. 586; *Frye v. Hubbell*, 74 N. H. 358, 17 L.R.A. (N.S.) 1197, 68 Atl. 325; *Mutual L. Ins. Co. v. United States Hotel Co.* 82 Misc. 632, 144 N. Y. Supp. 476; *Wallace v. Coward*, 79 N. J. Eq. 243, 81 Atl. 739; *Ray v. Pearce*, 84 N. C. 485; *Wilson v. Eckman*, 55 Pa. Super. Ct. 403; *Glezen v. Haskins*, 23 R. I. 601, 51 Atl. 219; *Simms v. Kearse*,

42 S. C. 43, 20 S. E. 19; Vaughn v. Tate, — Tenn. Ch. —, 36 S. W. 748; Mensing v. Fidelity Lumber Co. — Tex. Civ. App. —, 194 S. W. 208; Atkinson v. Patterson, 46 Vt. 750; Turnbull v. Mann, 99 Va. 41, 37 S. E. 288; Pickens v. Love, 44 W. Va. 725, 29 S. E. 1018.

⁷ DeFord v. Green, 1 Marv. (Del.) 316, 40 Atl. 1120. And see cases cited in note to Beekman v. Hamlin, 10 L.R.A. 454. So by § 44 Civ. Prac. Act; Parson's Prac. Manual of N. Y. 1921, p. 15 (formerly in slightly different language, § 376, N. Y. Code Civ. Proc.). But this section is limited to final judgments or decrees for the payment of moneys; it does not apply to a judgment for the recovery of the possession of land. Van Rensselaer v. Wright, 121 N. Y. 626, 25 N. E. 3.

Judson v. Phelps, 87 Conn. 495, 1 A.L.R. 768, 89 Atl. 161; Knowles v. Waller, 7 Penn. 220, 78 Atl. 611; Cobb v. Houston, 117 Mo. App. 645, 94 S. W. 299; Alberts v. Courtland Wagon Co. 94 Neb. 313, 143 N. W. 198; Camp v. John. 259 Pa. 38, 102 Atl. 285.

In North Carolina a former statute (now superseded by the Statute of Limitations) provided that judgments or decrees should be presumed to be paid within ten years after an accrual of the right of action thereon. And this applied to decrees directing payment of money in making equality in partition cases. Herman v. Watts, 107 N. C. 646, 12 S. E. 437; Ex parte Smith, 134 N. C. 495, 499, 47 S. E. 16, holding that the Statute of Limitations is a substitute for the above Statute of Presumptions.

⁸ Paterson General Hospital Asso. v. Blauvelt, 72 N. J. Eq. 725, 66 Atl. 1055; Outlaw v. Garner, 139 N. C. 190, 51 S. E. 925.

⁹ Bass v. Bass, 88 Ala. 408, 7 So. 243.

¹⁰ Chesapeake & D. Canal Co. v. United States, L.R.A.1916B, 734, 139 C. C. A. 406, 223 Fed. 926; Pittsfield v. Barnstead, 40 N. H. 477; Lohrs v. Miller, 12 Gratt. 456; Ash's Estate, 202 Pa. 422, 90 Am. St. Rep. 658, 51 Atl. 1030; Dorgeloh v. Bassford, 18 Jones & S. 450; Re Trenton, 17 N. J. L. J. 23; Mills v. Henry Oil Co. 57 W. Va. 255, 110 Am. St. Rep. 777, 50 S. E. 157, 4 Ann. Cas. 427; Elliott v. Williamson, 11 Lea, 38; and for additional cases and full discussion see L.R.A.1916B, 740.

¹¹ Snodgrass v. Snodgrass, 176 Ala. 276, 58 So. 201; Fagan v. Bach, 253 Ill. 588, 97 N. E. 1087, Ann. Cas. 1913A, 505; Wright v. Hull, 83 Ohio St. 385, 94 N. E. 813. See also note in 1 A.L.R. 786, and cases there cited.

¹² Shockley v. Christopher, 180 Ala. 140, 60 So. 317; Lowe v. Leary, 184 App. Div. 421, 171 N. Y. Supp. 637. For additional cases see note in 1 A.L.R. 791.

¹³ Lawrence v. Ball, 14 N. Y. 477.

¹⁴ Bell v. Wood, 94 Va. 677, 27 S. E. 504.

¹⁵ Jameson v. Rixey, 94 Va. 342, 26 S. E. 861; McCormick v. Eliot, 43 Fed 469 (uninterrupted attempts to enforce payment by judicial process): Barker v. Jones, 62 N. H. 497; Frye v. Hubbell, 74 N. H. 358, 17

L.R.A. (N.S.) 1197, 68 Atl. 325; Baent v. Kennicutt, 57 Mich. 268, 23 N. W. 808; Knight v. McKinney, 84 Me. 107, 24 Atl. 744; according to Blue v. Everett, 55 N. J. Eq. 329, 36 Atl. 960, however, presumption of payment of a mortgage debt arising from lapse of twenty years, without demand or acknowledgment, and without any explanation of the delay, is conclusive.

¹⁶ Morey v. Farmers' Loan & T. Co. 14 N. Y. 302; note to Beekman v. Hamlin, 10 L.R.A. 454.

And proof of actual nonpayment is not available. Fisher v. New York, 67 N. Y. 73.

Under the former North Carolina statute above referred to, the presumption of payment of a judgment was not conclusive, but might be rebutted by any pertinent proof. Ex parte Walker, 107 N. C. 340, 12 S. E. 136. See also Ex parte Smith, 134 N. C. 495, 499, 47 S. E. 16. For additional cases see note in 1 A.L.R. 791.

5. Oral evidence to vary receipt.

Oral evidence is admissible to vary, explain, or contradict a mere receipt,¹ but not where the receipt partakes of the nature of a contract,² except in case of fraud³ or mistake.⁴

¹ Fox v. Cox, 20 Ind. App. 61, 50 N. E. 92; State, Joslin, Prosecutor, v. Giese, 59 N. J. L. 130, 36 Atl. 680; Mosel v. William H. Frank Brewing Co. 2 App. Div. 93, 37 N. Y. Supp. 525; D. M. Osborne & Co. v. Stringham, 4 S. D. 593, 57 N. W. 776; Rogers v. Tomlinson, — Tex. Civ. App. —, 38 S. W. 244; Mounce v. Kurtz, 101 Iowa, 192, 70 N. W. 119; Allen v. Tacoma Mill Co. 18 Wash. 216; 51 Pac. 372.

² Cassilly v. Cassilly, 57 Ohio St. 582, 49 N. E. 795 (receipt releasing interest in certain estate, and agreeing not to contest will of testator); Jackson v. Ely, 57 Ohio St. 450, 49 N. E. 792 (receipt for money paid for services found to be due upon adjustment of unsettled items); Komp v. Raymond, 42 App. Div. 32, 58 N. Y. Supp. 909 (receipt for money paid for services upon final settlement after dispute as to balance due); Church of Holy Communion v. Paterson Extension R. Co. 63 N. J. L. 470, 43 Atl. 696 (receipt "in full settlement and discharge" of damages caused by negligence of defendant); Squires v. Amherst, 145 Mass. 192, 13 N. E. 609 (receipt "in full for all damages" caused by defective highway); Pratt v. Castle, 91 Mich. 484, 52 N. W. 52; Ostrander v. Scott, 161 Ill. 339, 43 N. E. 1089; Conant v. Kimball, 95 Wis. 550, 70 N. W. 74.

³ Oliwill v. Verdenhalven, 39 N. Y. S. R. 200, 15 N. Y. Supp. 94. And see ILLEGALITY; INDUCEMENT.

⁴ Cole v. Bower, 53 Kan. 468, 36 Pac. 1000. And see MISTAKE.

But the mistake must be one of fact, and not of law. Conant v. Kimball. 95 Wis. 550, 70 N. W. 74.

PERFORMANCE.

For kindred topics, see **CONTRACTS; DELIVERY; INDUCEMENT.**

Direct testimony.

A question which calls for a general summary or opinion of the witness as to whether a person has done as agreed is inadmissible; the testimony should be confined to a statement of what was done.¹

- ¹ *Nichols v. White*, 41 Hun, 152; *Clark v. Ryan*, 95 Ala. 406, 11 So. 22. Compare *Taulbee v. Moore*, 106 Ky. 749, 51 S. W. 564 (holding that where the parties to a verbal contract for labor to be performed differ essentially as to its terms, one of the parties may, after giving his version of it, state that the work was performed in accordance therewith).

PHONOGRAPHS.

Upon the question of damages to be allowed for diminution in value of the remaining property in an eminent domain proceeding, a phonograph may be operated before the jury to reproduce sounds claimed to be incident to the conduct of the petitioner's business, where there is evidence to show that the result is a substantially accurate and trustworthy reproduction of the sounds actually made.¹

- ¹ *Boyer City, G. & A. R. Co. v. Anderson*, 146 Mich. 328, 8 L.R.A. (N.S.) 306, 117 Am. St. Rep. 642, 109 N. W. 429, 10 Ann. Cas. 283.

PHOTOGRAPHS, MAPS, PLANS, ETC.

1. Judicial notice.
2. Admissibility generally.
3. Copy.
4. Photographs of persons.
5. Photographs of documents or instruments.
6. Proof of correctness.
7. Effect and conclusiveness of photographs.
8. Photographs as secondary evidence.
9. X-ray photographs.

See also **CONDITION**, §§ 3a, 12, 13; **HANDWRITING**; **IDENTITY**; **MOVING PICTURES**.

1. Judicial notice.

The court will not take judicial notice that a photograph fairly represents the subject it purports to represent, but evidence must be introduced to that effect.¹

¹ *Goldsboro v. Central R. Co.* 60 N. J. L. 49, 37 Atl. 433; *Varner v. Varner*, 16 Ohio C. C. 386, citing *Cowley v. People*, 83 N. Y. 464, 38 Am. Rep. 464; *People v. Buddensieck*, 103 N. Y. 487, 9 N. E. 44, 57 Am. Rep. 766; *Blair v. Pelham*, 118 Mass. 420; *Com. v. Coe*, 115 Mass. 481; *Dederichs v. Salt Lake City R. Co.* 14 Utah, 137, 35 L.R.A. 803, with note, 46 Pac. 656.

The court will take judicial notice of maps published by state authority. *Davis v. State*, 134 Wis. 632, 115 N. W. 150.

2. Admissibility generally.

Photographs,¹ maps,² and plans or diagrams³ are admissible to aid the court and jury in understanding the evidence, and also to aid witnesses in explaining their testimony. And a photograph is not incompetent because persons were stationed to be taken in it to indicate the points at which stood the actors in the scene involved in the issue.⁴

¹ Photographs of places: *Kansas City, M. & B. R. Co. v. Smith*, 90 Ala. 25, 24 Am. St. Rep. 753, 8 So. 43; *Kansas City Southern R. Co. v. Morris*, 80 Ark. 528, 98 S. W. 363, 10 Ann. Cas. 618; *Dederichs v. Salt Lake City R. Co.* 14 Utah, 137, 35 L.R.A. 802, 46 Pac. 656; *Dyson v. New York & N. E. R. Co.* 57 Conn. 9, 14 Am. St. Rep. 82,

17 Atl. 137; Illinois C. R. Co. v. Hayer, 225 Ill. 613, 80 N. E. 316; Rockford v. Russell, 9 Ill. App. 229; Keyes v. State, 122 Ind. 527, 23 N. E. 1097; Locke v. Sioux City & P. R. Co. 46 Iowa, 109; Blair v. Pelham, 118 Mass. 421; Bedell v. Berkey, 76 Mich. 435, 15 Am. St. Rep. 370, 43 N. W. 308; State v. O'Reilly, 126 Mo. 597, 29 S. W. 577; Edge v. Southwest Missouri Electric R. Co. 206 Mo. 471, 104 S. W. 90; Omaha Southern R. Co. v. Beeson, 36 Neb. 361, 54 N. W. 557; People v. Buddensieck, 103 N. Y. 487, 57 Am. Rep. 766, 9 N. E. 44; People v. Fish, 125 N. Y. 136, 26 N. E. 319; Chestnut Hill & S. H. Turnp. Co. v. Piper, 15 W. N. C. 55; Higgs v. Minneapolis, St. P. & S. Ste. M. R. Co. 16 N. D. 446, 15 L.R.A. (N.S.) 1162, 114 N. W. 722, 15 Ann. Cas. 97; State v. Kelley, 46 S. C. 55, 24 S. E. 60; Missouri, K. & T. R. Co. v. Moore, 4 Tex. App. Civ. Cas. (Willson) 323, 15 S. W. 714; Smith v. Central Vermont R. Co. 80 Vt. 208, 67 Atl. 535; Church v. Milwaukee, 31 Wis. 512; Reg. v. United Kingdom Electric Teleg. Co. 3 Fost. & F. 73, 9 Cox, C. C. 137, 31 L. J. Mag. Cas. N. S. 166, 8 Jur. N. S. 1153, 6 L. T. N. S. 378, 10 Week. Rep. 538, 12 Eng. Rul. Cas. 562; Pickett v. Atlantic Coast Line R. Co. 153 N. C. 148, 69 S. E. 8; Robinson v. St. Joseph, 97 Mo. App. 503, 71 S. W. 465; Grant Park v. Trah, 115 Ill. App. 291; Raab v. Roberts, 30 Ind. App. 6, 64 N. E. 618, 65 N. E. 191; Beals v. Brookline, 174 Mass. 1, 54 N. E. 339. For additional cases and full discussion see note in 51 L.R.A. (N.S.) 853.

² Jarvis v. State, 138 Ala. 17, 34 So. 1025; Pickering Light & Water Co. v. Savage, — Cal. —, 69 Pac. 846; West v. State, 53 Fla. 77, 43 So. 445; O'Donohue v. Cronin, 62 App. Div. 379, 70 N. Y. Supp. 737; State v. Harrison, 145 N. C. 408, 59 S. E. 867; Houston v. Finnegan, — Tex. Civ. App. —, 85 S. W. 470; Spokane v. Patterson, 46 Wash. 93, 8 L.R.A. (N.S.) 1104, 123 Am. St. Rep. 921, 89 Pac. 402, 13 Ann. Cas. 706; Poling v. Ohio River R. Co. 38 W. Va. 645, 24 L.R.A. 215, 18 S. E. 782. And a map made by a witness who surveyed the land is competent, notwithstanding the existence of an official map. Chicago v. Le Moyne, 56 C. C. A. 278, 119 Fed. 662.

³ People v. Figueroa, 134 Cal. 159, 66 Pac. 202; Koon v. Southern R. Co. 69 S. C. 101, 48 S. E. 86; Franklin v. Engel, 34 Wash. 480, 76 Pac. 84.

⁴ People v. Jackson, 111 N. Y. 362, 19 N. E. 54.

3. Copy.

A photograph is not incompetent merely because not an original, but copied from an original photograph.¹

¹ Wilcox v. Wilcox, 46 Hun, 32.

4. Photographs of persons.

Photographs of persons have frequently been admitted in

evidence to establish identity.¹ Photographs taken after death have been admitted.² The photograph of a putative father when he is dead, when proved to be a good likeness of him, has been held to be admissible in evidence on an issue of paternity, for the purpose of comparison with the child in court.³ But in another case it was held that, while the photographs of a putative father and an illegitimate child are not inadmissible for the purpose of showing resemblance between the two, yet they are entitled to but little weight.⁴ Photographs of various parts of the body have been held admissible to show the condition thereof,⁵ or to show the nature or location of a wound.⁶ The photograph of a child, taken when it was five years old, was admitted in evidence in an action for causing the death of the child when seven years old, to show its physical development and the probability of future growth and further development.⁷ And a photograph proved to have been a truthful representation of a person as she appeared about a week before her death, introduced to show that she was a healthy-looking woman, and to disprove fraud in obtaining insurance on her life, has been held admissible in an action for life insurance.⁸ The photograph of an accused person was admitted to support a witness for the prosecution and contradict a witness for the accused by showing the fact that when it was taken he wore side whiskers.⁹

¹ *United States v. A Lot of Jewelry*, 59 Fed. 684; *Wilson v. United States*, 162 U. S. 613, 40 L. ed. 1090, 16 Sup. Ct. Rep. 895; *Luke v. Calhoun County*, 52 Ala. 118; *Beavers v. State*, 58 Ind. 530; *Travelers Ins. Co. v. Sheppard*, 85 Ga. 751; *Com. v. Campbell*, 155 Mass. 537; *Marion v. State*, 20 Neb. 233, 57 Am. Rep. 825, 29 N. W. 911; *Wilcox v. Wilcox*, 46 Hun, 32; *People v. Smith*, 121 N. Y. 578, 24 N. E. 852; *Udderzook v. Com.* 76 Pa. 340, 1 Am. Crim. Rep. 311. See also cases cited under note Identity.

² *Ruloff v. People*, 45 N. Y. 213; *State v. Windahl*, 95 Iowa, 470, 64 N. W. 420.

³ *Shorten v. Judd*, 56 Kan. 43, 54 Am. St. Rep. 587, 42 Pac. 337;

⁴ *Re Jessup*, 81 Cal. 408, 6 L.R.A. 594, 21 Pac. 976, 22 Pac. 742, 1028.

⁵ *Reddin v. Gates*, 52 Iowa, 210, 2 N. W. 1079; *Cooper v. St. Paul City R. Co.* 54 Minn. 379, 56 N. W. 42; *Alberti v. New York, L. E. & W. R. Co.* 118 N. Y. 77, 6 L.R.A. 765, 23 N. E. 35. But photographs showing an injured foot in an aggravated aspect, well calculated to arouse the sympathy of the jury, were held inadmissible in an action

for personal injuries. *Selleck v. Janesville*, 104 Wis. 570, 47 L.R.A. 691, 76 Am. St. Rep. 892, 80 N. W. 944. *Davis v. Seaboard Air Line R. Co.* 136 N. C. 115, 48 S. E. 591, 1 Ann. Cas. 214; *Com. v. Keller*, 191 Pa. 122, 43 Atl. 198; *Young v. State*, 49 Tex. Crim. Rep. 207, 92 S. W. 841; *People v. Rogers*, 163 Cal. 476, 126 Pac. 143; *State v. Bailey*, 79 Conn. 589, 65 Atl. 951; *McKarren v. Boston & N. Street R. Co.* 194 Mass. 179, 80 N. E. 477, 10 Ann. Cas. 961; *Davis v. Adrian*, 147 Mich. 300, 110 N. W. 1084; *State v. Roberts*, 28 Nev. 377, 82 Pac. 100; *Cincinnati, H. & D. R. Co. v. De Onzo*, 87 Ohio St. 109, 100 N. E. 320; *Smith v. Territory*, 11 Okla. 669, 69 Pac. 805; *Powell v. State*, 50 Tex. Crim. Rep. 592, 99 S. W. 1005. For additional cases and full discussion see note in 51 L.R.A.(N.S.) 850.

⁶ *Franklin v. State*, 69 Ga. 42, 47 Am. Rep. 748; *People v. Fish*, 125 N. Y. 136; *People v. Rogers*, 163 Cal. 476, 126 Pac. 143, where such photographs were admitted as showing the character of the wounds inflicted even though they might tend to influence the jury; *People v. Balestieri*, 23 Cal. App. 708, 139 Pac. 821. See also note in 12 Mich. L. Rev. 699.

⁷ *Taylor, B. & H. R. Co. v. Warner*, 88 Tex. 642, 32 S. W. 868.

⁸ *Schaible v. Washington L. Ins. Co.* 9 Phila. 136. But the photograph of a girl to show her healthy appearance on the trial of an issue as to her health at the time when her life was insured was held incompetent in *Brown v. Metropolitan L. Ins. Co.* 65 Mich. 306, 8 Am. St. Rep. 894, 32 N. W. 610.

⁹ *Com. v. Morgan*, 159 Mass. 375, 34 N. E. 458.

5. Photographs of documents or instruments.

Photographic copies of documents or instruments which cannot be produced in court are admissible on proof of their accuracy.¹ But such copies are not admissible when the originals are not lost and can be produced, as the copies are only secondary evidence.²

¹ *Leathers v. Salvor Wrecking Co.* 2 Woods, 680, Fed. Cas. No. 8,164; *Stitzel v. Miller*, 250 Ill. 72, 95 N. E. 53; *Duffin v. People*, 107 Ill. 113, 47 Am. Rep. 431; *Ayers v. Harris*, 77 Tex. 108, 13 S. W. 768; *Fuller v. Robinson*, 230 Mo. 22, 130 S. W. 343, Ann. Cas. 1912A, 938; *Re McClellan*, 20 S. D. 498, 107 N. W. 681; *Parker v. C. A. Smith Lumber & Mfg. Co.* 70 Or. 41, 138 Pac. 1061; *Howard v. Illinois Trust & Sav. Bank*, 189 Ill. 568, 59 N. E. 1106; *Re Hayes*, 55 Colo. 340, 135 Pac. 449, Ann. Cas. 1914C, 531. For additional cases see note in 51 L.R.A.(N.S.) 857.

² *Maclean v. Scripps*, 52 Mich. 214, 17 N. W. 815, 18 N. W. 209; *White Sewing Mach. Co. v. Gordon*, 124 Ind. 495, 19 Am. St. Rep. 109, 24

N. E. 1053. Photographic copies of instruments can be used only as secondary evidence on laying a proper foundation for the introduction of secondary evidence. *Eborn v. Zimpelman*, 47 Tex. 503, 26 Am. Rep. 319.

As to admissibility of photographs of documents or instruments for purpose of comparing handwriting, see cases in notes in 35 L.R.A. 812 and 63 L.R.A. 438. See also cases cited under topic HANDWRITING, §§ 33 et seq. ante.

6. Proof of correctness.

While the reports of the cases do not always show whether or not there was any proof of the correctness of a photograph or map offered in evidence, there is no case which holds that such proof is not necessary. Such proof is either required or is assumed to be necessary, and in fact given.¹

In order to prove the correctness of a photograph it is not necessary to call the person who took it;² nor that the witness should be able to say from what point it was taken.³

Mere conflict of evidence as to correctness does not render a map, plan, or photograph incompetent; but the adverse party may put in one he deems correct.⁴

The preliminary question whether a plan, etc., shown is correct, is proper, though leading.⁵

¹ *Photographs*: *Kansas City, M. & B. R. Co. v. Smith*, 90 Ala. 25, 24 Am. St. Rep. 753, 8 So. 43; *Dyson v. New York & N. E. R. Co.* 57 Conn. 9, 14 Am. St. Rep. 82, 17 Atl. 137; *Ortiz v. State*, 30 Fla. 256, 11 So. 611; *Rockford v. Russell*, 9 Ill. App. 229; *Locke v. Sioux City & P. R. Co.* 46 Iowa, 109; *McKarren v. Boston & N. Street R. Co.* 194 Mass. 179, 80 N. E. 477, 10 Ann. Cas. 961; *Leidlein v. Meyer*, 95 Mich. 586; *Cooper v. St. Paul City R. Co.* 54 Minn. 379, 56 N. W. 42; *State v. O'Reilly*, 126 Mo. 597, 29 S. W. 577; *People v. Buddensieck*, 103 N. Y. 487, 57 Am. Rep. 766, 9 N. E. 44; *Alberti v. New York, L. E. & W. R. Co.* 118 N. Y. 77, 6 L.R.A. 765, 23 N. E. 35; *State v. Kelley*, 46 S. C. 55, 24 S. E. 60; *Houston v. Blythe*, 60 Tex. 506; *Scott v. New Orleans*, 21 C. C. A. 402, 41 U. S. App. 498, 75 Fed. 373.

Maps: *Bower v. Cohen*, 126 Ga. 35, 54 S. E. 918. But it is not necessary to verify a county map properly certified and recorded in the office of the secretary of state. *Berry v. Clark*, 117 Ga. 964, 44 S. E. 824. And if a plat is accurate as to the general situation of the premises, it may be admitted even if inaccurate as to some line or details. *Sanitary Dist. v. Conroy*, 109 Ill. App. 367. And an objection to the in-

trodition of a plat in evidence, on the ground that it is not shown to be correct, is removed by subsequent testimony of the surveyor, verifying it. *Greenleaf v. Bartlett*, 146 N. C. 495, 14 L.R.A.(N.S.) 660, 60 S. E. 419.

² While it is usually the better practice to verify the fidelity of a photograph by the testimony of the person who took it, it is not absolutely necessary that it be so verified. *Roosevelt Hospital v. New York Elev. R. Co.* 66 Hun, 633. It may be verified by any person of equally correct vision and powers of observation who is familiar with the subject of the photograph. *Ibid.*; *Nies v. Broadhead*, 75 Hun, 255, 27 N. Y. Supp. 52.

³ *Archer v. New York, N. H. & H. R. Co.* 106 N. Y. 589, 13 N. E. 318.

⁴ *Moon v. State*, 68 Ga. 687, 695 (homicide; diagram prepared for purpose of the trial). See also cases in note to *Dederichs v. Salt Lake City R. Co.* 35 L.R.A. 803 et seq.

⁵ *Stuart v. Binsse*, 10 Bosw. 436.

7. Effect and conclusiveness of photographs.

The weight to be given this class of evidence is not of conclusive effect, as matter of law, but depends upon the skill, accuracy, and manner in which taken, and they are to be considered under the same tests as other evidence.¹

¹ *Higgs v. Minneapolis, St. P. & S. Ste. M. R. Co.* 16 N. D. 446, 15 L.R.A. (N.S.) 1162, 114 N. W. 722, 15 Ann. Cas. 97; *Baustian v. Young*, 152 Mo. 317, 75 Am. St. Rep. 462, 53 S. W. 921.

8. Photographs as secondary evidence.

It has been commonly said by the courts that photographs are merely secondary evidence. This is doubtless true in most cases, and when the photograph is not in itself in dispute, or is offered as evidence of the thing photographed, it would seem plain that the photograph is only secondary evidence, and therefore inadmissible where the originals might be produced.¹ But photographs are not always secondary evidence. Thus, on a trial for the offense of selling indecent and obscene photographs, the photographs themselves are manifestly primary evidence.² And so they must be regarded when they are offered in evidence on an issue as to the skill with which they are made.³

¹ *Maclean v. Scripps*, 52 Mich. 214, 17 N. W. 815, 18 N. W. 209; *Eborn v. Zimpelman*, 47 Tex. 503, 27 Am. Rep. 319; *Perkins v. Buaas*, — Tex.

Civ. App. —, 32 S. W. 240; Chicago, M. & St. P. R. Co. v. Kendall, 49 Ill. App. 398; White Sewing Mach. Co. v. Gordon, 124 Ill. 495; Crane v. Dexter Horton & Co. 5 Wash. 479, 32 Pac. 223; Church v. Milwaukee, 31 Wis. 512; Omaha Southern R. Co. v. Beeson, 36 Neb. 361, 54 N. W. 557; Goldsboro v. Central R. Co. 60 N. J. L. 49, 37 Atl. 433.

2 People v. Muller, 32 Hun, 209.

3 Barnes v. Ingalls, 39 Ala. 193.

9. X-ray photographs.

Under the proper precautions, and with necessary explanations, what are known as "X-ray pictures" are admissible in evidence for the purpose of showing the condition of the bones or internal tissues of the body.¹ But the accuracy of the X-ray photograph must first be established.²

¹ Geneva v. Burnett, 65 Neb. 464, 58 L.R.A. 287, 101 Am. St. Rep. 628, 91 N. W. 275, 12 Am. Neg. Rep. 104; Dean v. Wabash R. Co. 229 Mo. 425, 129 S. W. 953; Elzig v. Bayles, 135 Iowa, 208, 112 N. W. 540; Eckles v. Boylan, 136 Ill. App. 258; Houston & T. C. R. Co. v. Shepard, 54 Tex. Civ. App. 596, 118 S. W. 596; Kimball v. Northern Electric Co. 159 Cal. 225, 113 Pac. 156; Bonnet v. Foote, 47 Colo. 282, 28 L.R.A.(N.S.) 136, 107 Pac. 252; Tish v. Walker, 5 Ohio S. & C. P. Dec. 725, 7 Ohio N. P. 472; Bruce v. Beall, 99 Tenn. 303, 41 S. W. 445; Miller v. Dumon, 24 Wash. 648, 64 Pac. 804; Mauch v. Hartford, 112 Wis. 40, 87 N. W. 816, 11 Am. Neg. Rep. 63. For additional cases see note in 51 L.R.A.(N.S.) 858.

But an X-ray picture of a set of false teeth placed under a dead body, taken from the opposite side of the body was rejected in Wingfield v. McClintock, 85 Kan. 207, 113 Pac. 394, as not having been taken under such conditions as to demonstrate that a like picture of the neck or stomach of a living patient would disclose the presence or absence of a set of teeth supposed to have been swallowed.

2 Ligon v. Allen, 157 Ky. 101, 51 L.R.A.(N.S.) 842, 162 S. W. 536.

PLACE.

As to Boundaries and Distance, see those titles.

Inferring from proximity.

The place of an occurrence, as whether within or without a specified county or other division, may be inferred from evidence of proximity to a place within that county or division.¹

¹ Indianapolis & C. R. Co. v. Stephens, 28 Ind. 429 (proof that an accident happened within half a mile of the town held sufficient that it happened within the county).

For other illustrations, see Criminal Trial Brief.

PLEADINGS.

I. ADMISSIBILITY OF PLEADINGS FOR THE PURPOSE OF ESTABLISHING FACTS SET OUT THEREIN.

1. Pleadings containing self-serving declarations.
 - a. General rule as to admissibility and exceptions thereto.
 - b. Parties for whom admissible.
 - c. Weight and conclusiveness.
2. Pleadings containing admissions against interest.

II. ADMISSIBILITY OF PLEADINGS FOR PURPOSES OTHER THAN ESTABLISHING FACTS SET OUT THEREIN.

3. Admissibility for purposes of impeachment.
4. Admissibility to prove nature of issue and claims of parties in case.
5. Admissibility for miscellaneous purposes.

I. ADMISSIBILITY OF PLEADINGS FOR THE PURPOSE OF ESTABLISHING FACTS SET OUT THEREIN.

1. Pleadings containing self-serving declarations.

a. *General rule as to admissibility and exceptions thereto.*—

In accordance with the rule of evidence applying to self-serving declarations in general, self-serving declarations contained in

pleadings are ordinarily inadmissible.¹ To this rule there are a number of exceptions. A verified pleading praying an injunction is usually looked upon as an affidavit and therefore treated as evidence.² In those jurisdictions where the common law still prevails a verified answer where verification was not waived by complainant is evidence of the self-serving declarations therein contained in favor of the defendant.³ Similarly verified answers to interrogatories in an ordinary bill for equitable relief⁴ or in a bill for discovery⁵ or the statutory substitute therefor⁶ are admissible, although in the latter two cases the defendant cannot himself offer the answer in evidence but may only take advantage of any self-serving declarations therein when the answer is offered by his opponent.⁷ Irresponsive statements in answers to interrogatories are however never considered evidence for the defendant.⁸ Where by statute or otherwise verification may be and is waived the answer cannot be used as evidence even if actually verified.⁹ An answer making discovery must relate to such facts as other testimony could be received to establish.¹⁰

¹ Self-serving declarations in bills in equity held inadmissible: *Fields v. Colby*, 102 Mich. 449, 60 N. W. 1048; *Schmidt v. Schmidt*, 29 N. J. Eq. 496; *Mutual Nat. Bank v. Moore*, 104 La. 150, 29 So. 103.

Self-serving declarations in petitions at law held inadmissible: *Wesner v. St. Louis & S. F. R. Co.* 177 Mo. App. 117, 163 S. W. 298; *Wilkins-Ricks Co. v. McPhail*, 169 N. C. 558, 86 S. E. 502; *Hocking Valley R. Co. v. Helber*, 91 Ohio St. 231, 110 N. E. 481.

In answer or plea in action at law: *Stewart v. Demming*, 54 Neb. 7, 74 N. W. 265.

² *State ex rel. Burton v. Missouri & K. Teleph. Co.* 77 Kan. 774, 95 Pac. 391; *Anderson v. Englehart*, 18 Wyo. 409, 108 Pac. 977; *Willis v. Lauridson*, 161 Cal. 106, 118 Pac. 530; *Foster v. Retail Clerks' International Protective Asso.* 39 Misc. 48, 78 N. Y. Supp. 860.

³ *Johns v. Bowden*, 72 Fla. 530, 73 So. 603; *Fish v. Fish*, 235 Ill. 396, 85 N. E. 662; *Real Estate & Mortg. Co. v. Cook*, 223 Pa. 158, 72 Atl. 345.

⁴ *Evans v. Evans*, — N. J. Eq. —, 59 Atl. 564; *Snow v. Hazlewood*, 85 C. C. A. 226, 157 Fed. 898.

⁵ *Clason v. Morris*, 10 Johns. 524; *Methodist Episcopal Church v. Wood*, 5 Ohio, 283.

⁶ *Beem v. Farrell*, 135 Iowa, 670, 108 N. W. 1044, 113 N. W. 509.

⁷ *Southern R. Co. v. Hayes*, 183 Ala. 465, 62 So. 874.

⁸ *American Securities Co. v. Goldsberry*, 69 Fla. 104, 1 A.L.R. 15, 67 So.

862; *Austin Clothing Co. v. Posey*, 105 Miss. 720, 1 A.L.R. 13, 63 So. 224, 64 So. 5; *Thompson v. FitzGerald*, 233 Pa. 242, 82 Atl. 212.

⁹ *Koebel v. Doyle*, 256 Ill. 610, 100 N. E. 154; *Leathers v. Stewart*, 108 Me. 96, 79 Atl. 16, Ann. Cas. 1913B, 366; *Coan v. Consolidated Gas E. L. & P. Co.* 128 Md. 530, 97 Atl. 921.

¹⁰ *Farrell v. Forest Invest. Co.* 73 Fla. 191, 1 A.L.R. 25, 74 So. 216.

b. Parties for whom admissible.—Where admissible at all the self-serving declarations are admissible in favor of the pleader against his opponent.¹ The courts are about equally divided as to whether such a pleading is admissible in behalf of a codefendant against the complainant.² It is not admissible for or against outside parties nor in any other proceedings³ except to show pedigree,⁴ and in some instances in favor of persons claiming under the pleader.⁵

¹ See cases cited *supra* I. 1, A, most of which involve the admissibility of pleadings on behalf of the pleader, against his opponent, in the proceeding in which filed.

² *Mills v. Gore*, 20 Pick. 28; *Miles v. Miles*, 32 N. H. 147, 64 Am. Dec. 362, holding such pleadings admissible. *Contra*: *Blodgett v. Hobart*, 18 Vt. 414; *Carr v. Weld*, 19 N. J. Eq. 319.

³ *Mead v. Randall*, 111 Mich. 268, 69 N. W. 506.

⁴ *Eisenlord v. Clum*, 126 N. Y. 552, 12 L.R.A. 836, 27 N. E. 1024.

⁵ *Ricketts v. Garrett*, 11 Ala. 806; *Trice v. Rose*, 79 Ga. 75, 3 S. E. 701.

c. Weight and conclusiveness.—As a general rule self-serving declarations contained in pleadings are not conclusive evidence on behalf of the pleader.¹ But while a pleader's opponent is in nearly all cases free to offer testimony to overcome the self-serving declarations he is not permitted to impeach the pleader by proving his want of truth and veracity.² The complainant must overcome the self-serving declaration which is treated merely as the testimony of one witness.³ The burden of proof is on the complainant and therefore the testimony of one witness is not sufficient to overcome such an answer.⁴ Two witnesses will be sufficient,⁵ or one witness and corroborating circumstances,⁶ or, in the absence of even one positive witness, any evidence sufficient to overcome the evidence of one witness.⁷

An evasive answer is not entitled to the same full weight as one which is direct positive and unequivocal.⁸ So too where the

allegations of the answer are on information and belief or indicate otherwise that they are not within the pleaders personal knowledge they are not entitled to the weight usually accorded to pleadings as evidence.⁹

¹ *Barron v. Meyers*, 140 Mich. 431, 103 N. W. 842; *Picture Plays Theatre Co. v. Williams*, 75 Fla. 556, 1 A.L.R. 1, 78 So. 674; *McDougal v. Alston*, 190 Ala. 78, 66 So. 683; *Goodman v. Lehigh Valley R. Co.* 82 N. J. L. 527, 81 Atl. 851.

² *Chambers v. Warren*, 13 Ill. 318; *Brown v. Bulkley*, 14 N. J. Eq. 294.

³ *Culbertson v. Luckey*, 13 Iowa, 12; *Veile v. Blodgett*, 49 Vt. 270.

⁴ *Campbell v. Northwest Eckington Improv. Co.* 229 U. S. 561, 57 L. ed. 1330, 33 Sup. Ct. Rep. 796.

⁵ *Schwebel v. Wohlsen*, 254 Pa. 281, 98 Atl. 864.

⁶ *Sheckells v. Sheckells*, 42 App. D. C. 131; *Pittman v. Milton*, 69 Fla. 304, 68 So. 658; *District of Columbia v. Robinson*, 180 U. S. 92, 45 L. ed. 440, 21 Sup. Ct. Rep. 283.

⁷ *Kirkpatrick v. McBride*, 120 C. C. A. 322, 328, 202 Fed. 144, 203 Fed. 449; *Phelps v. Root*, 78 Vt. 493, 63 Atl. 941.

⁸ *Fairbairn v. Middlemiss*, 47 Mich. 372, 11 N. W. 203; *Mitchell v. Mason*, 65 Fla. 208, 61 So. 579.

⁹ *Cornwell v. Sparks*, 248 Pa. 109, 93 Atl. 868; *Cady v. Barnes*, 208 Fed. 361.

For a full review of the authorities covering the admissibility of self-serving declarations in pleadings see note in 1 A.L.R. 39.

2. Pleadings containing admissions against interest.

The principal rules of evidence governing the admissibility in evidence of pleadings as containing admissions against interest in both civil and criminal cases are treated elsewhere in this volume.¹

¹ For cases on admission against interest in civil cases see topic **ADMISSIONS AND DECLARATIONS**, § 7. See also full discussion and review of authorities in note in 14 A.L.R. 22.

For cases on admission against interest in criminal cases see topic **ADMISSIONS AND DECLARATIONS**, § 8.

II. ADMISSIBILITY OF PLEADINGS FOR PURPOSES OTHER THAN ESTABLISHING FACTS SET OUT THEREIN.

3. Admissibility for purposes of impeachment.

As a general rule, statements made in a pleading are admis-

sible in evidence to discredit or impeach the pleader when he becomes a witness either in his own action¹ or that of another² and makes statements inconsistent with the allegations of the pleading.

¹ *Browder v. Southern R. Co.* 107 Va. 10, 57 S. E. 572; *Schuh v. R. H. Herron Co.* 177 Cal. 13, 169 Pac. 682.

Contra: *Leistikow v. Zuelsdorf*, 18 N. D. 511, 122 N. W. 340; *Taylor v. Evans*, 102 Ark. 640, 145 S. W. 564.

It is sometimes held that such evidence is only admissible when it affirmatively appears that the witness authorized the allegations in question.

² *Lee v. Chicago, St. P. M. & O. R. Co.* 101 Wis. 352, 77 N. W. 714; *Lindsay v. Dutton*, 227 Pa. 208, 75 Atl. 1096; *Johnson v. Hawthorne Ditch Co.* 32 S. D. 499, 143 N. W. 959; *Wilcox v. Downing*, 88 Conn. 368, 91 Atl. 262.

4. Admissibility to prove nature of issue and claims of parties in case.

Pleadings in a former action may ordinarily be admitted in evidence to explain the nature and object of such former suit, where such facts are material and relevant.¹ But a party's own pleadings in the former action are the only competent evidence in the later case of what he claimed in the earlier one.²

¹ *DeMontague v. Bacharach*, 187 Mass. 128, 72 N. E. 938; *Page v. Page*, 15 Pick. 368; *Van Rensselaer v. Akin*, 22 Wend. 549.

² *Reese v. Qualtrough*, 48 Utah, 23, 14 A.L.R. 94, 156 Pac. 955.

5. Admissibility for miscellaneous purposes.

Pleadings in a former action may be admitted to prove that an alleged claim was made¹ or that an offer of payment was made² or that certain allegations in an amended pleading were an afterthought.³ They may also be offered to prove handwriting,⁴ to explain a decree,⁵ to prove malice of the pleader,⁶ to show the date when a suit was begun,⁷ or to show notice.⁸

¹ *Miles v. Strong*, 68 Conn. 273, 36 Atl. 55; *Carrie v. Carnes*, 145 Ga. 184, 88 S. E. 949.

² *Gallimore v. Grubb*, 156 N. C. 575, 72 S. E. 628.

³ *Mathews v. Livingston*, 86 Conn. 263, 85 Atl. 529, Ann. Cas. 1914A, 195.

⁴ *Tucker v. Hyatt*, 144 Ind. 635, 640, 41 N. E. 1047, 43 N. E. 872.

⁵ *Hornbuckle v. Stafford*, 111 U. S. 389, 28 L. ed. 468, 4 Sup. Ct. Rep. 515.

⁶ *Meriwether v. Publishers: Geo. Knapp & Co.* 224 Mo. 617, 123 S. W. 1100.

⁷ *Oppermann v. McGown*, — Tex. Civ. App. —, 50 S. W. 1078.

⁸ *West Lumber Co. v. C. R. Cummings Export Co.* — Tex. Civ. App. —, 196 S. W. 546.

For a full discussion of the admissibility of pleadings for purposes other than the proof of the facts set out therein, with a full review of the authorities see note in 14 A.L.R. 103.

POSITION.

For kindred topics, see **CONDITION**; **OPINIONS**; **PLACE**.

Direct testimony.

Testimony of a witness to the place or position of an object¹ he observed is not rendered incompetent by his qualifying the statement by indicating the reason why he judged it to be so,² as distinguished from testifying to mere matter of opinion.³

¹ The opinion of a nonexpert as to the position of a person at the time of an injury, based on a description of the wound, is incompetent. *Nave v. Alabama G. S. R. Co.* 96 Ala. 264, 11 So. 391.

² *Hallahan v. New York, L. E. & W. R. Co.* 102 N. Y. 194, 6 N. E. 287.

³ *Manke v. People*, 17 Hun, 416, approved in *Kansas v. Jones*, 8 Crim. L. Mag. 148.

POSSESSION.

1. Direct testimony.
2. Title.
3. Paying tax, etc.
4. Judgment against third person.
5. Presumption of continuance.

For kindred topics, see CLAIM; DELIVERY; INTENT.
As to personal property, see also OWNERSHIP.

1. Direct testimony.

Actual possession, or occupation, of lands or chattels, as distinguished from legal or constructive possession, is a fact of observation, and may be testified to directly by a witness,¹ subject to cross-examination on details.²

Otherwise of the possession of what is shown not to be the actual occupation of anyone, such as uninclosed woodland.³

¹ Fisher v. Bennehoff, 121 Ill. 426, 13 N. E. 150; Hardenburgh v. Crary, 50 Barb. 32; Knapp v. Smith, 27 N. Y. 277; Steed v. Knowles, 97 Ala. 573, 12 So. 75; Bryan v. Spivey, 109 N. C. 57, 13 S. E. 766. See also Abbott, Tr. Ev. (3d ed.) pp. 1553, 1567, 1661, 1663.

Witness may testify that he was in possession of real estate at a particular time. Sweeney v. Sweeney, 121 Ga. 293, 48 S. E. 984.

But the exclusion of testimony that "it seems" that a person was in possession, as a mere opinion, was sustained in Richardson v. Stringfellow, 100 Ala. 416, 14 So. 283.

² And a witness who has described in detail his acts may be allowed to characterize those acts as a taking of possession. Keller v. Paine, 34 Hun, 167, 176. Such testimony has no weight against facts showing precisely what was done. Steele v. Benham, 84 N. Y. 634, reversing 21 Hun, 411 (mortgagee's testimony that he took and kept possession).

³ Miller v. Long Island R. Co. 71 N. Y. 380, reversing 9 Hun, 194.

2. Title.

Evidence of title raises a legal presumption of legal or constructive possession,¹ but not of actual possession or occupancy.²

¹ Pope v. Hanmer, 74 N. Y. 240, 245, affirming 8 Hun, 265; Zirngibl v. Calumet & C. Canal & Dock Co. 157 Ill. 430, 42 N. E. 431. See also Abbott Tr. Ev. (3d ed.) p. 1879. In Plew v. Missouri, K. & T. R. Co

— Tex. Civ. App. —, 29 S. W. 403, in an action against a railroad company to recover for stock killed, judgment was reversed because the court charged the jury that, unless it was proved that the road was controlled and operated by the defendant, they must find for the defendant, the appellate court holding that, in the absence of evidence to the contrary, the presumption that defendant did so control and operate the road should be indulged,—especially inasmuch as there was no such defense pleaded.

² Churchill v. Onderdonk, 59 N. Y. 134; Abbott, Tr. Ev. (3d ed.) p. 1879.

3. Paying tax, etc.

Payment of taxes, etc., upon unoccupied, uninclosed, and unimproved lands, is no evidence of possession.¹ Otherwise of payment of license fee for occupied premises.²

¹ Miller v. Long Island R. Co. 71 N. Y. 380, reversing 9 Hun, 194; Coleman v. First Nat. Bank, 115 Ala. 307, 22 So. 84. s. p., Thompson v. Burhans, 61 N. Y. 52, reversing 61 Barb. 260.

But that it, with other evidence, tends to show both a claim of ownership and the extent of the claimant's possession, and is competent in respect of actual possession, see Coleman v. First Nat. Bank, 115 Ala. 307, 22 So. 84.

² Wing v. Disse, 15 Hun, 190 (evidence of payment of a license fee for a saloon kept on the premises, and of the name over the door, is admissible to show possession).

4. Judgment against third person.

A judgment awarding possession, or other legal proceedings founded on possession, are competent¹ even against one who was not a party thereto, not for the purpose of concluding him as to title or right, but as showing possession and how acquired.²

¹ Thus, a judgment for the use and occupation of land under a petition charging exclusive possession is competent in a similar subsequent action between the same parties as evidence of exclusive possession. Lazarus v. Phelps, 156 U. S. 202, 39 L. ed. 397, 15 Sup. Ct. Rep. 271.

² Chirac v. Reinicker, 11 Wheat. 280, 6 L. ed. 474; Bradt v. Church, 39 Hun, 262. And see Nickerson v. Thacher, 146 Mass. 609, 16 N. E. 581.

In Clark v. Perdue, 40 W. Va. 300, 21 S. E. 735, an action of ejectment against a landlord; a record of recovery and delivery of possession by writ of possession in a former ejectment by one under whom the present plaintiff claims against a tenant of the present defendant was held admissible on the question of possession.

A judgment of eviction is evidence of ouster in an action against the gran-

tor on the covenants of warranty, though he was not a party to the suit in which it was rendered, or notified of it; but it is not evidence of ouster under paramount title. *Wheelock v. Overshiner*, 110 Mo. 100, 19 S. W. 640.

5. Presumption of continuance.

When actual possession is once admitted or proved, whether of real or personal property, it may be inferred as a presumption of fact for the purpose of determining where the burden of proof lies that the possession is continuous,¹ in the absence of evidence to the contrary.²

¹ *Sowles v. Carr*, 69 Vt. 414, 38 Atl. 77 (possession of land under perpetual lease; citing 2 Whart. Ev. § 1286; *Chilson v. Buttolph*, 12 Vt. 231; *Brown v. King*, 5 Met. 173; *Currier v. Gale*, 9 Allen, 522, and referring to note in *Huss v. Hochhausen*, 12 L.R.A. 620); *Bell v. Anderson*, 74 Wis. 638, 43 N. W. 666 (an action to recover back purchase price of piano for fraud in sale; proof of possession down to week of trial sufficient as against motion at close of plaintiff's testimony to nonsuit for want of proof of ability to return piano). Compare *Bethel v. Linn*, 63 Mich. 464, 30 N. W. 84 (continued possession of merchandise in a stock of goods for sale not presumed).

According to *Echols v. Hubbard*, 90 Ala. 309, 7 So. 817, the presumption of law is that actual possession of land once acquired and clearly defined by complete inclosure continues until it is shown to have been changed in some way. Compare *Florida Southern R. Co. v. Burt*, 36 Fla. 497, 18 So. 581 (holding that plaintiff in ejectment for land uninhabited, uninclosed, and unimproved, who relies upon the deed of his immediate grantor and the latter's possession, must show that that possession was at or near the time of the execution of the deed; it is not sufficient to show possession at some remote period).

In an action to determine conflicting claims to real property, brought under N. Y. Code Civ. Proc. § 1638 (*Birdseye, Cummings & Gilbert's Consolidated Laws of N. Y. Ann. 2d ed. Cumulative Supplement 1920*, § 500, vol. 2, p. 1651, Real Property Law, § 500), which, prior to the amendment of 1891, required actual possession in plaintiff as a condition of his right of action, it was held in *Cleveland v. Crawford*, 7 Hun, 616, that the rule as to the presumption of continued possession could not be invoked to show actual possession. But in *Stackhouse v. Stotenbur*, 22 App. Div. 312, 47 N. Y. Supp. 940, it was said that occupation being shown its continuance might be inferred, although it was held that actual possession was really established by the evidence. In 1891, however, the word "actual" was eliminated from the section, and constructive possession will be deemed sufficient. *Clason v. Stew-*

art, 23 Misc. 177, 51 N. Y. Supp. 1100. Whether the presumption of continued possession can be invoked as to constructive possession, see *dictum* in *Cleveland v. Crawford*, 7 Hun, 616.

- 2 Continued possession of money is not presumed, but rather the contrary. *Ogden v. Wood*, 51 How. Pr. 375 (holding that the presumption of the continuance of a fact would not sustain a creditor's action to reach merely money shown to have been once received). *Contra*: *Bockenstedt v. Perkins*, 73 Iowa, 23, 34 N. W. 488 (money presumed to remain in guardian's hands six days in order to charge new bondsmen); Compare *McPhillips v. McGrath*, 117 Ala. 549, 23 So. 721 (holding that there is no presumption of law for or against the proposition that funds misappropriated by a public official, which came into his possession before the execution of a bond covering a second or subsequent term of office, were still in his possession at the time of the execution of the bond, and were misappropriated thereafter, so as to render the sureties liable therefor; but the time of the conversion or misappropriation is a matter of inference to be drawn by the jury from all the facts and circumstances in evidence); *Spaulding v. Arnold*, 125 N. Y. 194, 26 N. E. 295 (holding that the presumption is that moneys received by the county treasurer and appropriated by law to a particular purpose, which have never been applied thereto, are still in the hands of the treasurer, in the absence of proof that they have been paid out).

POSSIBILITY.

For kindred topics, see CARE; CAUSE; OPINIONS; NEGATIVE.

What could have been.

On a matter within the experience of men in the ordinary walks of life and of common observation the question what could have been done by another person under given circumstances is not competent.¹

But on a question requiring special knowledge a skilled witness may be asked such a question.²

¹ *Jones v. State*, 71 Ind. 66 (whether deceased seated at a window could have seen an assailant who fired from without, not competent);

Haggerty v. Brooklyn City & N. R. Co. 61 N. Y. 624, 6 Abb. N. C. 129, note (unskilled witnesses of a casualty cannot be asked if anything could have been done to prevent it). The opinion of a witness as to whether or not it was possible for a person standing to have fallen in the position in which he was found is not admissible. Manufacturers' Acci. Indemnity Co. v. Dorgan, 22 L.R.A. 620, 7 C. C. A. 581, 16 U. S. App. 290, 58 Fed. 945.

² Mott v. Hudson River R. Co. 8 Bosw. 345 (a witness who testifies that he is somewhat familiar with railroad brakes and their operation, has used them and knows which are the best, is competent to testify as to the distance within which any given train can be stopped with a designated class of brakes and a given number of brakemen); Freeman v. Travelers' Ins. Co. 144 Mass. 572, 12 N. E. 372 (conductor competent to testify that train might have been stopped sooner than it was); Baltimore City Pass R. Co. v. Cooney, 87 Md. 261, 39 Atl. 859 (witness, who has been master mechanic of street railroad for many years, and as such has charge of its entire rolling-stock, competent to testify whether a boy could "steal a ride" on a given car in a certain manner).

PREGNANCY.

1. Judicial notice.
2. Presumption.
3. Opinion.
4. Inspection.

For kindred topics, see CHILD BEARING; CONDITION; FEELINGS; HEALTH.

1. Judicial notice.

A court may act on the common knowledge of mankind, and the presumption, amounting to almost a certainty, that a woman seventy years old cannot have a child.¹

¹ Re Lowman [1895] 2 Ch. 348, 64 L. J. Ch. N. S. 567, 12 Reports, 362, 72 L. T. N. S. 816.

The doctrine as to the possibility of issue extinct as affecting property rights is discussed in note in 48 L.R.A. (N.S.) 865.

See also Whitney v. Groo, 40 App. D. C. 496, and note in 27 Harvard L. Rev. 286.

2. Presumption.

There is no conclusive presumption that a woman under fifty years of age has ceased to have capacity to bear children.¹

- ¹ *Flora v. Anderson*, 67 Fed. 182. According to *Keller's Estate*, 11 Lanc. L. Rev. 185, the law presumes that the possibility of having children exists, even when a woman has passed the age to which the ability to do so usually continues, citing *List v. Rodney*, 83 Pa. 483.

3. Opinion.

A married woman who has borne children, and who had adequate opportunity of observing a woman, may testify whether her physical appearance was like that of other women when pregnant.¹

- ¹ *Doe v. Roe*, 32 Hun, 628 (so held of evidence in mitigation of slander in imputing unchastity).

In *Com. v. Thompson*, 159 Mass. 56, 33 N. E. 1111, the mother of a woman for whose death as the result of an attempt to commit an abortion defendant was being prosecuted was allowed to testify to certain changes in her daughter, and that they indicated to her that her daughter was pregnant.

In *Bois v. McAllister*, 12 Me. 308, where the opinion of witnesses that a woman "had been in a state of pregnancy" was excluded, the witnesses seem to have been men, and probably had less exact means of forming a judgment than a mother naturally would have. But they were allowed to testify to the indications.

To aid the jury in determining an issue as to whether pregnancy would probably result from the first intercourse of a woman, who had been raped, it is competent to ask the opinions of learned and experienced medical witnesses. *Young v. Johnson*, 46 Hun, 164.

4. Inspection.

Inspection by jury of matrons, or by medical expert.¹

- ¹ 1 Bishop, Crim. Pr. § 1324; 3 Harv. L. Rev. 45.

In *Kern v. Bridwell*, 119 Ind. 226, 21 N. E. 664, an action for slander, the alleged publication being that the plaintiff, an unmarried woman, was unchastened, and had become pregnant and had procured an abortion, an order requiring her to submit her person to a medical examination for the purpose of furnishing evidence under defendant's plea of justification was held to have been properly refused. And see generally, on the question of inspection and examination, notes in 14 L.R.A. 466 and 23 L.R.A. (N.S.) 463; *Civil Trial Brief* (4th ed.) pp. 425 *et seq.*

PREMISES.

For kindred topics, see **CONDITION**; **IDENTITY**.

Oral evidence.

Oral evidence is competent to show whether certain parts are or are not parcel of premises ambiguously described in any written instrument,¹ unless the ambiguity renders it void on its face for uncertainty.

¹ *Cary v. Thompson*, 1 Daly, 35; *Crawford v. Morris*, 5 Gratt. 98. See *Abbott* (3d ed.) pp. 434, 1890, 1894; *Atkinson v. Cummins*, 9 How. 479, 485, s. c., with note, 13 L. ed. 223, 227 (sheriff's deed; oral evidence of how mistake occurred, and what took place at the sale; and of the practical construction by the purchaser, etc., competent); *Sargent v. Adams*, 3 Gray, 72, 63 Am. Dec. 718 (oral evidence is admissible to explain a patent ambiguity in a written agreement to lease "for a term of ten years the 'Adams House,' so called," by showing that the intention of the parties was to include only that part of the building fitted up as a hotel by the name of "The Adams House," and not the separate stores which occupied the whole of the ground floor except the part used as an entrance to the hotel); *Hall v. Benner*, 1 Penr. & W. 402, 21 Am. Dec. 394 (error to exclude oral evidence offered to show whether a shop, dam, etc., were included in a sale of land; the court saying that when the extent of the claim is not apparent on the face of the deed, evidence of what is usually let or occupied with the land, mill, or manor conveyed is competent); *Frantz v. Ireland*, 66 Barb. 386 (description in judgment roll); *Patch v. White*, 117 U. S. 210, 29 L. ed. 860, 6 Sup. Ct. Rep. 617, 710. S. P., *Abbott, Tr. Ev.* (3d ed.) p. 434 (wills); *Christ v. Thompson*, 1 Sadler (Pa.) 562, 4 Atl. 8 (location of adjoining tracts, competent); *Dardonville v. Lewis*, 7 N. Y. Week. Dig. 188 (deed of adjoining tract not competent). See further, on this question, **AMBIGUITY**; **BOUNDARIES**.

PRESENCE.

1. Constructive.
2. Presumption of presence.

For kindred topics, see ABSENCE.

1. Constructive.

Presence for the purpose of proving the accused to have been a principal in a crime must be proved; but constructive presence is enough.¹

¹ *McCarney v. People*, 83 N. Y. 408, 413, 38 Am. Rep. 456. Folger, Ch. J., says: "Constructive presence is made out when it is shown that he acted with another in the pursuance of a common design; that he acted at one and the same time for the fulfilment of the same preconcerted end, and was so situated as to be able to give aid to his associate, with a view to insure the success of the common enterprise. A waiting and a watching at a convenient distance is enough; as if, in a case of larceny, he be placed where he may learn of the whereabouts and movements of the custodian of the property, and be prepared to lure him away, or to retard him, or to give timely warning of his approach."

2. Presumption of presence.

The recital in a journal entry of the hearing and determination of a matter, that a party excepted to the making of an order, raises the presumption that he was present either in person or by counsel.¹

¹ *Royal Trust Co. v. Exchange Bank*, 55 Neb. 663, 76 N. W. 425.

PRINTING.

1. Comparison.
2. Several impressions of same issue.

1. Comparison.

From a comparison of the types, devices, etc., of two newspapers, one of which is clearly proved, and the other imperfectly, the jury may infer that both were printed by the same person.¹

¹ McCorkle v. Binns, 5 Binn. 340, 6 Am. Dec. 420.

2. Several impressions of same issue.

It is enough to produce one copy with testimony that the copy to which the evidence relates was similar in all respects.¹

¹ Huff v. Bennett, 4 Sandf. 120; and see s. c., on appeal, 6 N. Y. 337 (libel).

PRIVILEGE.

1. Ordinary witnesses refusing to testify.
 - a. Privilege against self-incrimination.
 - b. Witnesses refusing to testify on grounds other than self-incrimination.
2. Husband and wife.
3. Physician and patient.
4. Attorney and client.
5. Child delinquent and juvenile court judge.

1. Ordinary witnesses refusing to testify.

a. *Privilege against self-incrimination.*—The Fifth Amendment of the Federal Constitution and the Constitutions of most states guarantee the privilege against self-incrimination. A witness may claim this constitutional privilege and refuse to testify

on the ground that he may incriminate himself,¹ but unless he does claim such protection the privilege is ordinarily held to be waived.² It is always proper for the court to caution the witness as to his privilege.³ In some jurisdictions it has been held to be the duty of the court to instruct where the witness was manifestly uninformed as to his rights,⁴ or even where such fact is not manifest,⁵ but the majority of the more recent decisions hold the court is not required to inform the witness.⁶ The better rule would seem to be to leave the matter to the trial court's discretion.⁷

The privilege of a man against self-incrimination does not act as "an exclusion of his body as evidence when it may be material,"⁸ nor does it exclude evidence as to his shoes or clothing.⁹ Where self-incriminating testimony is given under the protection of an immunity statute, it may ordinarily be admitted in evidence in a civil proceeding.¹⁰ The protection does not, however, extend to entries in public documents or records so as to excuse their production on the ground that the entries would incriminate the party making them.¹¹ Moreover, the privilege is purely personal and its protection does not extend to a corporation,¹² nor to a person to protect him from the use in evidence of corporate books produced by corporation of which said person was an officer.¹³

¹ *Emery's Case*, 107 Mass. 172, 9 Am. Rep. 22; *State v. Duncan*, 78 Vt. 364, 4 L.R.A.(N.S.) 1144, 112 Am. St. Rep. 992, 63 Atl. 225, 6 Ann. Cas. 602; *Thornton v. State*, 117 Wis. 338, 98 Am. St. Rep. 924, 93 N. W. 1107; *Gillespie v. State*, 5 Okla. Crim. Rep. 546, 35 L.R.A.(N.S.) 1171, 115 Pac. 620, Ann. Cas. 1912D, 259.

² *State v. Duncan*, 78 Vt. 364, 4 L.R.A.(N.S.) 1144, 112 Am. St. Rep. 922, 63 Atl. 225, 6 Ann. Cas. 602; *State v. Lloyd*, 152 Wis. 24, 139 N. W. 514, Ann. Cas. 1914C, 514. For general discussion of this question see notes in 4 L.R.A.(N.S.) 1144; 15 Columbia L. Rev. 340; and 11 Mich. L. Rev. 534.

Waiver of the privilege at a preliminary hearing or before the grand jury does not, however, constitute a waiver at the trial: *People v. Cassidy*, 213 N. Y. 388, 107 N. E. 713, Ann. Cas. 1916C, 1009; although the evidence at the earlier hearing is admissible against the defendant. See also note in 15 Columbia L. Rev. *supra*.

³ *State v. Dangelo*, 182 Iowa, 1253, 166 N. W. 587; *Dunn v. State*, 99 Ga. 211, 25 S. E. 448; *Emery v. State*, 101 Wis. 627, 78 N. W. 145.

- ⁴ *United States v. Bell*, 81 Fed. 830, 853; *Ivy v. State*, 84 Miss. 264, 36 So. 265; *Bowen v. State*, 47 Tex. Crim. Rep. 137, 82 S. W. 520.
 - ⁵ *People v. Maloy*, 204 Mich. 524, 170 N. W. 690, where in a prosecution for adultery, testimony of accused taken in a previous divorce proceeding was held improperly admitted on the ground that when the former testimony was given he was an involuntary witness under subpoena and had not then been warned as to his privilege.
 - ⁶ *Hanson v. Adrian*, 126 Minn. 298, 148 N. W. 276; *Brown v. State*, 108 Miss. 478, 66 So. 975; *Com. v. Shaw*, 4 Cush. 594, 50 Am. Dec. 813.
 - ⁷ *Wigmore*, Ev. § 2269; note in 33 Harvard L. Rev. 119.
 - ⁸ *Holt v. United States*, 218 U. S. 245, 54 L. ed. 1021, 31 Sup. Ct. Rep. 2.
 - ⁹ *State v. Barela*, 23 N. M. 395, L.R.A.1918B, 844, 168 Pac. 545; note in 16 Mich. L. Rev. 265. See also title FINGER PRINTS, PALM PRINTS AND FOOT PRINTS.
 - ¹⁰ *Re Biggers*, 24 Okla. 842; 25 L.R.A.(N.S.) 622, 104 Pac. 1083; note in 25 L.R.A.(N.S.) 622.
- For general note on the protection against being forced to furnish evidence to be used against oneself in a civil suit, see 29 L.R.A. 811.
- ¹¹ *Wilson v. United States*, 221 U. S. 361, 55 L. ed. 771, 31 Sup. Ct. Rep. 538, Ann. Cas. 1912D, 558; *Burnett v. State*, 8 Okla. Crim. Rep. 639, 47 L.R.A.(N.S.) 1175, 129 Pac. 1110; *Manning v. Mercantile Securities Co.* 242 Ill. 584, 30 L.R.A.(N.S.) 725, 90 N. E. 238; notes in 30 L.R.A.(N.S.) 725 and 11 Mich. L. Rev. 614.
 - ¹² *United States v. Philadelphia & R. R. Co.* 225 Fed. 301.
 - ¹³ *Heike v. United States*, 227 U. S. 131, 57 L. ed. 450, 33 Sup. Ct. Rep. 226, Ann. Cas. 1914C, 128.

b. Witnesses refusing to testify on grounds other than self-incrimination.—A witness cannot refuse to testify on the ground that the statute under which the investigation was being conducted was unconstitutional,¹ for as a witness he is not prejudiced and therefore is not a proper person to raise the question of constitutionality.²

Unless justice to the litigants renders the disclosure vitally necessary the witness may be excused from giving testimony tending to degrade him,³ or relating to trade secrets.⁴

The broad principle that the public has a right to every man's testimony extends according to the weight of authority even to an expert testifying in a controversy between private litigants.⁵

¹ *Blair v. United States*, 250 U. S. 273, 63 L. ed. 979, 39 Sup. Ct. Rep. 468.

² *Blair v. United States*, supra; *Wilkinson v. Children's Guardians*, 158 Ind. 1, 62 N. E. 481. See also note in 33 Harvard L. Rev. 119.

³ *Walters v. Seattle, R. & S. R. Co.* 48 Wash. 233, 24 L.R.A.(N.S.) 788, 93 Pac. 419.

⁴ *Crocker-Wheeler Co. v. Bullock*, 134 Fed. 241, 245; *Herreshoff v. Knietsch*, 127 Fed. 492. See also *Wigmore*, Ev. § 3212.

⁵ *Dixon v. People*, 168 Ill. 179, 39 L.R.A. 116, 48 N. E. 108; *Philler v. Waukesha County*, 139 Wis. 211, 25 L.R.A.(N.S.) 1040, 131 Am. St. Rep. 1055, 120 N. W. 829, 17 Ann. Cas. 712; *Burnett v. Freeman*, 134 Mo. App. 709, 115 S. W. 488.

See also note in 19 *Columbia L. Rev.* 253.

2. Husband and wife.

It is a generally recognized rule of law that confidential communications between husband and wife are privileged and cannot be divulged by either,¹ regardless of the purpose for which such evidence is offered,² and even if husband and wife are made competent witnesses against one another by statute.³ The privilege continues after the death⁴ or divorce.⁵ But to fall within the privilege the communications must be of a confidential character,⁶ and therefore the privilege should not cover statements made by either spouse in presence of third person.⁷ Since the privilege was created for their protection the husband and wife should have power to waive the privilege.⁸ The privilege may also be waived by the opposite party calling one spouse as a witness.⁹ The testimony of husband or wife obtained by a grand jury in violation of the privilege cannot be used for impeachment.¹⁰ The privilege applies in criminal cases¹¹ but where a husband pleads guilty and does not protest his wife has been allowed to testify against his codefendants.¹²

¹ *Sexton v. Sexton*, 129 Iowa, 487, 2 L.R.A.(N.S.) 708, 105 N. W. 314.

² *Baldwin v. Parker*, 99 Mass. 79, 96 Am. Dec. 697; note in 29 Am. St. Rep. 412.

³ *McCormick v. State*, 135 Tenn. 218, L.R.A.1916F, 382, 186 S. W. 95.

⁴ *Whitehead v. Kirk*, 104 Miss. 776, 51 L.R.A.(N.S.) 187, 61 So. 737, 62 So. 432, Ann. Cas. 1916A, 1051, and note in 51 L.R.A.(N.S.) 187.

⁵ *Mahlstedt v. Ideal Lighting Co.* 271 Ill. 154, 110 N. E. 795, Ann. Cas. 1917D, 209, 12 N. C. C. A. 499.

⁶ *Whitford v. North State L. Ins. Co.* 163 N. C. 223, 79 S. E. 501, Ann. Cas. 1915B, 270; note in Ann. Cas. 1916A, 1061.

⁷ *Hostetter v. Green*, 159 Ky. 611, L.R.A.1915C, 870, 167 S. W. 919. See also note by Prof. Wigmore, 7 Ill. L. Rev. 512, criticizing decisions in *Stephens v. Collison*, 256 Ill. 238, 99 N. E. 914, and *Donnan v. Donnan*, 256 Ill. 244, 99 N. E. 931.

⁸ *Stickney v. Stickney*, 131 U. S. 227, 33 L. ed. 136, 9 Sup. Ct. Rep. 677. See also *Ward v. New York L. Ins. Co.* 225 N. Y. 314, 122 N. E. 207,

as to competency of widow to testify as to assignment of policy from husband, and see note in 7 Ill. L. Rev. *supra*.

⁹ *Childress v. Childress*, 298 Ill. 185, 131 N. E. 586.

¹⁰ *Doggett v. State*, 86 Tex. Crim. Rep. 98, 215 S. W. 454.

¹¹ *People v. Holtz*, 294 Ill. 143, 128 N. E. 341.

¹² *Knoell v. United States*, 152 C. C. A. 66, 239 Fed. 16.

3. Physician and patient.

Communications between physician and patient are made privileged by statute¹ in order to encourage the patient to make a full disclosure to the physician.² The privilege extends to hospital records.³

By the weight of authority this privilege may be waived by the patient⁴ although some courts hold on grounds of public policy that this cannot be done.⁵ A patient does not waive the privilege by voluntarily testifying to his own symptoms,⁶ but he may waive by permitting the physician to testify.⁷ Some courts hold the privilege may be waived by the beneficiary after the patient's death,⁸ while others hold the privilege is a personal one, and therefore cannot be thus waived.⁹

¹ *William Laurie Co. v. McCullough*, 174 Ind. 477, 90 N. E. 1014, 92 N. E. 337, Ann. Cas. 1913A, 49.

² *Booren v. McWilliams*, 26 N. D. 558, 145 N. W. 410, Ann. Cas. 1916A, 388.

³ *Massachusetts Mut. L. Ins. Co. v. Michigan Asylum*, 178 Mich. 193, 51 L.R.A.(N.S.) 22, 144 N. W. 538, Ann. Cas. 1915D, 146; *Price v. Standard Life & Acci. Ins. Co.* 90 Minn. 264, 95 N. W. 1118.

⁴ *Epstein v. Pennsylvania R. Co.* 250 Mo. 1, 48 L.R.A.(N.S.) 394, 156 S. W. 699, Ann. Cas. 1915A, 423. See also note in Ann. Cas. 1918A, 1051.

⁵ *Gilchrist v. Mystic Workers*, 188 Mich. 466, 154 N. W. 575, Ann. Cas. 1918C, 757.

⁶ *Arizona & N. M. R. Co. v. Clark*, 235 U. S. 669, 59 L. ed. 415, L.R.A. 1915C, 834, 35 Sup. Ct. Rep. 210. See also notes in 28 Harvard L. Rev. 532 and 15 Columbia L. Rev. 199.

Contra: *McKenney v. American Locomotive Co.* 164 App. Div. 625, 149 N. Y. Supp. 826.

⁷ *Epstein v. Pennsylvania R. Co.* 250 Mo. 1, 48 L.R.A.(N.S.) 394, 156 S. W. 699, Ann. Cas. 1915A, 423.

It has even been held that where he permits one physician to testify he waives as to all other physicians. *State v. Long*, 257 Mo. 199, 165 S. W. 748.

But see *Contra*: *Jones v. Caldwell*, 20 Idaho, 5, 48 L.R.A.(N.S.) 119, 116 Pac. 110, and note in 28 Harvard L. Rev. 116.

• **Johnson v. Fidelity & C. Co.** 184 Mich. 406, L.R.A.1916A, 475, 151 N. W. 593, and note in 7 A.L.R. 1141.

See also note in 19 Mich. L. Rev. 202.

• **Maine v. Maryland Casualty Co.** 172 Wis. 350, 15 A.L.R. 1536, 178 N. W. 749.

4. Attorney and client.

Communications made to an attorney in his professional character by a client are privileged and cannot be divulged without the client's consent.¹ Nor can the client be compelled to divulge them,² although in the absence of statute he always has the right to waive the privilege.³ The privilege continues after death, so where a testator makes his attorney an attesting witness to his will, the attorney's testimony as to a communication relating to the drafting of the will is inadmissible.⁴ The privilege holds even where the attorney and client are co-trustees.⁵ A statement made by a person injured to carriers' attorney on belief that it was her own comes within the protection of the privilege and cannot be used.⁶ Nor can an attorney be compelled to disclose the identity of his client.⁷

¹ **Grant v. Harris**, 116 Va. 642, 82 S. E. 718, Ann. Cas. 1916D, 1081.

² **Duttenhofer v. State**, 34 Ohio St. 91, 32 Am. Rep. 362.

³ **Re Young**, 33 Utah, 382, 17 L.R.A.(N.S.) 108, 94 Pac. 731, 126 Am. St. Rep. 843, 14 Ann. Cas. 596; **Grant v. Harris**, *supra*.

⁴ **Anderson v. Searles**, 93 N. J. L. 227, 107 Atl. 429. See also note in 20 Columbia L. Rev. 216.

⁵ **Re Whitworth** [1919] 1 Ch. 320, 88 L. J. Ch. N. S. 560, 120 L. T. N. S. 519. See also note in 33 Harvard L. Rev. 120.

⁶ **Feuerheerd v. London General Omnibus Co.** [1918] 2 K. B. 565, 62 Sol. Jo. 753, 53 L. Jo. 332, 145 L. T. Jo. 312. See also note in 32 Harvard L. Rev. 290.

⁷ **Ex parte McDonough**, 170 Cal. 230, L.R.A.1916C, 593, 149 Pac. 566, Ann. Cas. 1916E, 327.

5. Child delinquent and juvenile court judge.

Where a child makes a statement in confidence to a juvenile court judge, such a statement should be treated as a privileged communication,¹ although it has been held that if the child waives the privilege and consents to the judge testifying, the latter is guilty of contempt for refusing to do so.²

¹ Note in 33 Harvard L. Rev. 88.

² **Lindsey v. People**, 66 Colo. 343, 16 A.L.R. 1250, 181 Pac. 531.

QUALITY.

1. Direct question.
2. Comparison; reference to other specimen.
3. Inspection in court.

For kindred topics, see **ADULTERATION**; **CONDITION**; **CONSTRUCTION**; **IDENTITY**.

1. Direct question.

On a subject not within the common knowledge and experience of men in the ordinary walks of life and of common education,¹ an expert witness,² who has testified to the facts, may be asked directly as to quality, as, for instance, whether cabinet work was a good job, and well done;³ or whether a specified invention was equal to the best.⁴

¹ Thus, whether or not two certain pieces of cloth are of the same texture and quality is a proper subject for expert testimony. *People v. Lovren*, 119 Cal. 81, 51 Pac. 22, 638.

So held, also, of the quality and condition of an article imported for a particular purpose and requiring the existence of certain special conditions in order that the grade of its quality and condition in the market may be determined. *Littlejohn v. Shaw*, 159 N. Y. 188, 53 N. E. 810 (cube gambier).

² The competency to testify to quality is not confined to professional experts; but such testimony is received from any person having a practical conversance with articles of the kind in question,—as when a witness is familiar with them from having handled or dealt in them for many years. *Littlejohn v. Shaw*, 159 N. Y. 188, 53 N. E. 810; *People v. Lovren*, 119 Cal. 88, 51 Pac. 22, 638 (dealer in cloths like the one in question).

So, farmers and dairymen well acquainted with milk, and showing themselves competent to judge whether it was diluted or not, are competent to testify whether milk looked and tasted like milk and water. *Lane v. Wilcox*, 55 Barb. 615.

One who has been a miller for more than twenty years, and has been accustomed to use a process for analyzing flour that is also used by others more or less is competent to testify as to the quality of the flour, although not a practical chemist. *Davis v. Mills*, 163 Mass. 481, 40 N. E. 852. And in *Reed Bros. v. Davis Mill Co.* 37 Neb. 391, 55 N. W. 1068, a witness engaged in selling flour in different markets, and acquainted with the price at the place where the flour was sold for the price of which the action is brought, was held qualified.

And one who drank beer may be required to say whether he thought it was lager beer. *Com. v. Moinehan*, 140 Mass. 463, 5 N. E. 259.

In an action for the price of jewelry, the order for which the buyer has attempted to rescind, expert evidence is admissible to show that articles in the order were marked so as to indicate that they were made of better material than that actually used. *Loveland v. Dinnan*, 81 Conn. 111, 17 L.R.A.(N.S.) 1119, 70 Atl. 634.

³ *Ward v. Kilpatrick*, 85 N. Y. 413, 416.

Under a contract of purchase of an article of merchandise of a specified grade, which contract was couched in technical terms and abbreviations, plaintiff tendered with the goods a certificate of the quality by certain chemists. Held, in an action for the unpaid price, that it was competent to prove the meaning of the technical terms of the contract according to the custom of the trade, and that by such custom the certificate offered was recognized as evidence of quality. *Baker v. Squier*, 1 Hun, 448, 3 Thomp. & C. 465. Compare MEASURE.

⁴ *Scattergood v. Wood*, 79 N. Y. 263, 35 Am. Rep. 515.

2. Comparison; reference to other specimen.

On the question of the quality of an article it is competent to prove the quality of another, if evidence be also given that the two were of the same quality.¹ Otherwise not.²

¹ *Ames v. Quimby*, 106 U. S. 342, 27 L. ed. 100, 1 Sup. Ct. Rep. 116 (goods furnished to another person, proved to be of same quality as those furnished to the party).

Thus, evidence is admissible in an action for wood sold, in which defendant claims that the wood was not of the quality specified in the contract, to show the merchantable quality of wood of the same grade cut from the same place, and on hand a day or two before the trial and sometime after a delivery of the wood sued for. *Barr v. Borthwick*, 19 Or. 578, 25 Pac. 360.

² *Albany & R. Iron & S. Co. v. Lundberg*, 121 U. S. 451, 30 L. ed. 982, 7 Sup. Ct. Rep. 958 (evidence as to product of mine in previous years, incompetent without showing identity of quality); *Fillo v. Jones*, 2 Abb. App. Dec. 121, 4 Keyes, 328 (holding thus also of fireworks); *Campbell v. Russell*, 139 Mass. 278, 1 N. E. 345 (different houses); *Morawetz v. McGovern*, 68 Wis. 312, 32 N. W. 290 (construction of ice boxes).

3. Inspection in court.

On the question of the quality of a thing which requires testimony of experts,—such as the mortar used in a building which fell,—a sample may be exhibited to the jury, and a specimen of a good article of the same kind, proved to be good, may be shown them for comparison.¹

¹ *People v. Buddensieck*, 103 N. Y. 487, 498, 57 Am. Rep. 766, 9 N. E. 44, affirming 4 N. Y. Crim. Rep. 230, 262.

QUANTITY.

1. Direct testimony.
2. Recount.
3. Comparison.

For kindred topics, see MEASURE; WEIGHT.

1. Direct testimony.

Quality is a subject in reference to which a witness may testify directly upon personal observation.¹ And a question calling for the witness's answer to the best of his judgment is not objectionable as calling for mere opinion.²

¹ *Bass Furnace Co. v. Glasscock*, 82 Ala. 452, 60 Am. Rep. 748, 2 So. 315; *Collins v. New York C. & H. R. R. Co.* 109 N. Y. 243, 16 N. E. 50, reversing 23 N. Y. Week. Dig. 154, for exclusion of such question.

² *Townsend v. Brundage*, 6 Thomp. & C. 527.

Compare *Thomas v. Kenyon*, 1 Daly, 132 (nonexpert not competent to testify to quantity of rain falling on specified area).

The opinion of a witness as to the quantity of goods burned, formed from an inspection of the *débris*, is inadmissible. *Birmingham F. Ins. Co. v. Pulver*, 27 Ill. App. 17, affirmed in 126 Ill. 329, 18 N. E. 804. Proof of the amount and appearance of the *débris*, and all other conditions manifest upon the premises after the fire, would be proper.

A witness in testifying as to the quantity and value of wheat alleged to have been destroyed by fire should be confined to his individual knowledge and judgment, and not permitted to give the estimate or conclusion of another person, who also made an examination as to quantity and value. *Atchison, T. & S. F. R. Co. v. Osborn*, 58 Kan. 768, 51 Pac. 286.

Persons acquainted with a certain sawmill and its capacity may testify as to the quantity of logs that can be sawed each day. *Fletcher v. Prestwood*, 143 Ala. 174, 38 So. 947.

In a case involving a change of the center line of a river after it had been surveyed, but without a new survey, a witness familiar with the locality was permitted to give his opinion as to the number of acres on one side of the river. *Dashiel v. Harshman*, 113 Iowa, 283, 85 N. W. 85.

2. Recount.

To show a mistake in a count it is competent to prove a

recount made by another person, though at a different place and time.¹

¹ *Standard Oil Co. v. Van Etten*, 107 U. S. 325, 332, 27 L. ed. 319, 321, 1 Sup. Ct. Rep. 178 (holding that, in the absence of evidence, it would not be presumed that any articles were lost in course of transmission to such other place, by regular shipment).

3. Comparison.

To prove a quantity not exactly known it is competent to show how far it went as materials for given work, the quantity required for which is known.¹

¹ *Miller v. Shay*, 142 Mass. 598, 8 N. E. 419 (quantity of sand shown by number of casks of lime used with it in making mortar). S. P., MEASURE, § 2.

RATIFICATION.

1. Allegation.
2. How proved.
3. Executory contract.
4. Legal effect.
5. Aid by evidence of agency.
6. Silence on receipt of letter.
7. What may be ratified.

For kindred topics, see **AQUIESCENCE**; **AGENCY**; **CORROBORATION**.

1. Allegation.

Under allegation of authority evidence of subsequent ratification is admissible.¹

¹ *Hoyt v. Thompson*, 19 N. Y. 207; *Hoosac Min. & Mill. Co. v. Donat*, 10 Colo. 529, 16 Pac. 157; *Seal v. Puget Sound Loan & Invest. Co.* 5 Wash. 422, 32 Pac. 214.

In *Bremner v. Fields*, — Tex. Civ. App. —, 34 S. W. 447, evidence of ratification was held admissible under allegations which would sustain an action on the instrument sued on if its execution had been duly authorized, a plea of ratification not being necessary.

2. How proved.

To prove ratification there must be either evidence that the acts relied on as constituting the ratification were done with full knowledge of all the material facts,¹ in which case intent to ratify need not be shown, and evidence to negative intent is incompetent;² or evidence of acts or declarations manifesting a decisive intent to assume responsibility for the act claimed to be ratified,³ in which case the party proving ratification need not in the first instance give evidence that the party ratifying had knowledge of the facts.

¹ *Nixon v. Palmer*, 8 N. Y. 398, 401; *Ritch v. Smith*, 82 N. Y. 627, 60 How. Pr. 159, reversing 60 How. Pr. 157 (acceptance of part of principal on mortgage [paid agent before it was due] without knowing that such payments were in consideration of an extension, no evidence of ratification of agent's authority to extend); *Owings v. Hull*, 9 Pet. 607, 9 L. ed. 246 (holding evidence of the communications between them competent, to show knowledge; and error to instruct the jury that if the principal ratified his agent's act it was immaterial whether he knew of the facts or not); *Bloomfield v. Charter Oak Nat. Bank*, 121 U. S. 121, 30 L. ed. 923, 7 Sup. Ct. Rep. 865; *Wheeler v. McGuire*, 86 Ala. 398, 2 L.R.A. 808, 5 So. 190; *Russell v. Erie R. Co.* 70 N. J. L. 808, 67 L.R.A. 433, 59 Atl. 150, 1 Ann. Cas. 672.

Effect of principal's performance of part of contract in ignorance of unauthorized provisions inserted by his agent, as ratification of latter, see note in 29 L.R.A.(N.S.) 210.

² *Hazard v. Spears*, 2 Abb. App. Dec. 353 (sustaining refusal to instruct the jury that if the principal did not intend by his silence with knowledge of the facts to ratify, there was no ratification).

³ *Ahern v. Goodspeed*, 72 N. Y. 108, affirming 9 Hun, 263.

3. Executory contract.

Knowledge need not be shown, but constructive notice is enough, in case of a continuing course of transaction, as distinguished from a past and completed transaction.¹

¹ *Higgins v. Armstrong*, 9 Colo. 38, 10 Pac. 232.

Compare *Murray v. C. N. Nelson Lumber Co.* 143 Mass. 250, 9 N. E. 634.

4. Legal effect.

It is not necessary to show knowledge of the legal effect of the facts,¹ except in case of a ratification by a *cestui que trust* of an act by the trustee in contravention of his duty.²

¹ Kelley v. Newburyport & A. Horse R. Co. 141 Mass. 496, 6 N. E. 745.

² Hoffman Steam Coal Co. v. Cumberland Coal & I. Co. 16 Md. 456, 508, 77 Am. Dec. 311. (The court said: "At the time of the supposed ratification, the principal must have been fully aware of every material circumstance of the transaction, the real value of the subject of the contract, and his act of ratification must have been an independent and substantive act founded on complete information and of perfect freedom and volition. And in addition to all this the *cestui que trust* must not only have been acquainted with the facts, but apprised of the law how those facts would be dealt with if brought before a court of equity," citing Lewin, Tr. ed. 1858, p. 615.)

5. Aid by evidence of agency.

Where an agency actually exists, slight evidence is sufficient;¹ and mere acquiescence of the principal raises the presumption of an intentional ratification of the act.² The relation of husband and wife between the parties strengthens the presumption.³

¹ St. James Parish v. Newburyport & A. Horse R. Co. 141 Mass. 500, 6 N. E. 749.

² Fowler v. Lockwood, 3 Redf. 465. And see cases in note to Wheeler v. McGuire (Ala.) 2 L.R.A. 808 *et seq.*

³ Fowler v. Lockwood, 3 Redf. 465.

6. Silence on receipt of letter.

Where an agent has exceeded his authority, an intention to ratify will be presumed from the silence of the principal, after receiving a letter informing him what has been done; and this is a legal presumption which, in the absence of other evidence, is conclusive.¹

¹ Field v. Farrington, 10 Wall. 141, 19 L. ed. 923 (as to the latter point, a *dictum*). See more fully note to Wheeler v. McGuire (Ala.) 2 L.R.A. 808. And see note to Ward v. Williams (Ill.) 79 Am. Dec. 387.

7. What may be ratified.

The doctrine of ratification enables one to take the benefit of an act done in his behalf by another person; and such ratification may be presumed in furtherance of justice.¹

But it does not enable one to take the benefit of a fraudulent act done in his name, but not for his benefit.²

¹ *Bennett v. Hunter*, 9 Wall. 326, 338, 19 L. ed. 672, 676, Followed in *Tacey v. Irwin*, 18 Wall. 549, 21 L. ed. 786. And see cases in note to *Dempsey v. Chambers* (Mass.) 13 L.R.A. 219.

² *Garvey v. Jarvis*, 46 N. Y. 310, 7 Am. Rep. 335, affirming 54 Barb. 179 (unless there has been some estoppel, or some injury to the rights of the assumed principal).

And see AGENCY, § 20.

REASON.**Right to prove.**

When the circumstances of an act, the significance of which depends upon intent, have been proved by one party, the other party has a right to prove by the witness, whose intent is in question, the reason for any relevant circumstances.¹

¹ *National Bank of the Metropolis v. Kennedy*, 17 Wall. 19, 26, 21 L. ed. 554, 556. (The court says: "Whatever it was, the reason should go with the fact").

A wife may testify as to her reason for not living with her husband.
Millspaugh v. Potter, 62 App. Div. 521, 71 N. Y. Supp. 134.

A lineman ascending a curved telegraph pole was struck by a street car and injured. As a reason for his act in ascending that side of the pole he was permitted to say that he considered it the safe side. *Ahearn v. Boston Elev. R. Co.* 194 Mass. 350, 80 N. E. 217.

REASONABLENESS.

1. Reasonable diligence.
2. Reasonable time.

1. Reasonable diligence.

If the facts are disputed, or, being undisputed, are of such a nature that reasonable men might differ in regard to the inferences proper to be drawn from them, then those inferences are to be drawn by a jury, under proper instructions from the court.¹

¹ Mead v. Parker, 22 Abb. N. C. 129, 133.

2. Reasonable time.

If there is no conflict in the evidence as to the facts on which reasonable time depends, the question is for the court.¹

If there is such conflict (and the rule should be the same where credibility of testimony is in doubt), the question is a mixed one of law and fact.²

¹ Wiggins v. Burkham, 10 Wall. 129, 19 L. ed. 884; Wright v. Bank of the Metropolis, 110 N. Y. 237, 249, 1 L.R.A. 289, 18 N. E. 79; Holt on Concurrent Jurisdiction, 149, § 129, says that this is not the rule in New York; but this is a misapprehension, and the cases cited do not sustain that statement. Travelers' Ins. Co. v. Myers, 62 Ohio St. 529, 49 L.R.A. 760, 57 N. E. 458; Turner v. Iron Chief Min. Co. 74 Wis. 355, 5 L.R.A. 533, 17 Am. St. Rep. 168, 43 N. W. 149; Normile v. Northern P. R. Co. 36 Wash. 21, 67 L.R.A. 271, 77 Pac. 1087.

² Standard Oil Co. v. Van Etten, 107 U. S. 325, 27 L. ed. 319, 1 Sup. Ct. Rep. 178.

REBUTTAL.

1. The right.
2. Cumulative testimony in rebuttal.
3. Allegation.
4. Anticipatory rebuttal.

For kindred topics, see **CAUSE**; **CORROBORATION**; **OPINIONS**.

1. The right.

A party has a right to give evidence in rebuttal which tends to meet the affirmative case, if any, sought to be established by his adversary,¹ and it is error to refuse it;² and it is no objection to such evidence that it may necessitate allowing the adverse party a surrebuttal.³

¹ *Louisville Underwriters v. Durland*, 123 Ind. 544, 7 L.R.A. 399, 24 N. E. 221; *Sebastian May Co. v. Codd*, 77 Md. 293, 26 Atl. 316; *Bounds v. Little*, 79 Tex. 128, 15 S. W. 225.

As to what constitutes a proper case in which evidence in rebuttal is competent within this rule, see *Robinson v. Parker*, 11 App. D. C. 132 (introduction of pleadings in former case by defendant after plaintiff had closed his direct, as admissions by plaintiff); *Kramer v. Messner*, 101 Iowa, 88, 69 N. W. 1142 (evidence that plaintiffs used the kind and grade of coal defendants directed them to use after defendants had complained of that which plaintiffs were using, and that results were no better, competent to rebut evidence by defendants that the failure of the steam heating plant put in by them was due to the use of improper coal); *Edwards v. Three Rivers*, 102 Mich. 153, 60 N. W. 454 (testimony that plaintiff, injured by stepping into a hole in the sidewalk, has been lame for many years and had varicose veins: testimony of acquaintance showing absence of such conditions competent in rebuttal).

² *Chase v. Lee*, 59 Mich. 237, 26 N. W. 483; *Odell v. McGrath*, 21 App. Div. 252, 47 N. Y. Supp. 601.

It is error to refuse plaintiff in ejectment permission to put in evidence to rebut that of defendant tending to show title by adverse possession. *Jennings v. Gorman*, 19 Mont. 545, 48 Pac. 1111.

³ *Scott v. Woodward*, 13 S. C. L. (2 M'Cord) 161.

For the general treatment of this question, see *Civil Trial Brief* (4th ed.) pp. 175 *et seq.*

2. Cumulative testimony in rebuttal.

If the testimony of a witness on direct, to a fact in issue, has been directly contradicted by the adversary's evidence in reply, the party who adduced the testimony may be allowed on rebuttal to call another witness to prove the same fact.¹

¹ *Chadbourn v. Franklin*, 5 Gray, 312; *Green v. Gould*, 3 Allen, 465; *Sherwood v. Titman*, 55 Pa. 77 (held, that as defendant had introduced evidence of a conversation between plaintiff and his wife for the purpose of showing their voluntary separation, this entitled plaintiff, not by way of contradiction merely, but as independent rebutting testimony, to prove by another witness that in that conversation plaintiff declared that his wife's misconduct with defendant was the reason which led him to the separation). See also *Civil Trial Brief* (4th ed.) p. 176.

If defendant has exhibited a model as evidence to meet plaintiff's testimony in chief that the machine in question would not work, plaintiff has a right in rebuttal to show by experts that a machine constructed according to the model would not work, although plaintiff denies the model's correctness. *Hayward v. Draper*, 3 Allen, 551.

Where, upon the question whether the signature to a note sued upon was forged, the plaintiff puts in evidence two letters, with proof, not by experts, that they are in the maker's handwriting, and the defendant calls experts who testify the other way, it is in the discretion of the court to allow the plaintiff to call an expert to testify that, in his opinion, the signature is genuine. *Costello v. Crowell*, 133 Mass. 352. In *Daniels v. Smith*, 130 N. Y. 696, 29 N. E. 1098, where plaintiff had, without objection, testified to the contents of a writing, and defendant had contradicted that testimony, plaintiff was allowed to call a witness who was present at the delivery of the writing to testify to its contents.

3. Allegation.

Evidence may be legal, as rebutting testimony to repel a charge of fraud, which would have been inadmissible as original evidence, upon the ground of the variance between the allegations and the proof.¹

¹ *Zacharie v. Franklin*, 12 Pet. 151, 163, 9 L. ed. 1035, 1040 (admitting evidence of a prior gift, to rebut an attempt to impeach a bill of sale for fraud, etc.).

4. Anticipatory rebuttal.

A party may properly be allowed, as part of his case in

chief, to give evidence to rebut matter which his adversary avows an intention of relying on.¹ But he is not required to do so.²

If he does so he makes it part of his case, and further evidence on the point is not of right allowable in rebuttal.³

¹ *Dunn v. People*, 29 N. Y. 523, 86 Am. Dec. 319 (the avowal here was in answer to a question put by the judge): *Jones v. New York, N. H. & H. R. Co.* 20 R. I. 210, 37 Atl. 1033; *York v. Pease*, 2 Gray, 282. And see *Civil Trial Brief*, (4th ed.) p. 175.

² *Dodge v. Dunham*, 41 Ind. 186; *Bancroft v. Sheehan*, 21 Hun, 550.

³ *Casey v. Le Roy*, 38 Cal. 697; *Dugan v. Anderson*, 36 Md. 567, 588, 11 Am. Rep. 509.

REGULARITY.

See also FORGOTTEN FACT; OFFICIAL CHARACTER AND ACTS.

Bank business.

The presumption of regularity applies, after the lapse of a considerable time, to sustain an inference that the duties of bank officers have been performed and business done in accordance with the custom and course of business of the bank.¹

¹ *Knickerbocker L. Ins. Co. v. Pendleton*, 115 U. S. 339, 344, 29 L. ed. 432, 8 Sup. Ct. Rep. 74.

RESCISSION.

Delay.

Delay in rescinding is an election to affirm.¹

¹ Strong v. Strong, 102 N. Y. 69, 5 N. E. 799.

As to rescission of contracts generally, see the cases collected in note to Metropolitan Elev. R. Co. v. Manhattan R. Co. 14 Abb. N. C. 301; and in notes in 30 L.R.A. 33, 1 L.R.A. 826, 6 L.R.A. 503, 9 L.R.A. 607, 17 L.R.A. 779, 33 L.R.A. 721, and 21 L.R.A. (N.S.) 691.

RESIDENCE.

1. **What constitutes residence.**
 - a. **In general.**
 - b. **Voting residence.**
 - (1) **In general.**
 - (2) **Student voting.**
 - (3) **Residences of teachers, ministers, and soldiers.**
 - (4) **Residences of transient workmen.**
2. **Direct testimony.**
3. **General reputation.**
4. **Declarations and conduct.**
5. **Place of business.**
6. **Absence.**
7. **Fugitive from justice.**
8. **Instrument executed out of the jurisdiction.**
9. **Deposition.**
10. **Presumption of continuance.**
11. **Burden of proof.**

For kindred topics, see ABSENCE; DOMICIL; FICTITIOUS PERSONS.

1. **What constitutes residence.**

a. In general.—The decree of fixity of abode requisite to constitute residence varies according to the legal purpose for which the word is used.¹

¹ Residence for purpose of qualification to hold office. *People v. Platt*, 46 Hun, 394.

Residence for purpose of mailing notice of protest. *Lee v. Boston*, 2 Gray, 484.

Residence for purpose of taxation. *Borland v. Boston*, 132 Mass. 89, 93, 95, 42 Am. Rep. 424; *Tazewell County v. Davenport*, 40 Ill. 197.

Residence for purpose of securing a homestead. *Skinner v. Hall*, 69 Cal. 195, 10 Pac. 406 (sleeping alone in a house one night held sufficient evidence).

Residence for purpose of identification of one of several persons of the same name. *Abbott*, Tr. Ev. (3d ed.) p. 286.

Residence entitling children to privileges of public schools. See notes to Com. ex rel. *Fry v. Upper Swatara Twp. School Directors*, 26 L.R.A. 581; and in 36 L.R.A.(N.S.) 341; and 51 L.R.A.(N.S.) 234.

Residence for purpose of divorce suit. See cases collected in notes in 16 L.R.A. 497, 12 L.R.A.(N.S.) 1100; 28 L.R.A.(N.S.) 992; and L.R.A.1915D, 852.

Nonresidence for purpose of civil arrest. *Frost v. Brisbin*, 19 Wend. 11, 13, 32 Am. Dec. 423.

Nonresidence for purpose of attachment and garnishment. Cases collected in notes in 19 L.R.A. 577; 1 L.R.A.(N.S.) 778, and L.R.A.1915A, 400.

Nonresidence within statute of limitations. Cases collected in notes to 17 L.R.A. 225, and 47 L.R.A.(N.S.) 309.

b. Voting residence. (1) In general. — In determining whether a person is qualified to vote or not as having been a "resident" of the state and voting precinct for the statutory period, proof of the party's intent is one of the principal factors.¹ This intent is to be gathered from all the circumstances.² The testimony of the party himself or his previous declarations as to intent are admissible,³ but not controlling.⁴ Residence for voting purposes is generally held to be synonymous with domicile⁵ or home.⁶ There can be only one such residence at a time,⁷ and to constitute a change to a new residence there must be an abandonment of the old.⁸

¹ *Welsh v. Shumway*, 232 Ill. 54, 83 N. E. 549; *Lankford v. Gebhart*, 130 Mo. 621, 51 Am. St. Rep. 585, 32 S. W. 1127.

² *Nelson v. Gass*, 27 N. D. 357, 146 N. W. 537, Ann. Cas. 1915C, 796.

³ *Sommers v. Gould*, 53 Mont. 538, 165 Pac. 599; *Welsh v. Shumway*, *supra*.

- ⁴ *Seibold v. Wahl*, 164 Wis. 82, 159 N. W. 546, Ann. Cas. 1917C, 400 and note.
- ⁵ *State v. Savre*, 129 Iowa, 122, 3 L.R.A.(N.S.) 455, 113 Am. St. Rep. 452, 105 N. W. 387. See also notes in 19 L.R.A.(N.S.) 759, and Ann. Cas. 1915C, 792.
- ⁶ *Langhammer v. Munter*, 80 Md. 518, 27 L.R.A. 330, 31 Atl. 300; *State ex rel. Goodell v. McGeary*, 69 Vt. 461, 44 L.R.A. 446, 38 Atl. 165.
- ⁷ *Seibold v. Wahl*, *supra*.
- ⁸ *People v. Turpin*, 49 Colo. 234, 33 L.R.A.(N.S.) 766, 112 Pac. 539, Ann. Cas. 1912A, 724, and note in 33 L.R.A.(N.S.) 766. See also *Barhydt v. Cross*, 156 Iowa, 271, 40 L.R.A.(N.S.) 986, 136 N. W. 525, Ann. Cas. 1915C, 792, and note in 40 L.R.A.(N.S.) 986

(2) *Student voting*.—Students in colleges and universities may under proper circumstances vote at the place where they are attending school.¹ In such cases the intention of the parties should have considerable weight.² It has been frequently held that if the student is receiving financial support from home that he is not entitled to vote in the college town.³

- ¹ *People v. Osborne*, 170 Mich. 143, 40 L.R.A.(N.S.) 168, 135 N. W. 921 and note in 40 L.R.A.(N.S.) 168.
- ² *Welsh v. Shumway*, 232 Ill. 54, 83 N. E. 549.
- ³ *Seibold v. Wahl*, 164 Wis. 82, 159 N. W. 546, Ann. Cas. 1917C, 400, and note.

(3) *Residences of teachers, ministers and soldiers*.—An unmarried teacher dependent on her own earnings may acquire a voting residence where she teaches even though her employment there is temporary.¹ So a minister is entitled to vote although his residence changes every two years.² It is generally provided by state constitutions or statutes that soldiers, sailors and inmates of public institutions do not gain or lose a residence by reason of such service or of being such inmates.³

- ¹ *Klutts v. Jones*, 21 N. M. 720, L.R.A.1917A, 291, 158 Pac. 490 and note in L.R.A.1917A, 291.

² *Klutts v. Jones*, *supra*.

³ Note to *People v. Osborne*, 40 L.R.A. (N.S.) 168; note in *Ann. Cas.* 1917B, 485.

(4) *Residences of transient workmen*.—It has been held that transient workmen in a logging camp could not vote because they did not have a permanent residence.¹ Mere proof, however, that a person's employment is of uncertain duration, does not render his residence temporary.²

¹ *State ex rel. Small v. Bosacki*, 154 Wis. 475, 143 N. W. 175.

² *State ex rel. Catlin v. Galligan*, 167 Wis. 487, 167 N. W. 803.

2. Direct testimony.

A witness may testify to the fact of a person's residence; and even negatively, by showing that the witness had adequate acquaintance with the place, and that the person could not have lived there without the witness knowing it.¹

¹ *Cavendish v. Troy*, 41 Vt. 108. Compare NEGATIVE and FICTITIOUS PERSONS.

Residence being largely a matter of intention, a person's positive testimony that he removed from one state into another with the intention, ever since continued, of becoming a resident of the latter state, is not overcome by circumstances raising mere suspicions that his testimony is false, but presenting no tangible facts upon which that conclusion can rest. *Albee v. Albee*, 141 Ill. 550, 31 N. E. 153.

3. General reputation.

Actual residence cannot be proved by reputation or family traditions.¹

¹ *Londonderry v. Andover*, 28 Vt. 416 (settlement of a pauper); *Wheeler v. Webster*, 1 E. D. Smith, 1; *Pfister v. Dascey*, 68 Cal. 572, 10 Pac. 117 (homestead law); *East Tennessee, W. & G. R. Co. v. Thompson*, 94 Ala. 636, 10 So. 280; *Albion v. Maple Lake*, 71 Minn. 503, 74 N.

W. 282; *Ferguson v. Wright*, 113 N. C. 537, 18 S. E. 691. And see *Filham v. Howe*, 60 Vt. 361, 14 Atl. 652.

So, evidence that witness had inquired at the address given as that of a person's residence, and had been told by some person on the premises that he did not live there, is inadmissible as hearsay. *Globe v. Rauch*, 21 Misc. 48, 46 N. Y. Supp. 889.

4. Declarations and conduct.

Residence is determined by a consideration of acts and intention combined.¹ Hence, if the facts are not decisive, evidence of declarations and of conduct manifesting intent is freely received.²

But declarations of intent, and acts relevant only for the purpose of manifesting intent, are not competent if the evidence as to abode is adequate and decisive to the contrary.³

¹ *Hindman's Appeal*, 85 Pa. 466.

² *Belmont v. Vinalhaven*, 82 Me. 524, 20 Atl. 89; *Follweiler v. Lutz*, 112 Pa. 107, 2 Atl. 721 (testimony that county line passes through the house lets in evidence that the party voted and took out a license in one county, and not in the other,—the question being in which county his assignment must be recorded); *Etna v. Brewer*, 78 Me. 377, 5 Atl. 884 (declarations as to intent in going to another town competent on the question of settlement under the poor laws); *Fulham v. Howe*, 60 Vt. 351, 14 Atl. 652 (evidence of having voted in another state, the laws of which are proved to have required a residence there of one year before voting, competent in action against tax collector). See also note in *Van Dresor v. King* (Pa.) 75 Am. Dec. 652, Citing *Austin v. Swank*, 9 Ind. 109 (declarations as to intent on leaving house competent to show whether declarant was thereafter a resident householder within the rule as to levy of execution). And see *Abbott*, Tr. Ev. 2d ed. 136–138.

But declarations of intention merely, unaccompanied by any act which is admissible in evidence, are not competent. *Filham v. Howe*, 62 Vt. 386, 20 Atl. 101, and cases cited.

³ *Pickering v. Cambridge*, 144 Mass. 244, 10 N. E. 827.

5. Place of business.

The fact of long continued business at a particular place is, in absence of evidence to the contrary, competent to raise the presumption of residence.¹ But a person having only a place

of business here, and living in another state, is a nonresident.²

¹ *Dederich v. McAllister*, 49 How. Pr. 351 (so held to show that the defendant resided out of the state, within the exception to the statute of limitation).

Otherwise of evidence as to one's mere intention to engage in business. *Fulham v. Howe*, 60 Vt. 351, 14 Atl. 652.

² *Wallace v. Castle*, 68 N. Y. 370 (so held to uphold an attachment, Criticising *Towner v. Church*, 2 Abb. Pr. 299).

6. Absence.

Where there is no proof that a debtor had a domicile in the state, on proof of absence he will be deemed a nonresident.¹

¹ *Harden v. Palmer*, 2 E. D. Smith, 172, 178. (Woodruff, J, so held, to show defendant was within the exception of the statute of limitations.)

7. Fugitive from justice.

The fact that a person convicted of a crime has escaped from the sheriff, and remains concealed, raises a presumption that he has gone out of the state to remain, in order to place himself beyond the reach of the sheriff, and therefore tends to prove that he is a nonresident.¹

¹ *New York v. Genet*, 4 Hun, 487, affirmed in 63 N. Y. 646 (so held in order to sustain an attachment). See also *Wolf v. Shenandoah Nat. Bank*, 84 Iowa, 138, 50 N. W. 561 (so holding, although the absentee was only accused of crime).

8. Instrument executed out of the jurisdiction.

Where a contract is executed out of the state, the presumption is that the parties thereto are nonresidents, and, in absence of evidence to the contrary, continue so.¹

¹ *Mayer v. Friedman*, 7 Hun, 218, affirmed on this opinion, in 69 N. Y. 608 (holding that a defendant in a suit under such a contract, in order to avail himself of the statute of limitations, must show that he has been within the state for six years). See also *Fox v. Moyer*, 54 N. Y. 125 (holding that an execution issued on a judgment in an action on a note in the county where the note was made and sued upon had been presumptively issued where the judgment debtor resided); *Nichols v.*

Mase, 94 N. Y. 160, 166 (this principle was applied as sanctioning the presumption that chattels covered by a mortgage executed without the state were within the jurisdiction where the mortgage was executed); Wilcox v. Hunt, 13 Pet. 378, 10 L. ed. 209 (holding that under the law of Louisiana there is a like presumption as to a subscribing witness).

9. Deposition.

Deponent presumed resident of place where he was examined, for purpose of letting in his deposition.¹

And the certificate of the officer who took the deposition is sufficient to show prima facie the residence of the witness.²

¹ People v. Hadden, 3 Denio, 220.

² Patapsco Ins. Co. v. Southgate, 5 Pet. 604, 8 L. ed. 243.

10. Presumption of continuance.

The fact of residence without the state at a given time raises a presumption, in absence of evidence to the contrary, that it continued thereafter.¹

¹ Nixon v. Palmer, 10 Barb. 175 (the reversal in 8 N. Y. 398, was wholly on another point); Clough v. Kyne, 40 Ill. App. 234; Botna Valley State Bank v. Silver City Bank, 87 Iowa, 479, 54 N. W. 472; Hatch v. Smith, 6 Kan. App. 645, 49 Pac. 698, 50 Pac. 952. See also Re Nichols, 54 N. Y. 62 (so held for the purpose of taxation); Rixford v. Miller, 49 Vt. 319 (statute of limitations; proof that defendant resided in another state when the cause of action accrued, raising a presumption that he continued to reside there).

Residence is presumed to continue until a change is established. State ex rel. Phelps v. Jackson, 79 Vt. 504, 8 L.R.A.(N.S.) 1245, 65 Atl. 657; Re Colton, 129 Iowa, 542, 105 N. W. 1008; Re Russell, 64 N. J. Eq. 313, 53 Atl. 169.

11. Burden of proof.

When the actual residence of a party is in question, slight evidence is enough to shift the burden of proof upon him as being a fact peculiarly within his own knowledge.¹

¹ Dederich v. McAllister, 49 How. Pr. 351.

REVIVAL.

Allegation of succession.

An order of court substituting a third person in the place of an original party, with the papers on which it is made, is conclusive evidence of succession and revival,¹ even without formal allegation in the pleadings;² unless the order requires further pleading.

The objection that the cause of action did not survive, or was not assignable, will still be available on the trial.³

¹ *Smith v. Zalinski*, 94 N. Y. 519, affirming 26 Hun, 225 (order made on default); *Smith v. Rathbun*, 22 Hun, 150 (order, alleged by amendment of complaint, and not denied).

² *Lawrence v. Saratoga Lake R. Co.* 36 Hun, 467 (order made on stipulation admitting succession).

³ *Arthur v. Griswold*, 60 N. Y. 143.

Contra: *Underhill v. Crawford*, 29 Barb. 664, 18 How. Pr. 112 (where, however, on other grounds, motion for new trial was granted, after judgment for plaintiff on verdict).

SATISFACTION.

1. Burden of proof.
2. Stipulation to satisfy.
3. Variance.

1. Burden of proof.

One who alleges the failure of an engine to satisfy a warranty thereon sustains the burden of proof.¹

¹ *Erie City Iron Works v. Dempsey*, 77 Ill. App. 667.

Beckett v. Gridley, 67 Minn. 37, 69 N. W. 622, holds that the purchaser of an article under a warranty that it will fulfil certain conditions, and requiring the vendor, if these conditions are not fulfilled, to replace the article with another of equal value or return the notes given for it, has, in an action on the notes, the burden of showing the breach of the conditions, and that the vendor had notice thereof, and an opportunity either to replace the article or return the notes.

2. Stipulation to satisfy.

Under a contract for a thing to be done to the satisfaction of a party, evidence that performance was such as he ought in reason to be satisfied with is enough,¹ unless the object of the contract is to gratify taste, serve personal convenience, or satisfy individual preference, in which case it is enough to show that he was not satisfied.² But it may be shown that he was satisfied, and that his expression of dissatisfaction was a pretense.³

¹ *Duplex Safety Boiler Co. v. Garden*, 101 N. Y. 387, 54 Am. Rep. 709, 4 N. E. 749. See note on this subject to *Doll v. Noble*, 18 Abb. N. C. 48. *McGuire v. Rapid City*, 6 Dak. 346, 5 L.R.A. 752, 43 N. W. 706, holds the certificate of an engineer sufficient evidence of the performance of a contract requiring the work to be done to his satisfaction to be testified to by a writing or certificate under his hand.

But as to whether or not a party has declared himself satisfied, a letter from the contractor containing statements of third persons expressing unanimous satisfaction with the work is not competent. Such opinions are not only irrelevant to the issue, but they are calculated to prejudice the jury. The minds of the jury would naturally be diverted from the real issue, and they might well be inclined to discredit his evidence of dissatisfaction, or at least regard the objections to the work as captious and unreasonable, in the face of opinions declaring the work to be of the highest merit. *Thomas v. Gage*, 141 N. Y. 506, 36 N. E. 385.

² *Duplex Safety Boiler Co. v. Garden*, 101 N. Y. 387, 54 Am. Rep. 709, 4 N. E. 749; *Campbell Printing Press Co. v. Thorp*, 36 Fed. 414; *Abst. s. c.*, 39 Alb. L. J. 135, 137.

³ *Baltimore & O. R. Co. v. Brydon*, 65 Md. 198, 57 Am. Rep. 318, 3 Atl. 306.

3. Variance.

Evidence that an article had been made to work to the purchaser's satisfaction at one time, but that it afterwards failed

so to do, does not support an allegation that vendor had agreed to furnish a new article if the first one did not work to the purchaser's satisfaction.¹

¹ McCormick Harvesting Mach. Co. v. Gustafson, 54 Neb. 276, 74 N. W. 576.

SEALS.

1. Material.
2. Judicial notice.
3. Direct testimony.
4. Affixing.
5. One for several.
6. Record and omission.
7. Corporate seal.

1. Material.

An impression directly on paper without wax, etc., satisfies the common-law rule.¹

¹ Pierce v. Indseth, 106 U. S. 546, 27 L. ed. 254, 1 Sup. Ct. Rep. 418 (the seal in this case was that of a foreign notary); Hunt v. Hunt, — N. J. Eq. —, 9 Atl. 690 (seal of court); Pillow v. Roberts, 13 How. 472, 14 L. ed. 228 (holding that the fact that a public officer in another state did not use wax in affixing a seal was sufficient, in the absence of evidence to the contrary, to show that wax was not there required). See also cases collected in note to Hacker's Appeal (Pa.) 1 L.R.A. 861.

The traditional rule that wax or other adhesive substance is necessary has been superseded in most states by statutes allowing the impression to be on paper; but the New York statute expressly allowing official

and judicial seals to be directly on paper (3 Rev. Stats. 5th ed., § 76, p. 687 was amended by omitting judicial seal) N. Y. Civil Prac. Act Sec. 330; Parson's Prac. Manual of N. Y. 1921, p. 141 (formerly, with slight modifications, § 960, N. Y. Code, Civ. Pro.). By N. Y. Laws 1848, p. 305, chap. 197, sec. 1; same stat. 3 Rev. Stat. 5th ed. p. 687, § 77, a corporate seal may be directly on the paper.

But in New York a bit of paper affixed with mucilage satisfies the common-law rule, even as a private seal. *Gillespie v. Brooks*, 2 Redf. 349; *Van Bokkelen v. Taylor*, 62 N. Y. 105, reversing 2 Hun, 138, 4 *Thomp. & C.* 422 (revenue stamp so used).

"In all cases where a seal is necessary by law to any commission, process, or other instrument provided for by the laws of Congress, it shall be lawful to affix the proper seal by making an impression therewith directly on the paper to which such seal is necessary; which shall be as valid as if made on wax or other adhesive substance." U. S. Rev. Stat. § 6, Comp. Stat. § 6, 9 Fed. Stat. Anno. 2d ed. p. 123.

As to seals on writs or process, and the effect of their issuance without a seal of the officer, see cases collected in note to *Choate v. Spencer* 20 L.R.A. 424.

As to seals on writs of venire from grand jury, see cases collected in note to *State ex rel. Dunn v. Noyes*, 27 L.R.A. 779.

As to the necessity of seal on assignment of lease, see cases collected in note to *Chicago Attachment Co. v. Davis Sewing Mach. Co.* 15 L.R.A. 754.

Seals to commercial paper, as affecting negotiability, see cases collected in notes to *D. M. Osborne & Co. v. Hubbard*, 11 L.R.A. 833; *Chase Nat. Bank v. Faurot*, 35 L.R.A. 605.

2. Judicial notice.

The court will take judicial notice of the seals of notaries public, even in foreign countries, for they are officers recognized by the commercial law of the world;¹ and of the seals of courts of record of other states.² But courts will not take notice of the seals of private corporations, nor do such seals prove themselves.³

¹ *Pierce v. Indseth*, 106 U. S. 546, 27 L. ed. 254, 1 Sup. Ct. Rep. 418; *The Gallego*, 30 Fed. 271; *McDonald v. People*, 123 Ill. App. 346, affirmed in 222 Ill. 325, 78 N. E. 609.

² *Hinton v. Life Ins. Co.* 116 N. C. 22, 21 S. E. 201.

³ *Griffling Bros. Co. v. Winfield*, 53 Fla. 589, 43 So. 687.

3. Direct testimony.

Any witness familiar with the device of a corporate or other peculiar seal may testify to its identity. But testimony

of a witness that he had been told by corporate officers, etc., that it was the seal, is not enough.¹

¹ Abbott, Tr. Ev. (3d ed.) p. 123.

Susquehanna Bridge & Bank Co. v. General Ins. Co. 3 Md. 305, 56 Am. Dec. 740, with note (held, affirming judgment, that proof of the seal of a corporation is unnecessary, when it is shown to have been affixed by the proper officer or agent of the company; as here, to a mortgage to secure a debt of the company).

Evidence that neither the officer who signed, nor the custodian of the seal, had knowledge of its being affixed, casts the burden on the holder of the instrument to prove that it was affixed rightfully. *Koehler v. Black River Falls Iron Co.* 2 Black, 715, 17 L. ed. 339.

4. Affixing.

Delivery without a seal, although the instrument is expressed to be attested by "my hand and seal," does not imply authority to affix a seal.¹

¹ *Metropolitan L. Ins. Co. v. McCoy*, 41 Hun, 142.

But the statement raises a presumption that the party affixed the seal. *Hammond v. Gordon*, 93 Mo. 223, 6 S. W. 93; *Ryan v. Cooke*, 172 Ill. 302, 50 N. E. 213. The presumption is the same in the absence of any mention of the mode of authentication. Abbott, Tr. Ev. (3d ed.) p. 998. Otherwise if signing is mentioned, and sealing is not. *Ibid.*

5. One for several.

To invoke the rule that one seal will do for several signers,¹ there must be evidence that they authorized it or intended to adopt it.²

¹ *Ludlow v. Simond*, 2 Cai. Cas. 1, 7, 42, 55, 2 Am. Rep. 291.

² *Citizens' Bldg. Asso. v. Cummings*, 45 Ohio St. 664, 16 N. E. 841; *Van Alstyne v. Van Slyck*, 10 Barb. 383; *Parr v. Greenbush*, 42 Hun, 232 (holding seal affixed after signatures by the trustees a good seal of the village if it had no peculiar seal).

The intent may be shown by any evidence competent to show intent. *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35, 13 Am. Rep. 556, affirming 50 Barb. 136.

A wife will be presumed to have adopted the seal opposite the signature of her husband to an instrument, in the absence of evidence to the contrary, where her name is signed thereto, but is not followed by a seal. *Warder, B. & G. Co. v. Stewart*, 2 Marv. (Del.) 275, 36 Atl. 88.

6. Record and omission.

Seal provable by record.¹ Omission from record, how supplied in evidence.²

¹ *Fillett v. Rose*, 3 McLean, 332, Fed. Cas. No. 4,900; *Gillespie v. Reed*, 3 McLean, 377, Fed. Cas. No. 5,436; *Abbott, Tr. Ev.* (3d ed.) p. 1311.

² *Todd v. Union Dime Sav. Inst.* 20 Abb. N. C. 270; *Campbell v. Laclede Gaslight Co.* 119 U. S. 445, 30 L. ed. 459, 7 Sup. Ct. Rep. 278.

7. Corporate seal.

The fact that the common seal of a corporation is affixed to an instrument is *prima facie* evidence that it was so affixed by proper authority.¹

¹ *Bowers v. Hechtman*, 45 Minn. 238, 47 N. W. 792; *Yanish v. Pioneer Fuel Co.* 64 Minn. 175, 66 N. W. 198; *Ruffner Bros. v. Welton Coal & Salt Co.* 36 W. Va. 244, 15 S. E. 48; *Mullanphy Sav. Bank v. Shott*, 135 Ill. 655, 26 N. E. 640; *Ellison v. Branstrator*, 153 Ind. 146, 54 N. E. 433.

A seal attached to a corporate instrument is presumed to be the seal of the corporation, and to have been affixed by its authority. *Bliss v. Harris*, 38 Colo. 72, 87 Pac. 1076.

SEPARATION.

For kindred topics, see **ABSENCE**; **DESEPTION**.

Competency of testimony of husband and wife.

When a wife is competent to testify to the fact of separation, and has done so, she is competent to testify to conversation had at the time between herself and husband as part of the *res gestæ* to show the ground then assigned for it.¹

¹ *Baker v. Baker*, 16 Abb. N. C. 293.

SERVICE.

Affidavits not competent.

The service of a notice, when required to be proved on a trial, must be proved by common-law evidence; and affidavits are not competent unless made so by some statute.¹

¹ People ex rel. Vogler v. Walsh, 87 N. Y. 481; Stroner v. Prokop, 30 Ill. App. 56.

Affidavit competent when the affiant is dead or insane, or his personal attendance cannot be compelled, with due diligence. Civ. Prac. Act. § 371, Parson's Prac. Manual of N. Y. 1921, p. 154 (formerly § 927 N. Y. Code Civ. Pro.).

SIGNATURE.

1. Document produced on notice.
2. Authority to sign.
 - a. Declarations.
 - b. Previous recognition by principal.
3. Oral evidence.

For kindred topics, see **AGENCY; DESIGNATION; GENUINENESS; HANDWRITING; MARK; NAME.**

1. Document produced on notice.

When one party, pursuant to notice, produces an instrument to which he is a party, and under which he claims a beneficial interest, the other party need not, before putting in evidence, prove the signatures thereto, or call the subscribing witnesses for that purpose.¹

¹ White v. Miller, 7 Hun, 427, reversed on other grounds in 71 N. Y. 118. See generally, on the question of proof of signature by an attesting witness, the cases collected in note to Garrett v. Hanshue, 35 L.R.A. 321.

2. Authority to sign.

a. Declarations.—In a conflict of evidence as to whether a person was authorized to sign the name of another, evidence of the previous declarations of the latter manifesting his intent, is competent.¹

¹ *Thompson v. First Nat. Bank*, 111 U. S. 529, 28 L. ed. 507, 4 Sup. Ct. Rep. 689; *Woodcock v. Johnson*, 36 Minn. 217, 30 N. W. 894. Compare *Lane v. Lockridge*, 17 Ky. L. Rep. 1082, 33 S. W. 730 (holding testimony that in conversation a husband had said that he had authority in writing from his wife to transact all her business and to sign her name for that purpose, and that in the opinion of the witness the wife was near enough to have heard what was said, incompetent to show authority in the husband to sign a note in the wife's name). See further, on this question, AGENCY, §§ 6 *et seq.*

b. Previous recognition by principal.—Evidence as to the extent to which a principal had previously recognized the signature of his agent as his own is competent as tending to show authority as to the particular signature in question.¹

¹ *Conroe v. Case*, 79 Wis. 338, 48 N. W. 480.

3. Oral evidence.

Oral evidence is competent to show that a party signing was to be liable personally in a particular character, and that when signing for principals he did so on his own behalf as well;¹ to show that one signing in a representative character did not intend to be personally liable,² or that a person signing individually was in fact signing for a principal.³

¹ *Young v. Schuler*, L. R. 11 Q. B. Div. 651, 49 L. T. N. S. 546.

² *Schmittler v. Simon*, 114 N. Y. 176, 21 N. E. 162; *Simanton v. Vliet*, 61 N. J. L. 595, 40 Atl. 595; *Kline v. Bank of Tescott*, 50 Kan. 91, 31 Pac. 688; *Keidan v. Winegar*, 95 Mich. 430, 54 N. W. 901, s. c., with note, 20 L.R.A. 705. Compare *Mathews v. Dubuque Mattress Co.* 87 Iowa, 246, 54 N. W. 225. s. c., with note, 19 L.R.A. 676, where it is held that oral evidence is not admissible to show that a person who signed a note in a form showing an individual liability intended only to bind a corporation of which he was president, although he added to his signature a description of his official character, and that such a note reading, "We promise, etc,"—is not made ambiguous so as to admit oral evidence, by the fact that it is made payable at the office

of the corporation, and ends with the name of the corporation after the words "Accepted March 21, 1889." See Abbott, Tr. Ev. (3d ed.) pp. 776 *et seq.*

- ³ Powell v. Wade, 109 Ala. 95, 19 So. 500; Southern P. Co. v. Von Schmidt Dredge Co. 118 Cal. 368, 50 Pac. 650, and cases cited; Atkinson v. Bennett, 103 Ga. 508, 30 S. E. 599, and cases cited. And see cases cited in notes to Matthews v. Dubuque Mattress Co. (Iowa) 19 L.R.A. 676, and Keidan v. Winegar (Mich.) 20 L.R.A. 705.

SIGNS AND SIGNALS.

1. Understanding of witness.
2. Dying declarations.

For kindred topics, see CONVERSATION; FEELINGS; INTENT; NEGATIVE.

1. Understanding of witness.

A witness cannot testify to his understanding of what another person meant by signs, such as a nod, when it amounts only to the opinion of the witness, and not to a statement of fact.¹

- ¹ Rillwagen v. Rollwagen, 3 Hun, 121, 5 Thomp. & C. 402, affirming 48 How. Pr. 289, affirmed in 63 N. Y. 504, without discussing the question (motions of testator in executing will). But see Messner v. People, 45 N. Y. 1 (holding that a witness cannot testify to significance of outcry).

2. Dying declarations.

Alleged declarations consisting of a nod of the head in answer to questions are incompetent as dying declarations, in the absence of evidence of sufficient consciousness to comprehend the questions asked.¹

- ¹ McBride v. People, 5 Colo. App. 91, 37 Pac. 953.

As to admissibility generally of dying declarations communicated by signs. see note in 56 L.R.A. 427, and ante, DYING DECLARATIONS, II., 7, note 3.

SPEED.

1. Direct testimony.
2. Comparison by combining witnesses.
3. Declarations as part of the *res gestæ*.
4. Experimental evidence.

For kindred topics, see OPINIONS; QUANTITY.

1. Direct testimony.

It is a general rule, as to which there is little conflict, that any person of ordinary intelligence who has had an opportunity for observation is competent to testify as to the rate of speed of a moving object. This rule has been held applicable to the speed of railroad trains,¹ hand cars,² street cars,³ and automobiles,⁴ and other road vehicles.⁵

¹ *Salter v. Utica & B. River R. Co.* 59 N. Y. 631, reversing 3 *Thomp. & C.* 800; *Guggenheim v. Lake Shore & M. S. R. Co.* 66 Mich. 150, 33 N. W. 161; *Hoppe v. Chicago, M. & St. P. R. Co.* 61 Wis. 357, 21 N. W. 227; *Alabama G. S. R. Co. v. Hall*, 105 Ala. 599, 17 So. 176; *Eckington & S. H. R. Co. v. Hunter*, 6 App. D. C. 287; *Chicago, B. & Q. R. Co. v. Gunderson*, 174 Ill. 495, 51 N. E. 708; *Walsh v. Missouri P. R. Co.* 102 Mo. 582, 14 S. W. 873, 15 S. W. 757; *Louisville, N. A. & C. R. Co. v. Hendricks*, 128 Ind. 462, 28 N. E. 58; *Waldele v. New York C. & H. R. R. Co.* 4 App. Div. 549, 38 N. Y. Supp. 1009; *Galveston, H. & S. A. R. Co. v. Sullivan*, — Tex. Civ. App. —, 42 S. W. 568; *Chipman v. Union P. R. Co.* 12 Utah, 68, 41 Pac. 562; *Sears v. Seattle Consol. Street R. Co.* 6 Wash. 227, 33 Pac. 389, 1081; *Bracken v. Pennsylvania R. Co.* 222 Pa. 410, 34 L.R.A.(N.S.) 790, 71 Atl. 926.

For additional cases and full discussion see notes in 34 L.R.A.(N.S.) 790, and L.R.A.1918A, 701.

And the fact that the witness does not know how many feet or rods there are in a mile does not affect the competency of his testimony. *Ward v. Chicago, St. P. M. & O. R. Co.* 85 Wis. 601, 55 N. W. 771.

So, testimony of a railway employee injured by being thrown from a hand-car alleged to have been suddenly stopped by the foreman without warning while it was moving rapidly, that the car was running faster than a man could run, is admissible as an expression of an opinion based upon observation, and should not be excluded for indefiniteness. *Kansas City, M. & B. R. Co. v. Crocker*, 95 Ala. 412, 11 So. 262.

And one accustomed to seeing and hearing trains pass, and claiming to be able to tell their relative rate of speed by the sound, was held com-

petent to testify whether a train which he heard was going fast or slow, in *Missouri P. R. Co. v. Hildebrand*, 52 Kan. 284, 34 Pac. 738, although he did not see it.

But a person injured by a train striking him in the nighttime, without seeing it, is not competent to testify to its speed, where his opinion is based merely upon his guess at the distance he was thrown and the force of the blow on his shoulder. *Northern P. R. Co. v. Hayes*, 30 C. C. A. 576, 59 U. S. App. 711, 87 Fed. 129.

Plaintiff in an action to recover damages resulting from a collision between her carriage and a street car may testify that the speed of the car looked fast to her; it is a fact, and not an opinion. *Montgomery Street R. Co. v. Shanks*, 139 Ala. 489, 37 So. 166.

² *Kansas City, M. & B. R. Co. v. Crocker*, 95 Ala. 412, 11 So. 262; *Evansville & T. H. R. Co. v. Crist*, 116 Ind. 446, 2 L.R.A. 450, 9 Am. St. Rep. 865, 19 N. E. 310; *Haworth v. Kansas City Southern R. Co.* 94 Mo. App. 215, 68 S. W. 111.

But in *Mott v. Detroit, G. H. & M. R. Co.* 120 Mich. 127, 79 N. W. 3, a witness who testified that he had observed bodies move and in motion a good many times, and had seen horses trot and run, was held incompetent to testify that a hand car was going a given number of miles per hour, since he was not shown to have had sufficient experience to give his opinion.

³ *Aston v. St. Louis Transit Co.* 105 Mo. App. 226, 79 S. W. 999; *Augusta R. & Electric Co. v. Arthur*, 3 Ga. App. 513, 60 S. E. 213; *Metropolitan R. Co. v. Blick*, 22 App. D. C. 194; *Chicago City R. Co. v. Rohe*, 118 Ill. App. 322; *Kern v. Des Moines City R. Co.* 141 Iowa, 620, 118 N. W. 451; *United R. & Electric Co. v. Ward*, 113 Md. 649, 77 Atl. 593; *Ehrman v. Nassau Electric Co.* 23 App. Div. 21, 48 N. Y. Supp. 379; *City & Suburban R. Co. v. Cooper*, 32 App. D. C. 555; *Garduhn v. Union R. Co.* 50 App. Div. 602, 64 N. Y. Supp. 210; *Hanlon v. Milwaukee Electric R. & Light Co.* 118 Wis. 210, 95 N. W. 100; *Sears v. Seattle Consol. Street R. Co.* 6 Wash. 227, 33 Pac. 389, 1081; *Tecklenburg v. Everett R. Light & Water Co.* 59 Wash. 384, 34 L.R.A. (N.S.) 784, 109 Pac. 1036; *Omaha Street R. Co. v. Larson*, 70 Neb. 591, 97 N. W. 824.

In order to testify as to the speed of street cars, however, a witness must have made some observation of the speed. *Garduhn v. Union R. Co.* 50 App. Div. 602, 64 N. Y. Supp. 210.

For additional cases and full discussion see notes in 34 L.R.A. (N.S.) 784, and L.R.A. 1918A, 702.

⁴ *Wolfe v. Ives*, 83 Conn. 174, 76 Atl. 526, 19 Ann. Cas. 752; *Miller v. Jenness*, 84 Kan. 608, 34 L.R.A. (N.S.) 782, 114 Pac. 1052; *Neidy v. Littlejohn*, 146 Iowa, 355, 125 N. W. 198; *Johnson v. Coey*, 142 Ill. App. 147, affirmed in 237 Ill. 88, 21 L.R.A. (N.S.) 81, 86 N. E. 678, on other grounds; *Zoltovski v. Gzella*, 159 Mich. 620, 26 L.R.A. (N.S.) 435, 134 Am. St. Rep. 752, 124 N. W. 527; *Hough v. St. Louis Car Co.*

146 Mo. App. 58, 123 S. W. 83; State v. Watson, 216 Mo. 420, 115 S. W. 1011; Dugan v. Arthurs, 230 Pa. 299, 34 L.R.A.(N.S.) 778, 79 Atl. 626.

⁵ Nesbit v. Crosby, 74 Conn. 554, 51 Atl. 550; United Breweries Co. v. O'Donnell, 124 Ill. App. 24, affirmed on other grounds in 221 Ill. 334, 77 N. E. 547; Brown v. Swanton, 69 Vt. 53, 37 Atl. 280 (horse and wagon); Myers v. McFarland, 31 Pa. Co. Ct. 49 (bicycle); Hiscock v. Phinney, 81 Wash. 117, 142 Pac. 461, Ann. Cas. 1916E, 1044; Creedon v. Galvin, 226 Mass. 140, 115 N. E. 307; Fisher Motor Car Co. v. Seymour & Allen, 9 Ga. App. 465, 71 S. E. 764; Galloway v. Perkins, 198 Ala. 658, 73 So. 956.

See generally note in L.R.A.1918A, 701.

2. Comparison by combining witnesses.

To show speed at a given place, evidence of speed within a reasonable distance, and that it was unchecked meanwhile, is competent.¹

¹ Louisville, N. A. & C. R. Co. v. Jones, 108 Ind. 551, 9 N. E. 476; St. Louis S. W. R. Co. v. Bishop, 14 Tex. Civ. App. 504, 37 S. W. 764.

For other illustrations of this principle, see Robbins v. Springfield Street R. Co. 165 Mass. 30, 42 N. E. 334 (holding evidence of the usual rate at which an electric car moves admissible, where there is other testimony that at the time of the accident the car was going at the usual rate of speed); Laufer v. Bridgeport Traction Co. 68 Conn. 475, 37 L.R.A. 533, 37 Atl. 379 (evidence that a car was running very rapidly at other places on the same trip, competent to support a claim that at the time of an accident it was behind schedule time, and trying to make up). And see FORGOTTEN FACT; QUALITY; QUANTITY.

3. Declarations as part of the *res gestæ*.

Declarations of an engineer of a railroad train, stating the speed at which the train was running at the time of the disaster, made, not at the time and as part of the accident, but afterwards and independently (however brief the time intervening), are not competent evidence as part of the *res gestæ*.¹

¹ Vicksburg & M. R. Co. v. O'Brien, 119 U. S. 99, 30 L. ed. 299, 7 Sup. Ct. Rep. 118 (collecting cases on the *res gestæ* of an accident). And see Alabama G. S. R. Co. v. Hill, 90 Ala. 71, 9 L.R.A. 442, 8 So. 90 (an action for injuries suffered by a passenger from derailment of the train, where a declaration by another passenger to the conductor, made before the accident, indicating his opinion that the engineer was running faster than usual, was held incompetent).

And so, statements by an engineer, made on a former trial, as to the speed

of his engine at the time a horse was struck, are not admissible against the company upon a subsequent trial, as the declarations of an agent made at the time he was engaged about the business of his principal. *Denver & R. G. R. Co. v. Watson*, 6 Colo. App. 429, 40 Pac. 778.

4. Experimental evidence.

Under proper precautions experimental evidence is admissible to show speed of an auto truck¹ or street car² but not as to the time it would take to stop an automobile going at a certain speed.³

¹ *Fippinger v. Glos*, 190 Ill. App. 238.

² *Augusta R. & Electric Co. v. Arthur*, 3 Ga. App. 513, 60 S. E. 213.

³ *Beckley v. Alexander*, 77 N. H. 255, 90 Atl. 878.

STATUS.

Competency of judgment against one not a party.¹

¹ *Eisenlord v. Eisenlord*, 49 Hun, 340, 2 N. Y. Supp. 123 (judgment in seduction competent against offspring); *Wottrich v. Freeman*, 71 N. Y. 601 (judgment in divorce competent in crim. con.); *Davis v. Wood*, 1 Wheat. 6, 4 L. ed. 22 (freedom).

In an action by heirs to recover their mother's community interest in land where defendant claims under an execution sale against their father, a divorce between the father and mother, granted by the courts of another state, is admissible to show that the marriage relation was dissolved before the contracting of the debt on which the execution sale was had, the wife's interest not being subject to sale for such debt. *Henry v. Forshee*, 84 Tex. 185, 19 S. W. 381.

A certified copy of a decree of divorce is competent evidence of the fact of divorce, and is properly submitted to the jury, although it may be necessary to introduce the other proceedings of the court or the pleadings in the cause. *Eve v. Rodgers*, 12 Ind. App. 623, 40 N. E. 25.

In an action for slander of a married woman a decree of divorce granted her from her first husband is not competent as evidence in her own behalf. *Claypool v. Claypool*, 65 Ill. App. 446.

Upon a trial of two persons for living in open adultery a decree of divorce between one of the defendants and her husband is not admissible. *Crane v. People*, 65 Ill. App. 492.

For conclusiveness, as to third persons, of decree in suit for divorce or annulment of marriage, as to facts adjudicated, as distinguished from status established, see notes in 38 L.R.A.(N.S.) 559, and L.R.A.1915C, 870.

SUNRISE AND SUNSET.

Almanac.

An almanac may be used to ascertain the time at which the sun rose or set at a specified date.¹

¹ The controversy is as to whether it is evidence, as held in *Munshower v. State*, 55 Md. 11, 39 Am. Rep. 414, or only the means of refreshing the knowledge of the court or jury, as held in *Case v. Perew*, 46 Hun, 57, and *People v. Chee Kee*, 61 Cal. 404, cited in *Ashworth v. Kittridge* (Mass.) 59 Am. Dec. 185, note, holding it therefore no error to exclude formal proof.

The courts will take judicial notice of the time of the rising or setting of the sun on any given day, and may consult the almanac, where such question is material, not strictly as evidence, but for the purpose of refreshing the memory of the court and jury. *Montenes v. Metropolitan Street R. Co.* 77 App. Div. 493, 78 N. Y. Supp. 1059; *Beardsley v. Irving*, 81 Conn. 489, 71 Atl. 580.

SURETYSHIP.

1. Oral evidence.
2. Direct testimony.
3. Burden of proof.

1. Oral evidence.

As between the parties who are apparently either principals or sureties, the question of suretyship in a written instrument is open to parol proof.¹

¹ *Preston v. Gould*, 64 Iowa, 44, 19 N. W. 834; *Leeper v. Paschal*, 70 Mo. App. 117, and cases cited; *Saunders v. Prunty*, 2 Va. Dec. 469, 26 S. E. 584. See also cases collected in note to *Keidan v. Winegar*

20 L.R.A. 710, in which not only are there cases illustrating the rule as between the obligors, but also cases illustrating the rule as to the competency of oral evidence to show the relation of the obligors as against a holder or payee who has notice of the facts. And see Abbott, Tr. Ev. (3d ed.) p. 690.

2. Direct testimony.

One of the makers of a note may testify directly as to whether he signed it as principal maker or as surety.¹

¹ Druly v. Johnson, 21 Ill. App. 267.

3. Burden of proof.

The burden is upon one who appears as a principal to show that in fact he is merely a surety, if he relies on that fact.¹

¹ Howle v. Edwards, 113 Ala. 187, 20 So. 956; Jennison v. Sceets, 60 Ill. App. 607.

The president of a bank will be presumed to have indorsed notes payable to the bank with the intention of becoming surety to the bank, where he made such indorsement before the notes were discounted, and the discount was made in reliance on the indorsement and after the maturity of the notes, and he conceded his liability after some dispute, and consented to the application on such notes of money belonging to him in possession of the bank. *Brown v. Mechanics' & T. Bank*, 16 App. Div. 207, 44 N. Y. Supp. 645.

SURPRISE.

See cases on surprise at the trial, collected in note to *Smith v. Clews*, in 14 Abb. N. C. 469.

See also Civil Trial Brief (4th ed.) p. 25.

Right to object.

Counsel have a right to rely upon the adversary's pleading as indicating the case he is to meet; and recovery upon proof of a somewhat different cause of action or defense cannot be sus-

tained by amending or disregarding the variance against objection, unless the objector is allowed adequate opportunity to amend also if necessary, and to meet the amended allegations against him by proof.¹

The right to require proof that the objector has been misled is waived if not claimed at the trial.²

¹ Romeyn v. Sickles, 108 N. Y. 650, 15 N. E. 698.

² Griggs v. Howe, 2 Abb. App. Dec. 291, 31 Barb. 100.

SURRENDER.

1. Verbal.

2. Payment as raising presumption.

For kindred topics, see **ABANDONMENT; ASSIGNMENT; CLAIM; DELIVERY; POSSESSION.**

1. Verbal.

Express oral consent to the retaking of possession of land, though not given on the land, is, followed by retaking and continuance of possession, without objection, equivalent to actual or symbolic surrender.¹

¹ Baumier v. Antiau, 65 Mich. 31, 31 N. W. 888.

2. Payment as raising presumption.

Evidence that an obligation has been paid raises a legal presumption that it was surrendered, if it be one which the debtor had a right to require surrender of, as his voucher; otherwise not.¹

¹ Lyman v. Bank of United States, 12 How. 225, 13 L. ed. 965 (promissory notes).

SURVIVORSHIP.

Presumptions and burden of proof.

By the Roman law there was no presumption that those who perished in the same disaster all died coinstantaneously. If all the dead were over sixty years of age, the youngest was presumed to have survived. If all were under fifteen, then the eldest was deemed to have lived the longest. And as between the sexes in the same class, the presumption of survivorship was in favor of the male.¹

In France, by the Code Napoleon, substantially the same presumptions were adopted as providing for "succession in the order of nature."² And the substance of the French law on this subject was incorporated in the Code of Louisiana.³ In California also this rule has been adopted into the statute law.⁴

At common law, however, there is no presumption of law, in the absence of all evidence, arising from age or sex, as to the survivorship amongst persons whose death was occasioned by the same cause, nor is there any presumption that they all died at the same time. The burden of proof is on the party asserting survivorship.⁵

¹ Dig. lib. 34, title 5; De rebus dublis, l. 9, §§ 1, 3; Id. 1, 16, 22, 23; Menochius de Presumpt, lib. 1, Quæst. x. n. 8, 9; 1 Greenl. Ev. chap. 4, § 29; note in 51 L.R.A. 863.

² Duranton, Cours de Droit Francais, tom. vi. pp. 39, 42, 43, 48, 67, 69, 2 Kent, Com. 435, and note; 1 Greenl. Ev. chap. 4, § 29.

³ La. Code, §§ 937, 939, Rev. Civ. Code of La. 2d ed. 1920, p. 166 (formerly, arts. 930-933).

⁴ Cal. Code. Civ. Proc. § 1963, subd. 40. See Deering Code Civ. Pro. 1915, pp. 911-912.

Where two persons perished in the same calamity, and it is not shown who died first, and there are no particular circumstances from which it can be inferred, survivorship is presumed from the probabilities resulting from strength, age, and sex according to certain rules. one of which is, that if both be over forty-five and under sixty, and the sexes be different, the male is presumed to have survived. *Sanders v. Simcich*, 65 Cal. 50, 2 Pac. 741.

In *Robinson v. Gallier*, 2 Woods, 178, Fed. Cas. No. 11,951, however, it was held that the presumption of law as to survivorship prescribed

by the Civil Code of the state, which agrees in substance with the Roman law and Code Napoleon, did not apply except where the persons were entitled to inherit from one another, and in the absence of circumstances of the fact; but that the burden was on the party asserting the survivorship, in accordance with the common-law rule.

⁵ This is the settled doctrine in both England and the United States. *Broughton v. Randall*, 2 Cro. Eliz. 502, 78 Eng. Reprint, 752, Noy 64, 74 Eng. Reprint, 1032 (the earliest English case); *Underwood v. Wing*, 19 Beav. 459, 52 Eng. Reprint, 428, 1 Jur. N. S. 159, 4 De G. M. & G. 633, 43 Eng. Reprint, 655, 3 Week. Rep. 228; *Pell v. Ball*, 15 S. C. Eq. (Cheves) 99; *Coye v. Leach*, 8 Met. 371, 41 Am. Dec. 518; *United States Casualty Co. v. Kacer*, 169 Mo. 301, 58 L.R.A. 436, 92 Am. St. Rep. 641, 69 S. W. 370; *Newell v. Nichols*, 12 Hun, 604, 75 N. Y. 78, 31 Am. Rep. 424; *Re Willbor*, 20 R. I. 126, 37 Atl. 634, and cases collected in an exhaustive note to same case, 51 L.R.A. 863.

TAMPERING.

1. Right to prove
2. Contradiction.

As to the presumption against the destroyer (spoliator) of evidence, see cases collected in note to *Hay v. Peterson* (Wyo.) 34 L.R.A. 581.

1. Right to prove.

It is competent to prove that the adverse party has tampered with witnesses¹ or a juror.²

But merely that a party's agent tampered with evidence is not enough, unless it is shown to have been done in the course of employment.³

And a party charged with tampering has a right to testify in explanation.⁴

¹ *Gulerette v. McKinley*, 27 Hun, 320 (offer to bribe); *Chicago City R. Co. v. McMahon*, 103 Ill. 485, 42 Am. Rep. 29; *Egan v. Bowker*, 5 Allen, 449 (subornation of a deposition competent though deposition be not used); *Brown v. Byam*, 65 Iowa, 374, 21 N. W. 684; *Snell v. Bray*, 56 Wis. 156, 14 N. W. 14 (letters urging testimony in specified way, or warning against aiding adversary); *People v. Marion*,

29 Mich. 31; Williams v. Dickenson, 28 Fla. 90, 9 So. 847. And it is unnecessary to cross-examine the witness first. Martin v. Barnes, 7 Wis. 239.

² People v. Marion, 29 Mich. 31.

³ Green v. Woodbury, 48 Vt. 5; Chicago City R. Co. v. McMahon, 103 Ill. 485, 42 Am. Rep. 29; Myers v. Trice, 86 Va. 835, 11 S. E. 428.

⁴ Homer v. Everett, 91 N. Y. 641. Compare Lynch v. Coffin, 131 Mass. 311 (saying the judge may, in his discretion, allow explanation).

2. Contradiction.

On a question of tampering one may contradict an answer given by his own witness on the adversary's cross-examination: ¹ or an answer given by the adversary's witness on one's own cross-examination. ²

¹ Comstock v. Handy, 23 N. Y. Week. Dig. 547.

² Lewis v. Steiger, 68 Cal. 200, 8 Pac. 884.

TELEGRAMS.

1. Not privileged.
2. Best and secondary evidence.
3. Presumption of delivery.
4. Connected correspondence.

For kindred topics, see LETTERS; MESSAGE.

1. Not privileged.

Telegrams are not privileged or confidential communications. The agent or operator of the company may be compelled to produce them by subpoena duces tecum; ¹ and, if the absence of the paper is accounted for, may give oral evidence of contents. ²

¹ Ex parte Brown, 72 Mo. 83, 37 Am. Rep. 426; Ex parte Gould, 60 Tex. Crim. Rep. 442, 31 L.R.A.(N.S.) 835, 132 S. W. 364

² State v. Litchfield, 58 Me. 267.

2. Best and secondary evidence.

In general, where the course of communication is such that the message as delivered to the telegraph company binds either party, that paper is primary evidence as against such party. Where such that the message as received binds either party, that paper is primary evidence, as against him.¹

In either case there must be preliminary evidence of the agency of the company transmitting the message; and of this fact the original itself in the handwriting of the sender or that of his agent is the primary evidence.² If its absence is accounted for, indirect evidence of authority or ratification is enough.³

¹ Oregon S. S. Co. v. Otis, 14 Abb. N. C. 388, 394 (with note and cases there collected on all the various aspects of offering telegrams as evidence. The case was affirmed in 100 N. Y. 446, 53 Am. Rep. 221, 3 N. E. 485); Nickerson v. Spindell, 164 Mass. 25, 41 N. E. 105. In Anheuser-Busch Brewing Asso. v. Hutmacher, 127 Ill. 652, 4 L.R.A. 575, 21 N. E. 626, that rule is well stated thus: When the person to whom a telegram is sent takes the risk of its transmission, or is the employer of the telegraph company, the message delivered to the operator is the original, and must be produced as the best evidence; but when the person sending the message takes the initiative, so that the telegraph company is to be regarded as his agent, the original is the message actually delivered at the end of the line, and that is primary evidence of the contents of the message sent. The best evidence of the contents of a lost or destroyed telegram is the original filed with the telegraph company. Young v. People, 221 Ill. 51, 77 N. E. 536.

² Oregon S. S. Co. v. Otis, 100 N. Y. 446, 53 Am. Rep. 221, 3 N. E. 485; Culver v. Warren, 36 Kan. 391, 13 Pac. 577.

Testimony to establish the contents of a telegram should not be admitted, in the absence of evidence showing its loss or destruction. Prather v. Wilkens, 68 Tex. 187, 4 S. W. 252; American U. Teleg. Co. v. Daugherty, 89 Ala. 191, 7 So. 660; Yavapai County v. O'Neill, 3 Ariz. 363, 29 Pac. 430; Magie v. Herman, 50 Minn. 424, 36 Am. St. Rep. 660, 52 N. W. 909. But it may be where the telegram is without the jurisdiction of the court, and an effort has been made to find it. People v. Seaman, 107 Mich. 348, 65 N. W. 203.

For cases showing sufficiency of proof to let in secondary evidence, see Newton v. Donnelly, 9 Ind. App. 359, 36 N. E. 769; Fox v. Pedigo, 19 Ky. L. Rep. 271, 40 S. W. 249; Lindauer v. Meyberg, 27 Mo. App. 181.

³ Oregon S. S. Co. v. Otis, 100 N. Y. 446, 53 Am. Rep. 221, 3 N. E. 485 (holding that omission to reply to a letter reciting the telegram sent, and dealings in compliance with other telegrams of the same series, were enough as against a party who, when examined as a witness, did not deny having sent the telegrams); Culver v. Warren, 36 Kan. 391, 13 Pac. 517 (holding part payment of the demand arising out of the transaction sufficient evidence of agency of the company).

3. Presumption of delivery.

Where a message to be transmitted by telegraph is shown to have been delivered to the operator, and it is proved by such operator at the telegraph office that all messages received were duly transmitted, there is a presumption, arising from the regular course of business, that the message was received by the person to whom it was sent.¹

¹ Com. v. Jeffries, 7 Allen, 548, 563, 83 Am. Dec. 712 (criminal case; false pretenses); Eppinger v. Scott, 112 Cal. 369, 373, 44 Pac. 723, 42 Pac. 301; Long-Bell Lumber Co. v. Nyman, 145 Mich. 477, 116 Am. St. Rep. 310, 108 N. W. 1019; Ottumwa v. McCarthy Improv. Co. 175 Iowa, 233, 150 N. W. 586, 154 N. W. 306, Ann. Cas. 1917E, 1077 and note; Corry v. Sylvia y Cia, 192 Ala. 550, 68 So. 891, Ann. Cas. 1917E, 1052; Providence Washington Ins. Co. v. Western U. Teleg. Co. 247 Ill. 84, 30 L.R.A.(N.S.) 1170, 139 Am. St. Rep. 314, 93 N. E. 134.

Upon proof of delivery of a telegraphic message for transmission, the presumption arises that the message reached its destination. Oregon S. S. Co. v. Otis, 100 N. Y. 446, 53 Am. Rep. 221, 3 N. E. 485 (civil case).

4. Connected correspondence.

Relevant letters and telegrams, which the party on testifying as a witness does not deny that he received or sent, may be received if they are a connected part of a correspondence otherwise already in evidence.¹

¹ Oregon S. S. Co. v. Otis, 100 N. Y. 446, 53 Am. Rep. 221, 3 N. E. 485. And see cases collected in note to Western Twine Co. v. Wright (S. D.) 44 L.R.A. 438.

TELEPHONE.

1. Judicial notice.
2. Burden of proof.
3. Recognition of speaker.
4. Other evidence of identity.
5. Necessity of identification of speaker.
6. Agency of operator.
7. A third party as a witness.
8. Conversation by telephone as a false pretense.

For kindred topics, see **ADMISSIONS; CONVERSATION; MESSAGE.**

1. Judicial notice.

Courts will take judicial notice that telephones have become an ordinary medium of communication and interchange of thought.¹

¹ *Globe Printing Co. v. Stahl*, 23 Mo. App. 451.

2. Burden of proof.

The burden of proof always rests on the party offering evidence of a telephone conversation to establish by some proof either direct or circumstantial the identity of the person speaking.¹

¹ *Smarak v. Segusse*, 91 N. J. L. 57, 102 Atl. 354.

3. Recognition of speaker.

The receiver or hearer of a message through the telephone may testify to the identity of the person speaking through the instrument, if he had had previous conversations with him through the instrument and otherwise, and at the time of the conversation in question recognized his voice through the in-

strument.¹ Even if the receiver of the message was not acquainted with the voice at the time but afterwards identifies the party seeing him and hearing his voice again, the telephone conversation is admissible.²

¹ *People v. Ward*, 3 N. Y. Crim. Rep. 483, 511, Barrett, J. (This decision has been criticized, 28 Alb. L. J. 422, 28 Cent. L. J. 362; but in view of the previous conversance with the voice, the competency of the evidence is analogous to that of the testimony to handwriting received from one who has corresponded with the alleged writer, or received letters from him.)

On the question of necessity and sufficiency of identification as a foundation for admission in evidence of conversation by telephone, see note in 6 L.R.A.(N.S.) 1180.

² *People v. Strollo*, 191 N. Y. 42, 83 N. E. 573; *People v. Dunbar Contracting Co.* 215 N. Y. 416, 109 N. E. 554.

4. Other evidence of identity.

The identity of a speaker may be proved by other evidence than the testimony of the one whom he addressed through the telephone.¹ Thus identification may be established by the introduction of the record of the telephone company.²

¹ *Davis v. Walter*, 70 Iowa, 465, 30 N. W. 804.

² *Spivey v. State*, 114 Ark. 267, 169 S. W. 949. See also note in Ann. Cas. 1916E, 978.

5. Necessity of identification of speaker.

By the weight of authority evidence is admissible as to conversations over the telephone, where the witness has called for a designated person at his place of business and the one answering the telephone and carrying on the conversation claims to be the person called for.¹

¹ *Theisen v. Detroit Taxicab & Transfer Co.* 200 Mich. 136, L.R.A.1918D, 715, 166 N. W. 901; *Monarch Livery Co. v. Luck*, 184 Ala. 518, 63 So. 656; *General Hospital Soc. v. New Haven Rendering Co.* 79 Conn. 581, 118 Am. St. Rep. 173, 65 Atl. 1065, 9 Ann. Cas. 168; *Tonkin-Clark Realty Co. v. Hedges*, 24 Idaho, 304, 133 Pac. 669; *Godair v. Hamilton Nat. Bank*, 225 Ill. 572, 116 Am. St. Rep. 172, 80 N. E. 407, 8 Ann. Cas. 447; *Delaney v. McNeil & H. Co.* 195 Ill. App. 524; *Cox*

v. Cline, 147 Iowa, 353, 126 N. W. 330; *Reed v. Burlington, C. R. & N. R. Co.* 72 Iowa, 166, 2 Am. St. Rep. 243, 33 N. W. 451; *Miller v. Leib*, 109 Md. 414, 72 Atl. 466; *Gardner v. Hermann*, 116 Minn. 161, 133 N. W. 558; *St. Paul F. & M. Ins. Co. v. McQuaid*, 114 Miss. 430, 75 So. 255; *Kansas City Star Pub. Co. v. Standard Warehouse Co.* 123 Mo. App. 13, 99 S. W. 765; *Wolfe v. Missouri P. R. Co.* 97 Mo. 473, 3 L.R.A. 539, 10 Am. St. Rep. 331, 11 S. W. 49, abstr. s. c. 17 Wash. L. Rep. 309; *Jenderson v. Hansen*, 50 Mont. 216, 146 Pac. 473; *Heckman v. Davis*, 56 Okla. 483, 155 Pac. 1170; *Clough v. Western U. Teleg. Co.* 99 S. C. 484, 83 S. E. 916; *Olds Motor Works v. Churchill*, — Tex. Civ. App. —, 175 S. W. 785; *Stein v. Jasculca*, 165 Wis. 317, 162 N. W. 182.

See also cases collected in notes 17 L.R.A. 440; 6 L.R.A.(N.S.) 1180; and L.R.A.1918D, 720; and 31 Harvard L. Rev. 794. See also Abbott Civil Trial Brief (4th ed.) chap. xvi., § 79.

For the same principle, see § 8, AGENCY.

6. Agency of operator.

If it be shown that the person serving as operator at the telephone was requested or authorized by the speaker to act for him in speaking through the instrument, or in hearing the message through the instrument and repeating it to the receiver, he may be regarded as the agent of the speaker, and his interpretation of the message to the receiver binds the speaker, and may be proved by any witness who heard it.¹

¹ *Sullivan v. Kuykendall*, 82 Ky. 483, 56 Am. Rep. 901; *Oskamp v. Gadsden*, 35 Neb. 7, 17 L.R.A. 440, 52 N. W. 718. The decision in the first case has been criticised. 22 Cent. L. J. 34. But if questionable in any point it is as to assuming that the operator was the agent of the speaker, rather than of the receiver in that case. *Herendeen Mfg. Co. v. Moore*, 66 N. J. L. 74, 48 Atl. 525.

7. A third party as a witness.

Where an agreement is made by telephone, a third party who was present when one of the parties was telephoning may state what he heard that party say into the telephone.¹

¹ *Jamaica Pond Garage v. Woodside Motor Livery*, 236 Mass. 541, 128 N. E. 881; *Liverpool & L. & G. Ins. Co. v. Hinton*, 116 Miss. 754, 77 So. 652; *Northern Assur. Co. v. Morrison*, — Tex. Civ. App. —, 162 S. W. 411; *Kent v. Cobb*, 24 Colo. App. 264, 133 Pac. 424; *Rees v. Gair*, 144 App. Div. 294, 129 N. Y. Supp. 213.

See also notes in Ann. Cas. 1916E, 977 and 27 Harvard L. Rev. 683.

8. Conversation by telephone as a false pretense.

Evidence of a telephone conversation in which an attempt is made to obtain goods by false pretenses may be admitted in a criminal case.¹

¹ State v. Peterson, 109 Wash. 25, 8 A.L.R. 652, 186 Pac. 264. See also note in 8 A.L.R. 656.

TENDER.

1. Burden of proof.
2. Actual production.
3. Offer and readiness.
4. Having in sight.
5. "Willingness" to pay.
6. Waiver.
7. Place of tender.

1. Burden of proof.

The defense of tender must not only be pleaded, but be proved with definiteness.¹

1. Fisk v. Casey, 119 Cal. 643, 51 Pac. 1077.

2. Actual production.

Actual production of money is necessary.¹ An offer to pay is not the equivalent of a tender.²

¹ Strong v. Blake, 46 Barb. 227 (holding that it is not enough for the debtor to have the money in his pocket); Bakeman v. Pooler, 15 Wend. 637. But Smith v. Old Dominion Bldg. & L. Asso. 119 N. C. 257, 26 S. E. 40, holds the production of money unnecessary where the debtor stated to his creditor that he then had the money in a bank located in the same building with the creditor, that he was ready to pay the sum tendered, but that the creditor declined to receive it.

² Lewis v. Mott, 36 N. Y. 395.

3. Offer and readiness.

Offer and readiness to pay by check to be certified is suffi-

cient as against a party who, without intimating that he would deliver on payment, departs and does not return.¹

¹ Currie v. White, 45 N. Y. 822.

But a certified check is not ordinarily the equivalent of money, for the purpose of a tender. Hobbs v. Ray, 29 Ky. L. Rep. 999, 96 S. W. 589.

4. Having in sight.

Having in sight is enough if there is a practical refusal to receive.¹

¹ Lawrence v. Miller, 86 N. Y. 137 (deed).

5. "Willingness" to pay.

It is not error to refuse to allow a debtor to testify that he was "willing" to pay or that he communicated his willingness to the creditor.¹

¹ Fisk v. Casey, 119 Cal. 643, 51 Pac. 1077.

6. Waiver.

Evidence of a waiver of a tender is admissible under an allegation of tender.¹

¹ Smith v. Old Dominion Bldg. & L. Asso. 119 N. C. 257, 26 S. E. 40.

7. Place of tender.

Evidence to show an oral agreement fixing the place for tender of money contemplated by a contemporaneous written agreement which does not definitely fix the place is competent.¹

¹ Jamison v. Keith, 19 Ky. L. Rep. 511, 41 S. W. 33. In the absence of such an oral agreement, however, it would be the duty of the debtor to seek out the creditor. Ibid.

TESTIMONY (GIVEN IN FORMER PROCEEDING).

1. Proof of former testimony generally.
2. Deposition.
3. Identity of parties and subject-matter.
4. Opportunity to cross-examine.
5. Oath.
6. Proof of death, absence, or disqualification.
7. Diligence in procuring deposition.
8. Impeachment of witness.
9. Refreshing recollection.
10. Proving by stenographer reading notes.
11. Proving by official reporter's transcript.
12. Proving by witness who heard.
13. Proving by bill of exceptions.

See the rules as applied in criminal causes, fully stated in Criminal Trial Brief; see also ADMISSIONS; FORGOTTEN FACT; PLEADINGS.

1. Proof of former testimony generally.

An exception to the rule rejecting hearsay evidence is the testimony of a witness given in a former proceeding between the same parties,¹ who has since died,² or who is dead for all purposes of evidence,—as where he is insane³ or cannot be found after diligent search, or resides in a place beyond the jurisdiction of the court,⁴ or who, for some reason, has become disqualified to testify as a witness.⁵ The courts are divided as to whether the former testimony or deposition of a party is admissible after the death of his adversary where such testimony relates to a personal transaction with him. The modern tendency is to admit such evidence,⁶ but a number of jurisdictions have excluded it.⁷ It has been held that where a witness has been disqualified by marriage with defendant her testimony is not admissible.⁸

¹The statement that the admission of the testimony of a witness on a former trial is an exception to the rule rejecting hearsay evidence was criticized in *Minneapolis Mill Co. v. Minneapolis & St. L. R. Co.* 51 Minn. 304, 53 N. W. 639, as being inaccurate. "The chief objections," said the court in that case, "to hearsay evidence, are the want of the sanction of an oath, and of any opportunity to cross-examine,

neither of which applies to testimony given on a former trial. The real objection to such evidence is that it is only the testimony of someone else as to what the witness swore to on a former trial; and before the day of official reporters in our trial courts the accuracy or completeness of such evidence depended entirely upon the fallible memory of those who heard the witness testify. It can be readily seen why, under such circumstances, courts were disinclined to admit such evidence except in cases of actual necessity. But where the words of a witness as they come from his lips are taken down in full by an official court stenographer, this objection does not apply. We do not see why such testimony is not as satisfactory and reliable as a new deposition, taken out of the state, would be." A former criminal trial against the same defendant in a later civil action involving the same issue meets the requirement of being a former proceeding between the same parties. *Kreuger v. Sylvester*, 100 Iowa, 647, 69 N. W. 1059; *Gavan v. Ellsworth*, 45 Ga. 283; *Ray v. Henderson*, 44 Okla. 174, 144 Pac. 175; note in 28 Harvard L. Rev. 429.

Contra: *McInturff v. Insurance Co. of N. A.* 248 Ill. 92, 140 Am. St. Rep. 153, 93 N. E. 369, 21 Ann. Cas. 176; *Harger v. Thomas*, 44 Pa. 128, 84 Am. Dec. 422.

* *Louisville & N. R. Co. v. Whitley County Ct.* 20 Ky. L. Rep. 1367, 49 S. W. 332; *Price v. Lawson*, 74 Md. 499, 22 Atl. 206; *Lewis v. Roulo*, 93 Mich. 475, 53 N. W. 622; *Lee v. Hill*, 87 Va. 497, 12 S. E. 1052; *Carrico v. West Virginia C. & P. R. Co.* 39 W. Va. 86, 24 L.R.A. 50, 19 S. E. 571. And so by statute in some states. N. Y. Civ. Prac. Act, § 348; *Parson's Prac. Manual of N. Y.* 1921, p. 147 (formerly § 830 N. Y. Code Civ. Proc.); Cal. Code Civ. Proc. § 1870, subd. 8, Code of Civ. Proc. Cal. 1917, p. 883. Compare other local Codes and statutes. The application of the New York statute is not confined to testimony taken upon the trial immediately preceding the one in which the testimony is offered. But the testimony may be read on any subsequent trial of the action. *Koehler v. Scheider*, 16 Daly, 235, 10 N. Y. Supp. 101.

But incompetent testimony, even though admitted without objection on the former trial, is not competent on a second or subsequent trial. *Garrett v. Weinberg*, 54 S. C. 127, 31 S. E. 341. And see cases collected in note to *Davis v. Kline*, 2 L.R.A. 78; note to *Morehouse v. Morehouse*, 17 Abb. N. C. 421.

* *Ibanez v. Winston*, 222 Mass. 129, 109 N. E. 814.

* *Starkie*, in his work on Evidence (page 310), states this as prevailing English rule.

In *Greenleaf on Evidence* (§ 163) the rule is laid down quite as broadly. This, however, has been criticized as too broad by some courts, which hold that, to make the testimony admissible, it must appear that the witness is dead, insane, or by physical disability at the time of the trial unable to be examined, or that he is absent by the act or pro-

curement of the party against whom the evidence is offered, or that his whereabouts cannot be ascertained, so that by the exercise of due diligence his deposition could not be taken. See 1 Greenl. Ev. § 163, and note; 1 Phil. Ev. 393, and note 114. And see *Kirchner v. Laughlin*, 5 N. M. 365, 23 Pac. 175. See further, § 6, this title.

The fact that there had been a second trial on which the witness had also testified, intervening between the one at which the desired testimony was given and the one at which the testimony is offered, is no reason for excluding it. *Ord v. Nash*, 50 Neb. 335, 69 N. W. 964.

But testimony of an absent witness read on the first trial is not competent on a third trial, when on the second trial the issues were materially changed by amendment of the pleadings, and the witness was fully examined thereon. *Schindler v. Milwaukee, L. S. & W. R. Co.* 87 Mich. 400, 49 N. W. 670.

And a party who has taken the deposition of a witness for use on the trial cannot, on the ground of the witness's absence from the state, introduce his testimony given on a former trial. *Stein v. Swensen*, 46 Minn. 360, 49 N. W. 55.

⁵ *Bowie v. Hume*, 13 App. D. C. 286; *Whitaker v. Marsh*, 62 N. H. 477. And it is so provided by statute in some states, N. Y. Code Civ. Proc. § 830. And see cases collected in note to *Davis v. Kline*, 2 L.R.A. 78; *Pope v. State*, 183 Ala. 61, 63 So. 71; *Langham v. State*, 12 Ala. App. 46, 68 So. 504, where the cases are reviewed and the rule as to the admission of former testimony is well stated in the following language: "If the right of cross-examination has been exercised or full opportunity afforded therefore such evidence (former testimony) is admissible: (1) Where the witness is dead; (2) is insane or mentally incapacitated; (3) is shown to be beyond the seas; (4) is kept away by the contrivance of the opposite party; (5) has gone beyond the jurisdiction of the court, or his personal attendance is unobtainable by the exercise of due diligence; and (6) where the witness is alive and his personal attendance may be obtained, if he has been rendered incompetent as a witness by subsequently occurring facts for which the party offering the testimony is not responsible and over which he had no control."

⁶ *New v. Smith*, 94 Kan. 6, L.R.A.1915F, 771, 145 Pac. 880, Ann. Cas. 1917B, 362; *Munger v. Myers*, 96 Kan. 743, 153 Pac. 497; *Armitage v. Snowden*, 41 Md. 119; *Pratt v. Patterson*, 81 Pa. 114; *Rice v. Motley*, 24 Hun, 143. See also note in L.R.A.1915F, 771, 15 Columbia L. Rev. 368, and *Wigmore, Ev.* § 578.

⁷ If a witness has become incompetent to testify at the second trial of an action on account of the death of the other party to the transaction, because of a statute providing that no person shall be examined as a witness in regard to any personal transaction with a person who has, at the commencement of the examination, deceased, against his personal representative, a transcript of his testimony taken at the former

trial, when the other person was living, cannot be admitted, notwithstanding a statutory provision that a transcript of testimony taken upon a trial, when material and competent, shall be admissible on a retrial of the cause. *Greenlee v. Mosnat*, 136 Iowa, 639, 14 L.R.A. (N.S.) 488, 111 N. W. 996. See also notes in 14 L.R.A. (N.S.) 488, and L.R.A.1915F, 771, on admissibility, after death of adversary, of testimony or deposition of party given or taken before the former's death and relating to a personal transaction with him.

See also to same effect in the case of deposition *Boyd v. Gore*, 143 Wis. 531, 128 N. W. 68, 21 Ann. Cas. 1263; *Hardin v. Taylor*, 78 Ky. 593.

And testimony of a living witness at a former trial cannot be proved at a subsequent trial of the same case, although he is too ill to attend court, if the illness existed at the beginning of the trial, so that, if his evidence was material, an adjournment could have been had until he could be present. *McCrorey v. Garrett*, 109 Va. 645, 24 L.R.A. (N.S.) 139, 64 S. E. 978.

⁸ *Langham v. State*, 12 Ala. App. 46, 68 So. 504. But see comment *contra* note in 29 Harvard L. Rev. 102.

2. Deposition.

The exception is not confined to testimony given orally, but extends to the deposition, otherwise unobjectionable, of an absent or disqualified witness which was read on a former proceeding between the parties.¹

¹ *Watson v. St. Paul City R. Co.* 76 Minn. 358, 79 N. W. 308; *Allen v. Chouteau*, 102 Mo. 309, 14 S. W. 869; *Taylor v. Mallory*, 96 Va. 18, 30 S. E. 472; *Briggs v. Briggs*, 80 Cal. 253, 22 Pac. 334. See also cases collected in note to *Davis v. Kline*, 2 L.R.A. 78; note to *Morehouse v. Morehouse*, 17 Abb. N. C. 421. And according to *Mabe v. Mabe*, 122 N. C. 552, 29 S. E. 843, it is competent, even though the witness has testified on the present hearing.

In *Thornton v. Briton*, 144 Pa. 126, 22 Atl. 1048, it was held no abuse of discretion for the court to admit the deposition of a witness eightv-seven years old and confined to his room, instead of enforcing his attendance or compelling the taking of a new deposition.

The party offering the deposition may offer and read such portions only as are desired, subject to the right of the court to order that all be read at the same time, or to the right of the adverse party to read other relevant and material portions. *Watson v. St. Paul City R. Co.* 76 Minn. 358, 79 N. W. 308. And see also *Ainley v. Manhattan R. Co.* 47 Hun, 206; *Weeks v. McNulty*, 101 Tenn. 495, 43 L.R.A. 185, 48 S. W. 809; *Bradford v. Taylor*, 74 Tex. 175, 12 S. W. 20.

But the court cannot of itself separate and admit only that which is corroborative of the witness's present testimony, and exclude that which is not. *Mabe v. Mabe*, 122 N. C. 552, 29 S. E. 843.

3. Identity of parties and subject-matter.

And, in order to be competent, the former proceeding must have been between the same parties, involving the same questions.¹

¹ *Briggs v. Briggs*, 80 Cal. 253, 22 Pac. 334; *Choate v. Huff*, 4 Tex. App. Civ. Cas. (Willson) 480, 18 S. W. 87; *Oliver v. Louisville & N. A. R. Co.* 17 Ky. L. Rep. 840, 32 S. W. 759; *Fearn v. West Jersey Ferry Co.* 143 Pa. 122, 22 Atl. 708 (s. c., with note, 13 L.R.A. 366); *Varnum v. Hart*, 47 Hun, 18 (§ 348, Civ. Prac. Act; *Parson's Prac. Manual of N. Y.* 1921, p. 147, formerly § 830, N. Y. Code Civ. Proc.); *Marshall v. Hancock*, 80 Cal. 82, 22 Pac. 61 (Cal. Code Civ. Proc. § 1870, subd. 8; Code of Civ. Proc. Cal. 1917, p. 883).

In *Washington Gaslight Co. v. District of Columbia*, 161 U. S. 316, 40 L. ed. 712, 16 Sup. Ct. Rep. 564, an action by the District of Columbia against the gaslight company to recover over the proceeds of a judgment recovered against the district for personal injuries caused by the alleged negligence of the gaslight company, the testimony of a deceased witness given on the trial between the person injured and the District was allowed to go in on the trial against the company in order to show the subject-matter of the litigation. "Clearly," as was said by the court in that case, "even although it be conceded that the testimony of the witness given on the trial was *res inter alios* as to the defendant in this action, and was, therefore, not admissible as going to establish substantive facts, yet obviously it was competent for the purpose of throwing light upon the record of the first action, and thus elucidating the determination of the question of what was the subject-matter covered by the judgment rendered in that action."

It is matter of no consequence, however, that there were other persons parties to the former action who are not parties to the subsequent action. *Allen v. Chouteau*, 102 Mo. 309, 14 S. W. 869.

4. Opportunity to cross-examine.

It must also appear that the adverse party was present at the proceeding at which the testimony was taken, and permitted to cross-examine the witness.¹

¹ *Jackson v. Crilly*, 16 Colo. 103, 26 Pac. 331; *Briggs v. Briggs*, 80 Cal. 253, 22 Pac. 334.

That testimony was taken orally in the probate court contrary to the statute and against the objection of the witness, as to money alleged to belong to a decedent's estate and to be in witness's hands, will not prevent its use in a subsequent action against the witness for such money, where he was represented by counsel and no injustice or prejudice appears to have resulted. *Lilley v. Mutual Ben. L. Ins. Co.* 92 Mich. 153, 52 N. W. 631.

A deposition read on a former hearing, which it is desired to use at a subsequent hearing, must have been taken on due and regular notice given as required by law. *Behan v. Long*, — Tex. Civ. App. —, 30 S. W. 380.

5. Oath.

It is essential that it shall also appear that the witness was sworn in the court in which such former hearing was had.¹

¹ And it is not enough that it appear that he believed at the time he testified that he was swearing. *Ford v. State*, 97 Ga. 365, 23 S. E. 996.

6. Proof of death, absence, or disqualification.

But whether the testimony was given orally or by deposition, it must be affirmatively shown that the witness is dead, absent, or has since testifying become disqualified to testify as a witness.¹

¹ *Louisville & N. R. Co. v. Whitley County Ct.* 20 Ky. L. Rep. 1367, 49 S. W. 332; *United States v. Cross*, 9 Mackey, 365 (exclusion of question asking witness in effect to state his own former testimony, held proper).

And see cases cited in note 3, § 1, this title. In *Spaulding v. Chicago, St. P. & K. C. R. Co.* 98 Iowa, 205, 67 N. W. 227, the testimony was admitted on proof that the witness, though diligently searched for, could not be found.

Oral proof that a witness whose testimony on a former trial was taken down in shorthand is beyond the jurisdiction of the court is a substantial compliance with the Kentucky statutes (§ 4643; see Carroll's Ky. Stats. 6th ed. 1922, p. 2229), admitting such testimony upon proper "affidavit." *Byrne v. Morel*, 20 Ky. L. Rep. 1311, 49 S. W. 193.

Failure of a witness, short of mental incapacity, to recollect particular facts, will not justify the introduction of his testimony given on a former trial. *Stein v. Swensen*, 46 Minn. 360, 49 N. W. 55.

And testimony of a witness given on a former trial is not admissible where he is a resident of the state and has been attached as a witness, although testimony which it is necessary to contradict thereby has

been given in surprise. The party should apply for a continuance or postponement. *Caldwell v. State*, 28 Tex. App. 566, 14 S. W. 122.

7. Diligence in procuring deposition.

As to whether testimony given by a witness on a former proceeding, who is beyond the jurisdiction of the court, but whose whereabouts are unknown, is admissible irrespective of whether due diligence has been exercised in attempting to procure his deposition, the cases are in conflict.¹

¹ Concerning the admissibility of the testimony of a deceased or disqualified witness given at a former trial between the same parties, upon the same issue, there is no disagreement among the authorities. See cases this title, § 1, *supra*. A number of cases hold that the rule applies also to a witness residing in a state other than that in which the litigation is pending, for the reason that he is as much out of the reach of the process of the court as if he were in fact dead. For example, see *Emerson v. Burnett*, 11 Colo. App. 86, 52 Pac. 752; *Howard v. Patrick*, 38 Mich. 795; *People v. Devine*, 46 Cal. 46; *Magill v. Kauffman*, 4 Serg. & R. 317, 8 Am. Dec. 713; *Omaha v. Jensen*, 35 Neb. 68, 52 N. W. 833; *Reynolds v. Powers*, 96 Ky. 481, 29 S. W. 299; *Sneed v. State*, 47 Ark. 180, 1 S. W. 68; *Minneapolis Mill Co. v. Minneapolis & St. L. R. Co.* 51 Minn. 304, 53 N. W. 639; *Omaha Street R. Co. v. Elkins*, 39 Neb. 480, 58 N. W. 164, and cases cited.

On the other hand, there are cases holding that such evidence is admissible only upon a showing that after the exercise of due diligence the party offering the evidence has been unable to procure the deposition of the witness; and this view finds support in the decisions of a number of courts whose opinions are entitled to respect. See, for example, *Gerhauser v. North British & Mercantile Ins. Co.* 7 Nev. 174; *Slusser v. Burlington*, 47 Iowa, 300; *Berney v. Mitchell*, 34 N. J. L. 337; *Gastrell v. Phillips*, 64 Miss. 473, 1 So. 729; *Cassady v. Trustees of Schools*, 105 Ill. 560; *Kirchner v. Laughlin*, 5 N. M. 365, 23 Pac. 175. And see *Spaulding v. Chicago, St. P. & K. C. R. Co.* 98 Iowa, 205, 67 N. W. 227 (where the testimony was admitted on showing that the witness could not be found after a diligent search, and that his whereabouts were unknown).

8. Impeachment of witness.

Testimony of a witness given on a former proceeding is admissible to impeach him as a witness at a subsequent trial as to contradictory statements.¹

¹ *Tobin v. Jones*, 143 Mass. 448, 9 N. E. 804; *Charlton v. Kelly*, 84 C. C.

A. 295, 156 Fed. 433, 13 Ann. Cas. 518. See fully on this question Civil Trial Brief (4th ed.) chap. ix., IMPEACHMENT OF WITNESSES.

9. Refreshing recollection.

Testimony of a witness given at a former trial is properly admissible to refresh the recollection of such witness in the subsequent trial,¹ but cannot be used as supplementing his present testimony as to any facts concerning which his memory has not been refreshed and he has no present recollection.²

¹ Com. v. Burton, 183 Mass. 461, 471, 67 N. E. 419.

² Stearns Lumber Co. v. Howlett, — Mass. —, 131 N. E. 217; Rio Grande Southern R. Co. v. Campbell, 55 Colo. 493, 136 Pac. 68, Ann. Cas. 1914C, 573; Robinson v. Gilman, 43 N. H. 295; Stein v. Swenson, 46 Minn. 360, 24 Am. St. Rep. 234, 49 N. W. 55; Reed v. Orton, 105 Pa. 294.

10. Proving by stenographer reading notes.

It is proper to prove the testimony of a witness given on a former proceeding, which has been taken down in shorthand by the official reporter, by having him read such testimony so taken down.¹

¹ Minneapolis Mill Co. v. Minneapolis & St. L. R. Co. 51 Minn. 309, 53 N. W. 639 (where the question is discussed at some length); Lucker v. Liske, 111 Mich. 683, 70 N. W. 421. *Contra*: Kirchner v. Laughlin, 5 N. M. 365, 23 Pac. 175 (holding that the New Mexico statute [see § 1379, N. M. Stat. 1915, p. 475, re-enacted with slight changes N. M. Session Laws 1921, chap. 199, p. 440], providing the stenographer's notes shall at the end of each term be deposited in the office of the clerk, does not declare the legal value of such notes as evidence, or change the rule as to the admissibility of evidence, as to what a witness testified to on a former trial); Kellogg v. Scheuerman, 18 Wash. 293, 51 Pac. 344, 52 Pac. 237 (but he may use them to refresh his memory).

In Smith v. Hine, 179 Pa. 203, 36 Atl. 222, an official reporter was not allowed to read his notes because he was not sworn as required by Pa. act 1887, § 3.

In Bennett v. Syndicate Ins. Co. 43 Minn. 45, 44 N. W. 794, where, after a witness had denied that he had changed his testimony as given upon a previous trial after the stenographer had produced and read his notes in full, which the witness recognized as correct, it was held that all the testimony of the witness taken on the previous trial was admissible in support of the claim that he had changed his testimony.

In *Overtoom v. Chicago & E. I. R. Co.* 80 Ill. App. 515, an action for wrongful death from alleged negligence of the railroad company, a stenographer employed by the company, who took notes of the testimony introduced at the coroner's inquest over the body of the deceased, was not allowed to read from those notes,—especially as it did not appear that they were correct, or that they were in the same condition as they were at the close of the inquest.

11. Proving by official reporter's transcript.

So, too, the testimony of a witness given on a former proceeding may be proved by a correct transcript thereof as taken down in shorthand and transcribed by the official reporter.¹

¹ *Emerson v. Burnett*, 11 Colo. App. 86, 52 Pac. 752 (where the transcript was admitted to be correct); *Reese v. Morgan Silver Min. Co.* 7 Utah, 489, 54 Pac. 759; *Spaulding v. Chicago, St. P. & K. C. R. Co.* 98 Iowa, 205, 67 N. W. 227; *Omaha v. Jensen*, 35 Neb. 68, 52 N. W. 833; *Merchants' Nat. Bank v. Stebbins*, 10 S. D. 466, 74 N. W. 199, and cases cited; *Bridgman v. Corey*, 62 Vt. 1, 20 Atl. 273. Compare *Chicago, St. P. M. & O. R. Co. v. Myers*, 25 C. C. A. 486, 49 U. S. App. 279, 80 Fed. 361 (following state practice allowing such evidence but holding that the particular transcript in the case was incompetent because incomplete); *Mulcahey v. Lake Erie & W. R. Co.* 69 Fed. 172 (refusing to follow state practice allowing such evidence).

But where the stenographer states that he does not know that he took down the exact words of a witness, but thinks they are substantially what the witness stated, it is proper to refuse to allow them to be read in evidence, but to permit him to refresh his memory from the notes and to testify therefrom. *Ellis v. State*, 25 Fla. 702, 6 So. 768.

And a statement taken down by the stenographer at a former trial was held inadmissible in *Adams v. Eddy*, — Tex. Civ. App. —, 29 S. W. 180, because he could not testify as to its correctness without his original notes, which he did not have in court.

12. Proving by witness who heard.

The stenographer's minutes of a trial are not such a record as to constitute the only or primary evidence of testimony desired to be proved on a subsequent trial, unless made so by express statute;¹ and any person who was present in court and heard the testimony at the former proceeding is competent to testify in respect thereto.²

It is not necessary, however, that the witness should be able

to state the exact language used; it is sufficient if he can repeat the substance.³

¹ So by statute in West Virginia (Hogg's Supp. W. Va. Code Ann. 1918, § 4630h, 7d III. p. 743 [formerly Code 1897, p. 1062, § 3]). See *Carrico v. West Virginia C. & P. R. Co.* 39 W. Va. 86, 24 L.R.A. 50, 19 S. E. 571. Compare other local Codes and statutes for similar provisions.

² *Nasanowitz v. Hanf*, 17 Misc. 157, 39 N. Y. Supp. 327 (that it is not necessary to produce the stenographer); *Price v. Lawson*, 74 Md. 499, 22 Atl. 206 (where the party offering the testimony was himself allowed to testify to it); *Brice v. Miller*, 35 N. C. 537, 15 S. E. 272; *Garrett v. Weinberg*, 54 S. C. 127, 31 S. E. 341; *Loughry v. Mail*, 34 Ill. App. 523; *German Nat. Bank v. Leonard*, 40 Neb. 676, 59 N. W. 107 (that the witness may testify with or without the aid of a proper memorandum).

And oral evidence is admissible, without presenting the record of a former suit, to show that certain depositions were taken and used in the suit, when it is not sought to prove their contents by parol. *Ayers v. Chisum*, 3 N. M. 59, 1 Pac. 856.

In *Kain v. Larkin*, 131 N. Y. 300, 30 N. E. 105, it was held that a referee having in his possession an examination made by him of a judgment debtor in supplementary proceedings, which was reduced to writing and read to and subscribed by the debtor, could not testify to the latter's statements upon such examination, the written examination itself being the best evidence.

³ *Sebring v. Stryker*, 10 Misc. 289, 30 N. Y. Supp. 1053; *State v. O'Brien*, 81 Iowa, 88, 46 N. W. 752; *McGeoch v. Carlson*, 96 Wis. 138, 71 N. W. 116. See also *Civil Trial Brief* (4th ed.) p. 228, note 3.

13. Proving by bill of exceptions.

Whether or not it is proper to prove former testimony by a bill of exceptions in which it is incorporated is contested.¹

¹ *Affirmative*: *Rico Reduction & Min. Co. v. Musgrave*, 14 Colo. 79, 23 Pac. 458; *Torrey v. Burney*, 113 Ala. 496, 21 So. 348; *Louisville Water Co. v. Upton*, 18 Ky. L. Rep. 326, 36 S. W. 520; *Slingerland v. Slingerland*, 46 Minn. 100, 48 N. W. 605 (that it may be done by a case settled, allowed, and certified as prescribed by statute as constituting all the testimony produced at such former trial); *Padley v. Catterlin*, 64 Mo. App. 629 (Mo. Acts 1891, p. 138).

Negative: *Fisher v. Fisher*, 131 Ind. 462, 29 N. E. 31; *Illinois C. R. Co. v. Ashline*, 171 Ill. 313, 49 N. E. 521; *Simmons v. Spratt*, 26 Fla. 449, 9 L.R.A. 343, 8 So. 123; *Anderson v. Reid*, 10 App. D. C. 426. But it may be used as a memorandum to refresh recollection. *Ibid.*

THREATS.

1. Allegation.
2. As to state of mind.

For the rules in full, see Criminal Trial Brief, and note in 17 L.R.A. 654. See also CONVERSATION; HANDWRITING; LETTERS.

1. Allegation.

An allegation of threatening may be proved by acts as well as by words.¹

¹ People v. Deacons, 109 N. Y. 374, 16 N. E. 676 (so holding on indictment under statute punishing "any tramp who . . . shall threaten to do injury to any person") s. p., Criminal Trial Brief.

Ambiguity does not render threat incompetent. *Id.*

Threats made prior to a difficulty between the parties to an assault, are admissible. *Vanhooser v. State*, — Tex. Crim. Rep. —, 113 S. W. 285. See also *People v. Owen*, 154 Mich. 571, 21 L.R.A.(N.S.) 520, 118 N. W. 590; *State v. Stratford*, 149 N. C. 483, 62 S. E. 882. Threats by accused two weeks before the homicide.

2. As to state of mind.

Threats whether communicated¹ or uncommunicated² are admissible in evidence to show the state of mind of the party making them.

¹ *Rogers v. State*, 8 Okla. Crim. Rep. 226, 127 Pac. 365. See also note in 13 Columbia L. Rev. 167.

² *State v. Johnson*, 162 Iowa, 597, 144 N. W. 303. See also notes in 16 Columbia L. Rev. 57, and 34 Harvard L. Rev. 675.

TIDE.

For kindred topics, see MOON; NAVIGABILITY.

Flow.

It is not necessary to show a backward current. It is enough that there is a regular rise and fall.¹

¹ *Peyroux v. Howard*, 7 Pet. 324, 343, 5 L. ed. 700, 707; *Eichberger v. Mills Land & Water Co.* 9 Cal. App. 628, 100 Pac. 117.

TIME AND DISTANCE.

1. Comparison.
2. Direct testimony; opinion.
 - a. Time spent.
 - b. Distance object visible.
 - c. Time or distance to stop train.
 - d. Time to get off train.
 - e. Time necessary for specified distance.
 - f. Time necessary for specified work.
 - g. Distance within which sparks from engine will set fire.
 - h. Miscellaneous matters of distance.
3. Entries and records.

See also JUDICIAL NOTICE; OPINIONS.

1. Comparison.

In the absence of better evidence, or in case of conflict of testimony as to a period of time, it is competent to prove facts otherwise irrelevant, that occupied the same time, and when they occurred.¹

¹ *Sias v. Munroe*, 134 Mass. 153 (period during which a dealer served a customer, proved by evidence of his simultaneous service of another). See also *Whipple v. New York, N. H. & H. R. Co.* 19 R. I. 587, 35 Atl. 305 (holding that evidence of the distance between a telegraph pole and side of a freight car is admissible to prove the distance between the pole and the side of another car, upon the side ladder of which a brakeman was climbing when he was struck by the pole, in connection with evidence that the two cars were of the same pattern and dimensions, and in the absence of evidence to show that the latter car is available for measurement). S. P., FORGOTTEN FACT.

See note in L.R.A.1918A, 662, on right of witness to express an opinion on nontechnical subject because of impossibility or difficulty of reproducing the data. This note discusses estimates of time and distance.

2. Direct testimony; opinion.

a. *Time spent*.—The question what portion of another person's time was spent in a given service is one of fact to which a witness having had adequate opportunities of observation may testify directly.¹

¹ *Johnson v. Myers*, 103 N. Y. 663, 9 N. E. 52 (what portion of his time witness's husband had spent in his employer's business).

b. *Distance object visible*.—The question as to how far in

each direction objects on a railroad track can be seen from a certain point by the engineer on a train, or by other persons, is one of fact to which a person having knowledge or adequate opportunities of observation is competent to testify.¹

How far a certain light can be seen on the water under given circumstances is a proper subject for the opinion of a mariner conversant with the place.²

¹ As cattle, for example. *Gulf, C. & S. F. R. Co. v. Washington*, 1 C. C. A. 286, 4 U. S. App. 121, 49 Fed. 347; *Gulf, C. & S. F. R. Co. v. Campbell*, 1 C. C. A. 293, 4 U. S. App. 133, 49 Fed. 354; *Gulf, C. & S. F. R. Co. v. Ellidge*, 1 C. C. A. 295, 4 U. S. App. 136, 49 Fed. 356; *Gulf, C. & S. F. R. Co. v. Childs*, 1 C. C. A. 297, 4 U. S. App. 200, 49 Fed. 358. See also *Bias v. Chesapeake & O. R. Co.* 46 W. Va. 349, 33 S. E. 240 (where evidence as to the distance a child, the size of the decedent, along or on the track, was visible in the direction from which the train was coming by which she was killed, was held competent); *Chicago, R. I. & P. R. Co. v. Martin*, 59 Kan. 437, 53 Pac. 461 (holding that testimony as to how far the rear lights of a train may be seen is not necessarily a mere expression of opinion, but that it may be founded upon observation and knowledge). But *Hermes v. Chicago & N. W. R. Co.* 80 Wis. 590, 50 N. W. 584, holds that testimony as to how far a child could have been seen on the track on the day of the accident is inadmissible on the ground that that is a question for the jury under all the evidence.

² *Case v. Perew*, 46 Hun, 57. But see *McKerchnie v. Standish*, 6 N. Y. Week. Dig. 433 (opinion of astronomical expert as to how far a vessel could be seen on a certain day and hour, if there were no obstruction,—held, mere speculation; and doubt expressed as to its competency even in the absence of all other proof).

c. Time or distance to stop train.—The question as to the time or distance under which a given train, under given circumstances, can be stopped, is one which involves technical knowledge and experience.¹

It is sometimes held competent for witnesses, although not experts, to state their own observations and experiences as to the distance within which a train can be stopped, not, however, for the purpose of expressing an opinion, but simply to state facts within their observation.²

¹ *Schlereth v. Missouri P. R. Co.* 115 Mo. 87, 21 S. W. 1110; *Watson v. Minneapolis Street R. Co.* 53 Minn. 551, 55 N. W. 742; *Mammerberg v.*

Metropolitan Street R. Co. 62 Mo. App. 563, citing *Guorley v. St. Louis & S. F. R. Co.* 35 Mo. App. 92; *Maher v. Atlantic & P. R. Co.* 64 Mo. 276; *Czezewzka v. Benton-Bellefontaine R. Co.* 121 Mo. 212, 25 S. W. 911; *Grimmell v. Chicago & N. W. R. Co.* 73 Iowa, 93, 34 N. W. 758; *Rogers, Expert Testimony*, 237. In *O'Neil v. Dry Dock, E. B. & B. R. Co.* 129 N. Y. 125, 29 N. E. 84, not only was a witness, qualified to speak, allowed to testify to the time and distance within which a driver could stop a car with one horse going on a moderate trot on level ground (see 27 *Jones & S.* 123, 15 N. Y. Supp. 84), but also another, qualified to speak, was permitted to answer a question as to the distance within which a horse and loaded truck could be stopped under certain conditions. But the court of appeals criticized the latter question, as belonging to a class not to be encouraged; that the answer could be of little value to the jury, who were generally acquainted with such common things as trucks and horses, and the power, actions, and capacity of horses, which are constantly open to observation.

But the witness must be competent to speak as an expert. *Barry v. Second Ave. R. Co.* 1 Misc. 502, 20 N. Y. Supp. 871; *Mammerberg v. Metropolitan Street R. Co.* 62 Mo. App. 563.

And the question must be stated hypothetically, embodying substantially all the facts relating to the question. *Mammerberg v. Metropolitan Street R. Co.* 62 Mo. App. 563, and cases cited. See also *Frost v. Milwaukee & N. R. Co.* 96 Mich. 470, 56 N. W. 19; *Adams v. Chicago, M. & St. P. R. Co.* 93 Iowa, 565, 61 N. W. 1059 (opinions held incompetent because not based on the evidence).

* *Harmon v. Columbia & G. R. Co.* 32 S. C. 127, 10 S. E. 877. Thus, in *Chicago City R. Co. v. Taylor*, 170 Ill. 49, 48 N. E. 831, a nonexpert witness was allowed to testify that he had seen cable cars which were running at the usual rate of speed stop within 20 or 30 feet. And in *St. Louis & S. F. R. Co. v. Brown*, 62 Ark. 254, 35 S. W. 225, a nonexpert was allowed to give his opinion as to the distance which a train had run before it stopped, although he was unable to observe external objects.

Witnesses who have run other trains, but are not familiar with the train in question, may testify as to the distance required to stop such train. *Chesapeake & O. R. Co. v. Lang*, 135 Ky. 76, 121 S. W. 993.

d. Time to get off train.—An expert cannot be asked his opinion whether the time during which a railroad train stopped was sufficient to enable the passengers to get off.¹

¹ *Keller v. New York C. R. Co.* 2 Abb. App. Dec. 480, approved in *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 473, 24 L. ed. 256, 258; *Stowe v. Bishop*, 58 Vt. 498, 56 Am. Rep. 569, 3 Atl. 494; *Omaha & R. V. R. Co. v. Chollette*, 41 Neb. 578, 59 N. W. 921 (where the

witness, a conductor, had previously testified that he did not know how many passengers there were for that station); *Texas & P. R. Co. v. Lee*, 21 Tex. Civ. App. 174, 51 S. W. 351, 57 S. W. 573 (holding such testimony inadmissible as a mere conclusion. But the decision does not show whether the witnesses were experts or not).

Contra. Of an eye witness. *Quinn v. New York, N. H. & H. R. Co.* 56 Conn. 44, 12 Atl. 97 (question whether one had time to jump from a hand car, allowed).

But see *Burrows v. Erie R. Co.* 3 Thomp. & C. 44, reversed in 63 N. Y. 556.

e. Time necessary for specified distance.—When the time necessary for passing from one point to another is material, a witness who has passed over the ground under similar conditions may testify to the result of his experiment.¹

¹ *People v. Kelly*, 35 Hun, 295; *State v. Flint*, 60 Vt. 304, 14 Atl. 178. But the details of the conditions may be essential. *Klanowski v. Grand Trunk R. Co.* 64 Mich. 279, 31 N. W. 275 (court divided on this question).

Opinion or direct testimony as to the distance to which fire would "jump," and the time sparks would remain alive, competent. See *Davidson v. St. Paul, M. & M. R. Co.* 34 Minn. 57, 24 N. W. 324; abstr. s. c., 32 Alb. L. J. 379.

f. Time necessary for specified work.—An expert may testify to the time necessary for a given operation.¹

¹ *McDonald v. Barton*, 1 Thomp. & C. Add. 12 (building stairs); *Hadden v. Houghtaling*, 1 Hun, 318; *Smith v. Gugerty*, 4 Barb. 614 (time required, in opinion of mason, for walls to dry). Compare: *Payne v. Hodge*, 7 Hun, 612, affirmed in 71 N. Y. 596 (without opinion); *Emerson v. Lowell Gaslight Co.* 3 Allen, 410; *Grahlman v. Chicago, St. P. & K. C. R. Co.* 78 Iowa, 564, 5 L.R.A. 813, 43 N. W. 529 (holding that witness cannot testify as to the time usually required to fill a cattle guard with snow).

g. Distance within which sparks from engine will set fire.—The distance within which sparks from a properly equipped engine will set fires is a proper subject of expert testimony.¹

¹ *Chicago & E. R. Co. v. Kreig*, 22 Ind. App. 393, 53 N. E. 1033; *Babbitt v. Erie R. Co.* 108 App. Div. 74, 95 N. Y. Supp. 429; *Kansas City, Ft. S. & M. R. Co. v. Blaker*, 68 Kan. 244, 64 L.R.A. 81, 75 Pac. 71, 1 Ann. Cas. 883.

And an experienced locomotive engineer is competent to testify, from his observation and experience, as to the distance that sparks from a properly equipped locomotive will set fires, although he has made no scientific tests and is not a competent physicist. *Potter v. Grand Trunk Western R. Co.* 157 Mich. 216, 22 L.R.A. (N.S.) 1039, 121 N. W. 808.

So the following persons have been held to be qualified to testify as experts on this subject: A general foreman of the mechanical department of a division of the railroad, who had been a practical engineer (*Dean v. Chicago, M. & St. P. R. Co.* 39 Minn. 413, 12 Am. St. Rep. 659, 40 N. W. 270); engineers, conductors, master mechanics, or assistant master mechanics employed on and about locomotive engines from ten to twenty-five years, and a brakeman and yard master of three years' service (*Davidson v. St. Paul, M. & M. R. Co.* 34 Minn. 51, 24 N. W. 324).

But in *Hitchner Wall Paper Co. v. Pennsylvania R. Co.* 93 C. C. A. 598, 168 Fed. 602, affirming 158 Fed. 1011, it was held that an expert locomotive builder, not in touch with the operation of locomotives on the road, was not qualified to testify as to the distance that sparks going through the arrester would carry on a windy day so as to set fire to inflammable material.

And in *Peck v. New York C. & H. R. R. Co.* 165 N. Y. 347, 59 N. E. 206, reversing 37 App. Div. 110, 55 N. Y. Supp. 1121, it was held that, while engineers could testify as to whether, within their observation and experience, live or burning sparks would be carried a certain distance, it was improper to permit them to give an opinion as to whether the heat in a spark thrown such a distance would ignite anything along the road, as this was not a proper subject for expert evidence, at least from those particular witnesses.

h. Miscellaneous matters of distance.—Opinions as to distance have been held proper on matters of the distance between two points in general,¹ the distance between two points on a railroad,² the distance covered by a train,³ and the distance of an object above the ground.⁴

¹ *State v. Laster*, 71 N. J. L. 586, 60 Atl. 361; *Kipper v. State*, 45 Tex. Crim. Rep. 377, 77 S. W. 611.

² *San Antonio & A. P. R. Co. v. Griffith*, — Tex. Civ. App. —, 70 S. W. 438.

³ *St. Louis & S. F. R. Co. v. Brown*, 62 Ark. 254, 35 S. W. 225, 8 Am. Neg. Cas. 44.

⁴ *Walker v. Lake Shore & M. S. R. Co.* 104 Mich. 606, 62 N. W. 1032. For additional cases and full discussion, see note in L.R.A.1918A, 695.

3. Entries and records.

As between third persons, entries in the ordinary course of business, such as the record of the time of passing trains, are not made evidence of the time, merely by proving the custom to keep the record. The testimony of the persons who reported the fact, and thereupon made the entry, should be produced or accounted for.¹

¹ *Graville v. New York C. & H. R. R. Co.* 34 Hun, 224, reviewing cases.
Compare FORGOTTEN FACT.

TITLE.

1. Direct testimony.
2. General reputation.
3. Possession.
4. Conveyance by one in possession.
5. Deed founded on judicial proceedings.
6. Assessment roll.
7. Oral evidence.
8. Admissions.
9. Declarations.
10. Opinion as to marketableness.
11. Refusal of others to pass.

See also ACCEPTANCE; ASSIGNMENT; DELIVERY; POSSESSION.
As to personal property, see OWNERSHIP.

1. Direct testimony.

A party may testify directly that he never had any title or interest in certain lands, even though the question of his owning the lands be directly involved in the issue.¹

When title is only incidentally involved, a witness may testify directly as to who is or was the owner.² Otherwise when directly involved in the issue.³

¹ *Florence Land, Min. & Mfg. Co. v. Warren*, 91 Ala. 533, 9 So. 384. The absence of title or claim is not presumed to be evidenced by documentary proof.

⁴ *Potter v. Weidman*, 20 N. Y. Week. Dig. 110; *Hodson v. Goodale*, 22 Or 68, 29 Pac. 70; *Pelzer Mfg. Co. v. Sun Fire Office*, 36 S. C. 213, 15 S. E. 562; *Bexar County v. Terrell*, — Tex. —, 14 S. W. 62; *St. Louis & S. F. R. Co. v. Caldwell*, 93 Ark. 286, 124 S. W. 1034; *Johnson v. Carlin*, 121 Minn. 176, 179, 141 N. W. 4, Ann. Cas. 1914C, 705; *Re Mingo Drainage Dist.* 267 Mo. 268, 183 S. W. 611; *Newcomer v. Shepard*, 51 Okla. 335, 152 Pac. 66; *Campbell v. Peacock*, — Tex. Civ. App. —, 176 S. W. 774; *Littlefield v. Bowen*, 90 Wash. 286, 155 Pac. 1053, Ann. Cas. 1918B, 177. For additional cases see note in 1 A.L.R. 1143.

⁸ *Jordan v. McKinney*, 144 Mass. 438, 11 N. E. 702; *Lavery v. Brooke*, 37 Ill. App. 51; *Moe v. Chesrown*, 54 Minn. 118, 55 N. W. 832; *Carter v. Pitcher*, 87 Hun, 580, 34 N. Y. Supp. 549; *Cox v. Ward*, 107 N. C. 507, 12 S. E. 379; *Benjamin v. Shea*, 83 Iowa, 392, 49 N. W. 989.

2. General reputation.

General reputation is not competent to show title.¹

¹ *Green v. Chelsea*, 24 Pick. 71; *Canfield v. Hard*, 58 Vt. 217, 2 Atl. 136; *Sexton v. Hollis*, 26 S. C. 231, 1 S. E. 893; *Johnson v. Turner*, — Md. —, 22 Atl. 1103; *Goodson v. Brothers*, 111 Ala. 589, 20 So. 443 (evidence that by reputation and general understanding in the neighborhood the title to land was in one claiming adverse possession, incompetent to establish title by adverse possession). Compare *McAuliff v. Parker*, 10 Wash. 141, 38 Pac. 744 (evidence that land was generally reputed to belong to defendant from a designated time, competent as tending to show his title by adverse possession).

3. Possession.

Actual possession raises presumption of title;¹ and as against a trespasser this is sufficient.²

Otherwise of occasional entering on vacant land.³

¹ *Miller v. Long Island R. Co.* 71 N. Y. 380, reversing 9 Hun, 194 (civil case); *White v. State*, 14 Tex. App. 449 (criminal case); *Harland v. Eastman*, 119 Ill. 22, 8 N. E. 810, 7 N. E. 59 (ejectment); *Weaver v. Rush*, 62 Ark. 51, 34 S. W. 256; *Kendrick v. Latham*, 25 Fla. 819, 6 So. 871; *Doherty v. Matsell*, 119 N. Y. 646, 23 N. E. 994; *McDonald v. Fox*, 20 Nev. 364, 22 Pac. 234; *Tillman v. Fontaine*, 98 Ga. 672, 27 S. E. 149; *Mettler v. Miller*, 129 Ill. 630, 22 N. E. 529; *Loomis v. Roberts*, 57 Mich. 284, 23 N. W. 816; *Salazar v. Longwill*, 5 N. M. 548, 25 Pac. 927; *Miller v. Bumgardner*, 109 N. C. 412, 13 S. E. 935; *McTavish v. Great Northern R. Co.* 8 N. D. 333, 79 N. W. 443; *Howell v. Mellon*, 169 Pa. 138, 32 Atl. 450; *Watkins v. Smith*, 91 Tex. 589, 45 S. W. 560; *Teass v. St. Albans*, 38 W. Va. 1, 19 L.R.A. 802, 17 S. E. 400; *Moore v. Chicago, M. & St. Pr. R. Co.* 78 Wis. 120, 47 N. W. 273.

An actual possession of a part of farm lands, accompanied by constructive possession of abutting lands included in the description of a deed, raises a presumption of ownership of all the land described in the deed. *Burk v. Spinning*, 2 N. Y. S. R. 221.

As to notice of title from possession, see ante, NOTICE.

² *Burt v. Panjaud*, 99 U. S. 180, 25 L. ed. 451; *Campbell v. Rankin*, 99 U. S. 261, 25 L. ed. 435.

³ *Miller v. Long Island R. Co.* 71 N. Y. 380.

4. Conveyance by one in possession.

A conveyance is competent as evidence of title in the grantee, if it be shown that the grantor was in possession.¹ Otherwise it is not evidence of title.²

¹ *Doherty v. Matsell*, 11 N. Y. Civ. Proc. Rep. 392, and cases cited, 22 Jones & S. 17.

In *Zundel v. Baldwin*, 114 Ala. 328, 21 So. 420, an action of trespass *quare clausum fregit*, a deed from grantors, as to whom there was no evidence what title to, or connection with, the land they had, if any, was held insufficient as evidence of title in the grantee, but at most could be regarded only as color of title in connection with any evidence of possession proved.

But in *Rina v. Pelnar*, 86 Wis. 408, 57 N. W. 51, trespass upon the plea of title, it was held that the defendant's title deeds were admissible without proof of seisin or possession of the premises in either grantor or grantee within twenty years; since under the Wisconsin statute (§ 4210, chap. 177, Wis. Stat. 1921, vol. 2, p. 2190) defendant, having shown his legal title to the premises, was presumed to have been possessed thereof within the time required by law, and the occupancy of other persons is deemed in subordination to the legal title unless adverse.

² *Miller v. Long Island R. Co.* 71 N. Y. 380, reversing 9 Hun, 194; *Forsyth Rickenbrode*, 22 N. Y. Week. Dig. 470.

Title to land by deed, how proved, see *Abbott, Trial Evidence* (3d ed.) p. 1879.

5. Deed founded on judicial proceedings.

Deed founded on judicial proceedings, not competent without proof of those proceedings.¹

¹ *Reed v. Ohio & M. R. Co.* 126 Ill. 48, 17 N. E. 807 (master's deed to successor of corporation); *Hasbrouck v. Burhans*, 47 Hun, 487 (sheriff's deed without execution, etc.; saved from this rule, however, by being ancient deed aided by evidence of declarations of party); *McGehee v.*

Wilkins, 31 Fla. 83, 12 So. 228 (sheriff's deed); **Riley v. Pool**, 5 Tex. Civ. App. 346, 24 S. W. 85 (administrator's deed incompetent without order of sale produced or accounted for). Compare **Wilmerton v. Sample**, 39 Ill. App. 60 (sheriff's deed based on a sale under execution issued more than a year after date of judgment good until vacated by proper court, and competent as evidence of title, or in disproof of adverse claim of title); **Munro v. Meech**, 94 Mich. 596, 54 N. W. 290 (deed by assignee for creditors not incompetent in ejectment because unaccompanied by proof that assignee had executed and filed bond before making deed); **Jordan v. Surghnor**, 107 Mo. 520, 17 S. W. 1009 (ejectment; sheriff's deed on execution issued upon transcript of justice's judgment against nonresident of county, competent without proof of issuance of execution by justice and return *nulla bona*, and without proof of justice's judgment and the transcript). In **Hughes v. McDivitt**, 102 Mo. 77, 14 S. W. 660, 15 S. W. 756, the court admitted in support of the grantee's title an administrator's deed made in 1841, which recited the date of the order of sale, the court making the order and the consideration as required by a statute then in force, supplemented by oral proof of approval of the sale by the proper court by an order entered of record, it appearing the records of the court had been destroyed by fire. See further, as to proof of title by deed founded on judicial proceedings, **Abbott**, Trial Evidence (3d ed.) p. 1900 et seq.

As to proving lost records, see note to **Goldman v. Kennedy**, 21 Abb. N. C. 367, collecting cases; **Dawson v. Parham**, 47 Ark. 215, 1 S. W. 73; **Tucker v. Murphy**, 66 Tex. 355, 1 S. W. 76 (administrator's deed).

But a deed made by one competent to convey in his own right, and made in proper form for that purpose, is effective, notwithstanding it recites judicial proceedings as its occasion, and they are not proved. **Rockwell v. McGovern**, 69 N. Y. 294, affirming 8 Jones & S. 118 (assignment in insolvency).

6. Assessment roll.

Assessment roll not alone competent as tending to show title.¹

¹ There must be proof, also that the person against whom it is offered gave it in, or had knowledge of it. **Shumway v. Leakey**, 67 Cal. 458, 8 Pac. 12; **Locke v. Moulton**, 96 Cal. 21, 30 Pac. 957. But see query in **Doe ex dem. Stansbury v. Arkwright**, 2 Ad. & El. 182, note, 111 Eng. Reprint 71, note.

In **Tyres v. Kennedy**, 126 Ind. 523, 26 N. E. 394, it is held that there must be proof identifying it as the original paper.

Proof of listing land for taxation was held, in **Ruffin v. Overby**, 105 N. C. 78, 11 S. E. 251, an action in ejectment, admissible as an act done in pursuance of law and under a claim of ownership, although of very

slight import as evidence of title. And in *Shober v. Wheeler*, 113 N. C. 370, 18 S. E. 328, failure of an alleged fraudulent grantee to return the land for taxation was admitted as tending to show that he did not consider himself as the owner of the land.

But in *Hammond v. Abbott*, 166 Mass. 517, 44 N. E. 620, it was held that the fact that land was assessed in the name of a person other than the one claiming to own it at the time was not competent upon the issue of his ownership at that time, as such assessment was no act of his, and called for no action on his part.

7. Oral evidence.

In certain cases oral evidence is competent to supply defects in title.¹

¹ Cases collected in note to *Toole v. Toole*, 22 Abb. N. C. 397-422.

As to oral evidence to establish or vary trusts, see cases reviewed in notes to *Ferguson v. Rafferty* (Pa.) 6 L.R.A. 47; *Collar v. Collar* (Mich.) 13 L.R.A. 622; *Durkin v. Cobleigh* (Mass.) 17 L.R.A. 270, and *Western U. Teleg. Co. v. Call Pub. Co.* (Neb.) 27 L.R.A. 622.

8. Admissions.

Title to land, or the want of it, cannot be proved or disproved by an adversary's oral admission.¹

¹ *Walker v. Dunspaugh*, 20 N. Y. 170. See also *Lawrence v. Wilson*, 160 Mass. 304, 35 N. E. 858 (admissions by administrator of defendant's predecessor in title); *Greenleaf v. Brooklyn, F. & C. I. R. Co.* 141 N. Y. 395, 36 N. E. 393 (holding that an admission of ownership in plaintiff in ejectment, made by one who is not shown to have ever had any title thereto or possession thereof, does not bind the defendants, although they took a deed from such person, where they subsequently take possession of the land and claim to be the owners thereof, relying upon their possession as sufficient evidence of ownership). And see *Abbott, Trial Evidence* (3d ed.) p. 1925.

9. Declarations.

Declarations of a person having or claiming title to land, which would be competent against him, are competent against persons deriving title through or from him, if they were made when he held all the title which they obtained or could claim;¹ but they are not competent for the purpose of impeaching or destroying a record title.²

Acts and declarations made after the actor and declarant had contracted to convey, but before conveying, are competent;³ but when made after conveyance and in the absence of his grantee are not competent against those claiming under him.⁴

¹ *Ellis v. Harris*, 106 N. C. 395, 11 S. E. 248; *Snow v. Starr*, 75 Tex. 411, 12 S. W. 673; *Youngs v. Cunningham*, 57 Mich. 153, 23 N. W. 626; *Knight v. Knight*, 178 Ill. 553, 53 N. E. 306, and cases cited; *Fry v. Feamster*, 36 W. Va. 454, 15 S. E. 253; *Cunningham v. Fuller*, 35 Neb. 58, 52 N. W. 836; *Fry v. Stowers*, 92 Va. 13, 22 S. E. 500; *Gage v. Eddy*, 179 Ill. 492, 53 N. E. 1008; *Williams v. Harter*, 121 Cal. 47, 53 Pac. 405; *Levi v. Gardner*, 53 S. C. 24, 30 S. E. 617; *Finch v. Garrett*, 102 Iowa, 381, 71 N. W. 429; *Ratliff v. Ratliff*, 131 N. C. 425, 63 L.R.A. 963, 42 S. E. 887.

² *Kelley v. Perrault*, 5 Idaho, 221, 48 Pac. 45; *Gibney v. Marchay*, 34 N. Y. 304.

³ *Chadwick v. Fonner*, 69 N. Y. 407.

⁴ *Beville v. Jones*, 74 Tex. 148, 11 S. W. 1128; *Towner v. Thompson*, 81 Ga. 171, 6 S. E. 184; *Rawson v. Plaisted*, 151 Mass. 71, 23 N. E. 722; *Casto v. Fry*, 33 W. Va. 449, 10 S. E. 799; *Harris v. Russell*, 93 Ala. 59, 9 So. 541; *Allen v. Kirk*, 81 Iowa, 658, 47 N. W. 906 (so holding unless the grantor and grantee conspired together to defraud third persons); *Consolidated Tank Line Co. v. Pien*, 44 Neb. 887, 62 N. W. 1112; *Kurtz v. St. Paul & D. R. Co.* 61 Minn. 18, 63 N. W. 1; *Francis v. Wilkinson*, 147 Ill. 370, 35 N. E. 150; *Fenton v. Miller*, 94 Mich. 204, 53 N. W. 957; *Graham v. Botner*, 18 Ky. L. Rep. 637, 37 S. W. 583; *Sullivan v. Ball*, 55 S. C. 343, 33 S. E. 486; *Baldwin v. Stier*, 191 Pa. 432, 43 Atl. 326; *Thornton v. Gaar*, 87 Va. 315, 12 S. E. 753 (so holding upon the trial of the question whether the conveyance was fraudulent as to creditors); *Kain v. Larkin*, 131 N. Y. 300, 30 N. E. 105. See further, on this question, *Abbott, Trial Evidence* (3d ed.) pp. 1926 et seq.

10. Opinion as to marketableness.

The opinion of counsel as to whether a title is marketable¹ is not competent evidence on a question between vendor and purchaser.²

¹ For the rule as to doubtful or bad title, see note to *Toole v. Toole*, 22 Abb. N. C. 397, collecting cases.

As to what is a marketable title, see note in 38 L.R.A.(N.S.) 1.

² *Murray v. Ellis*, 112 Pa. 485, 3 Atl. 845; *Stiles v. Steele*, 37 Kan. 552, 15 Pac. 561; *Moser v. Cochrane*, 107 N. Y. 35, 13 N. E. 442; *Evans v. Gerry*, 174 Ill. 595, 51 N. E. 615; *Brackenridge v. Claridge*, 91 Tex. 527, 43 L.R.A. 593, 44 S. W. 819.

11. Refusal of others to pass.

The refusal of others to take the title, or to make a loan upon it, is not competent.¹

¹ Moser v. Cochrane, 107 N. Y. 35, 13 N. E. 442.

TREATMENT.**Direct testimony.**

When the manner of one person's treatment of another is involved in the issue, a witness having adequate opportunity of examination may testify as to whether it was kindly or not.¹

¹ Baldwin v. Parker, 99 Mass. 79, 96 Am. Dec. 697 (in this case a party was allowed to testify that her own treatment of children was kind).
See also FEELING.

(For other kinds of evidence see Cowley v. People, 83 N. Y. 464, 38 Am. Rep. 464, with note, 8 Abb. N. C. 1.)

USAGE.

1. When competent.
2. To control meaning.
3. Not competent to create contract.
4. Direct testimony.
5. Single witness.
6. Single cases.
7. Foreign law.
8. Presumption of knowledge.
9. Testimony as to knowledge.
10. Common consent.
11. Cogency of evidence.

As to judicial notice of, see JUDICIAL NOTICE, I. 1, notes 31-33.

For kindred topics, see ABBREVIATIONS; AGENCY; AMBIGUITY; BUSINESS; FORGOTTEN FACT.

1. When competent.

In the interpretation of a contract, a uniform, continuous, and well-settled usage pertaining to its subject may be proved, if not opposed to the law, and not unreasonable.¹ The rule is sometimes stated to be that such a usage or custom when so proven, is deemed to have been incorporated by the parties by implication into their agreement,² but perhaps a better statement of the rule is that evidence of such a custom is admissible as explaining the terms of the contract.³

But usage cannot be proved to contradict a rule of law;⁴ or to contradict unambiguous terms in the contract;⁵ or its legal effect.⁶

¹ *Walls v. Bailey*, 49 N. Y. 464, 10 Am. Rep. 407; *Barnard v. Kellogg*, 10 Wall. 383, 19 L. ed. 987; *Robinson v. United States*, 13 Wall. 363, 20 L. ed. 653; *Fuller v. Robinson*, 86 N. Y. 306, 40 Am. Rep. 540; *Off v. J. B. Inderrieden Co.* 74 Ill. App. 105; *Eddy v. Northern S. S. Co.* 79 Fed. 361; *White v. Ellisburgh*, 18 App. Div. 514, 45 N. Y. Supp. 1122; *Schaub v. Dallas Brewing Co.* 60 Tex. 634, 16 S. W. 429; *Richlands Flint Glass Co. v. Hildebeitel*, 92 Va. 91, 22 S. E. 806; *McCulsky v. Klosterman*, 20 Or. 108, 25 Pac. 366. s. o. with note on the subject, 10 L.R.A. 785.

For the general rule and its exceptions, see *Miller v. Insurance Co. of N. A.* 1 Abb. N. C. 470, with note; *Abbott*, Trial Evidence (3d ed.) pp. 781 et seq.

² *Hart v. Cort*, 165 App. Div. 583, 151 N. Y. Supp. 4; *Atkinson v. Truesdell*, 127 N. Y. 230, 27 N. E. 844. See also note in 28 Harvard L. Rev. 639.

³ *El Reno Wholesale Grocery Co. v. Stocking*, 293 Ill. 494, 127 N. E. 642. See also § 8 *infra*.

⁴ *Corn Exch. Bank v. Nassau Bank*, 91 N. Y. 74, 43 Am. Rep. 655, and cases cited; *Svensden v. Wallace Bros.* L. R. 11 Q. B. Div. 616, 46 L. T. N. S. 742, 30 Week. Rep. 841 (holding mercantile acquiescence in the practice of average adjusters to disregard a decision of the courts not a valid usage). See also cases reviewed in note to *Conestoga Cigar Co. v. Finke*, 13 L.R.A. 438.

⁵ *Farmers' & M. Nat. Bank v. Logan*, 74 N. Y. 568; *McIntosh v. Pendleton*, 75 App. Div. 621, 78 N. Y. Supp. 152; *Scott v. Hartley*, 126 Ind. 239, 25 N. E. 826; *DeWitt v. Berry*, 134 U. S. 306, 35 L. ed. 896, 10 Sup. Ct. Rep. 536; *Louisville-Cincinnati Packet Co. v. Rogers*, 20 Ind. App. 594, 49 N. E. 970, and cases cited; *Meloche v. Chicago, M & St. P.*

R. Co. 116 Mich. 69, 74 N. W. 301; *Coates v. Early*, 46 S. C. 220, 24 S. E. 305. And see cases collected in notes in 13 L.R.A. 438 and in 3 L.R.A.(N.S.) 248.

Liability for brokerage upon a contract for the sale of a certain quantity of a commodity, "the seller paying brokerage at 10 cents per ton," cannot be reduced by proof of a custom to pay brokerage only on the amount actually delivered. *Fairly v. Wappoo Mills*, 44 S. C. 227, 29 L.R.A. 215, 22 S. E. 108.

Nor is proof of custom admissible to show that an absolute written contract to furnish all coal needed between certain dates was not to be binding in case of a strike. *Covington v. Kanawha Coal & Coke Co.* 121 Ky. 681, 3 L.R.A.(N.S.) 248, 123 Am. St. Rep. 219, 89 S. W. 1126, 12 Ann. Cas. 311.

⁶ *Barnard v. Kellogg*, 10 Wall. 383, 19 L. ed. 987; *Van Hoesen v. Cameron*, 54 Mich. 609, 20 N. W. 609.

2. To control meaning.

Usage of language may be used to show the meaning of words otherwise unambiguous.¹

But to control the ordinary meaning of words used in a contract, by proof of a usage of a particular trade or profession giving them a technical meaning, the evidence must show usage uniform, continuous, and well settled, so that it can be inferred that the parties contracted with a knowledge of and reference to it.²

¹ *Myers v. Sarl*, 30 L. J. Q. B. N. S. 9, 7 Jur. N. S. 97, 3 El. & El. 306, 121 Eng. Reprint, 457, 9 Week. Rep. 96, 14 Eng. Rul. Cas. 656; *McKee v. Wild*, 52 Neb. 9, 71 N. W. 958; *Maculsky v. Klosterman*, 20 Or. 108, 25 Pac. 366, 10 L.R.A. 785, with note; *Connable v. Clark*, 26 Mo. App. 162.

² *Miller v. Burke*, 68 N. Y. 615, affirming 6 Daly, 171; *Wheelright v. Dyal*, 99 Ga. 247, 25 S. E. 170.

3. Not competent to create contract.

Evidence of usage or custom is not competent to show a contract liability unless there is some other evidence of the existence of a contract.¹

¹ *Tilley v. Cook County* (*Tilley v. Chicago*), 103 U. S. 155, 26 L.

ed. 374; *E. Goddard & Sons v. Garner Bros.* 109 Ala. 98, 19 So. 513; *Creager v. Douglass*, 77 Tex. 484, 14 S. W. 150; *Bowe v. Hyland*, 44 Minn. 88, 46 N. W. 142.

4. Direct testimony.

Any witness, though not an expert in the particular business, is competent to testify to usage if he knows the usage.¹

But testimony, even of experts, to what is proper, etc., is unavailing. There must be testimony to the existence of a usage.²

¹ *Griffin v. Rice*, 1 Hilt. 184. But he must show knowledge of the usage. *Kugelman v. Levy*, 4 Misc. 519, 29 N. Y. Supp. 559, and cases cited; *Farnum v. Pitcher*, 151 Mass. 470, 24 N. E. 590.

Custom or usage is a matter of fact, and not of opinion. It is proved, not by witnesses testifying as to their opinions, but as to its existence from facts within their own knowledge, obtained by observation of what is practised by themselves and others in the trade or business to which it relates; *Lawson, Usages & Cust.* § 55; *Haskins v. Warren*, 115 Mass. 535. See also *Conner v. Citizens' Street R. Co.* 146 Ind. 430, 45 N. E. 652. And it is no valid objection to the competency of a witness that his knowledge is derived from his own business, if the knowledge thus derived is sufficiently extensive to enable him to testify to the fact of usage or custom. *Holmes v. Whitaker*, 23 Or. 319, 31 Pac. 705, Citing *Hamilton v. Nickerson*, 13 Allen, 351. But knowledge based on what the witness has been told as to the usage is not enough. *Cadden v. American Steel Barge Co.* 88 Wis. 409, 60 N. W. 800.

² *Marine Nat. Bank v. National City Bank*, 59 N. Y. 67, 74, 17 Am. Rep. 305, with note, reversing 4 Jones & S. 470, *Oelricks v. Ford*, 23 How. 49, 16 L. ed. 534; *Gallup v. Lederer*, 1 Hun, 282, 3 Thomp. & C. 710. See also *Abbott, Trial Evidence*, (3d ed.) p. 781.

Opinions of witnesses are incompetent to prove that a usage exists, if it be shown by their testimony that such opinions were deduced from the fact that they never knew a case where a right was asserted contrary to the alleged usage, and that such usage would be necessary for the protection of a class of dealers. *Willis v. Tibbals*, 1 Jones & S. 220.

But where the ultimate question is one of care or negligence, and usage is only relevant as bearing on the measure of duty, the opinion of an expert may be competent. *The City of Washington*, 92 U. S. 31, 23 L. ed. 600.

Where witnesses for one side testify to a usage in some places and contracts only, and witnesses on the other deny its existence, in other localities, there is no proof of its uniformity, but merely proof of

a local or partial usage, which would be insufficient to vary the ordinary meaning of a term in a written contract. *Dickinson v. Poughkeepsie*, 75 N. Y. 65. s. p., applied to divided usage in one and the same place, *Pevey v. Schulenburg & B. Lumber Co.* 33 Minn. 45, 21 N. W. 844.

5. Single witness.

Usage may be proved by one witness.¹

¹ *Vail v. Rice*, 5 N. Y. 155; *Robinson v. United States*, 13 Wall. 363, 20 L. ed. 653; *Miller v. Insurance Co. of N. A.* 1 Abb. N. C. 470 (holding the testimony of the plaintiff alone, though contradicted by two disinterested witnesses, sufficient).

A single witness is sufficient to establish a local custom. *Jones v. Herrick*, 141 Iowa, 615, 118 N. W. 444.

6. Single cases.

Testimony to specific instances merely,¹ or to a habit of doing business in a loose way,² does not prove usage.

¹ *Stringfield v. Vivian*, 63 Mich. 681, 30 N. W. 346; *Cleveland, C. C. & St. L. R. Co. v. Jenkins*, 174 Ill. 398, 51 N. E. 811; *Cogswell v. Rochester Mach. Screw Co.* 39 App. Div. 223, 57 N. Y. Supp. 145; *Norwood v. Alamo F. Ins. Co.* 13 Tex. Civ. App. 475, 35 S. W. 717.

But it may be competent as tending to show a party's knowledge of the usage. *Off v. J. B. Inderrieden Co.* 74 Ill. App. 105.

² *Farmers' & M. Nat. Bank v. Erie R. Co.* 72 N. Y. 188, 195.

7. Foreign law.

Parol evidence is competent to show usage where it arises out of a foreign edict, as well as where it arises out of governmental instructions; and this whether the trade be allowed or prohibited by such edicts or instructions.¹

¹ *Livingston v. Maryland Ins. Co.* 7 Cranch, 506, 547, 3 L. ed. 421, 434.
And see FOREIGN LAW.

8. Presumption of knowledge.

Parties are presumed to contract in reference to a uniform, continuous, and well-settled usage pertaining to the subjects of the agreement, if it be not opposed to well-settled principles of law, and not unreasonable.¹ But if the usage is of a partic-

ular trade or locality, the presumption is not conclusive, and may be rebutted by proof of ignorance.² There is no presumption of knowledge of a custom or usage, unless it is so general or notorious that the parties to a transaction of which it is claimed to have constituted a part may be deemed to have had knowledge of it.³

¹ Walls v. Bailey, 49 N. Y. 464, 10 Am. Rep. 407 (usage of plasterers in Buffalo to include door and window spaces in computation of area done); Mooney v. Howard Ins. Co. 138 Mass. 375 (holding that underwriter's knowledge of the usage of the business of one whose property they insured, might be inferred by the jury from evidence of the universality, and long existence of the usage); Iasigi v. Rosenstein, 3 App. Div. 500, 38 N. Y. Supp. 354; Briscoe v. Litt, 19 Misc. 5, 42 N. Y. Supp. 908; Plover Sav. Bank v. Moodie, 135 Iowa, 685, 110 N. W. 29, 113 N. W. 476.

² Walls v. Bailey, 49 N. Y. 464, 10 Am. Rep. 407.

³ Hurricane Mill. Co. v. Steel & P. Co. 84 W. Va. 376, 6 A.L.R. 637, 99 S. E. 490.

9. Testimony as to knowledge.

A party sought to be charged on the ground that a usage of trade was known to him has a right to testify whether at the time of contracting he had such knowledge.¹

¹ Walls v. Bailey, 49 N. Y. 464, 10 Am. Rep. 407; s. p., Johnson v. De Peyster, 50 N. Y. 666.

10. Common consent.

To establish in any case a particular usage, it must appear in some way that it had its origin in common consent.¹

¹ Stimmel v. Brown, 7 Houst. (Del.) 219, 30 Atl. 996. And the fact of its being disputed, at law or otherwise, is sufficient proof that such common consent is wanting. Ibid.

11. Cogenoy of evidence.

To establish a custom or usage, proof of the particular course of dealing, and its nature and terms, must be clear and convin-

cing, and nothing is presumed to be within its terms which is not clearly implied.¹

¹ Mount Vernon Co. v. Alabama G. S. R. Co. 92 Ala. 296, 8 So. 687; Smith v. Hess, 83 Iowa, 238, 48 N. W. 1030; Allam v. Pennsylvania R. Co. 3 Pa. Super. Ct. 335. And see cases collected in note to Conestoga Cigar Co. v. Finke, 13 L.R.A. 438.

VAIN THINGS.

See also EXCUSE; EXPLAINING.

The law does not require.

The law does not require one to do a vain or useless thing.¹ So where a party indicates that he will refuse to accept a return of consideration or a tender of property the other party is excused from making an actual return or tender.²

¹ Lawrence v. Miller, 86 N. Y. 131, 137 (formal tender dispensed with, the deed being present and ready for delivery, when the purchaser declared he was unable to make payment, and was told he could have no further time); Loomis v. Tift, 16 Barb. 541, 544 (action against administrators before creditor's action to set aside fraudulent conveyance by decedent, not necessary where the estate was wholly insolvent and there were no assets). The present rule as to such actions may be different. See note to Sweetser v. Smith, 22 Abb. N. C. 329, 338, 341. See also Adsit v. Sanford, 23 Hun, 45, 48 (holding that execution is necessary to sustain a creditor's suit, although it would be useless; affirmed as Adsit v. Butler, 87 N. Y. 585); People ex rel. Bailey v. Greene Supers. 12 Barb. 217, 222 (holding, on a motion for writ of mandamus, that it must be shown that party can perform the duty required); s. p., Meyer v. M'Clean, 2 Johns. 183; Huntington Trustees v. Nicoll, 3 Johns. 598 (quo warranto).

² Lindley v. Denver, 170 C. C. A. 151, 154, 259 Fed. 83, 86; Puffer v. Badley, 92 Or. 360, 4 A.L.R. 1561, 181 Pac. 1; Jones v. McGinn, 70 Or. 236, 140 Pac. 994; Clark v. Wells, 127 Minn. 353, L.R.A.1916F, 476, 149 N. W. 547.

VALUE.

1. Comparison to lost article.
2. Cost.
3. Other sales.
 - a. Price paid for adjoining property.
 - b. Other sales of personalty or services.
4. Offers and refusals.
5. Consideration in deed or bill of sale.
6. Opinions.
7. Market reports.
8. Wages.
9. Trade scale and union wages.
10. Tax valuation or assessment.
11. Crops.
12. Profits.
13. Choses in action.
 - a. In general.
 - b. Value of stocks and bonds.
14. Foreign coin.

For more familiar rules, see *Abbott, Trial Evidence* (3d ed.) pp. 803, 908, 939, 1968.

1. Comparison to lost article.

To prove the value of a lost article it is competent to prove by one witness its resemblance in qualities affecting value to another article, and to prove the value of the latter by another witness.¹

¹ *Berney v. Dinsmore*, 141 Mass. 42, 5 N. E. 273, abst. s. c., 33 Alb. L. J. 243 (not error to allow plaintiff, though not an expert, to pick out a pearl of the same size, color, and appearance as the one lost, and to prove its value by an expert); s. p., *Home Ins. Co. v. Weide*, 11 Wall. 438, 20 L. ed. 127 (allowing value of stock of goods burned to be proved by evidence of value of similar stocks in same place in proportion to annual sales); *Morey v. Hoyt*, 62 Conn. 542, 19 L.R.A. 611, 26 Atl. 127 (value of new articles of similar kind competent to show value of articles converted which were substantially new); *Davis v. Cotey*, 70 Vt. 120, 39 Atl. 628 (allowing evidence of price of timber similar to that cut by defendant on plaintiff's land, in a town adjoining that in which the timber was cut, to show the value of the timber cut). Compare *Stockton Combined Harvester & Agri.*

Works v. Glens Falls Ins. Co. 121 Cal. 167, 53 Pac. 565 (worthlessness of machine of similar or identical pattern to those destroyed by fire, not competent to show worthlessness of those destroyed).

2. Cost.

In the absence of other evidence, cost is competent as tending to show value.¹

¹ *Ellsworth v. Aetna Ins. Co.* 105 N. Y. 624, 11 N. E. 355 (stock of goods); *Aetna Ins. Co. v. Weide*, 9 Wall. 677, 19 L. ed. 810 (stock of goods); *Hawber v. Bell*, 141 N. Y. 140, 36 N. E. 6 (engine, threshers, etc.); *Perlberger v. Grell*, 77 App. Div. 128, 78 N. Y. Supp. 1038 (store fixtures); *Jacksonville, T. & K. W. R. Co. v. Jones*, 34 Fla. 286, 15 So. 924 (mule); *John Mouat Lumber Co. v. Wilmore*, 15 Colo. 136, 25 Pac. 556 (wearing apparel and family clothing negligently burned); *Terre Haute & I. R. Co. v. Smith*, 65 Ill. App. 101; *Burke v. Pierce*, 27 C. C. A. 462, 53 U. S. App. 59, 83 Fed. 95; *Bini v. Smith*, 36 App. Div. 463, 55 N. Y. Supp. 842; *Johnston v. Farmers' F. Ins. Co.* 106 Mich. 96, 64 N. W. 5 (store fixtures). Compare *Louisville Jeans Clothing Co. v. Lischkoff*, 109 Ala. 136, 19 So. 436 (cost at time not specified not competent to show present market value); *Jacksonville, T. & K. W. R. Co. v. Prior*, 34 Fla. 271, 15 So. 760 (to the effect that a question asked on cross-examination after witness testifies to the value of cattle killed by defendant's train, as to how much he paid for them, was properly ruled out, there being no reference to place or time).

The cost price is some evidence of the value of property replevied. *Osmer v. Furey*, 32 Mont. 581, 81 Pac. 345.

So the cost of goods destroyed by fire is some evidence of value, in an action against the insurance company. *Glaser v. Home Ins. Co.* 47 Misc. 89, 93 N. Y. Supp. 524.

The first cost of household effects is some, but not sufficient, evidence of their value, especially after the property has been used for a considerable period. *Goldberg v. Besdine*, 76 App. Div. 451, 78 N. Y. Supp. 776.

And in an action to recover damages for injuries to wearing apparel, proof of its cost and of its condition after the accident is insufficient, without evidence of its value and the wear to which it had been subjected. *Walsh v. New York City R. Co.* 93 N. Y. Supp. 552.

Evidence of the actual cost of the plant and property of a water company, together with a proper allowance for depreciation, is admissible, but not controlling, upon the question of the amount which must be allowed for it when the plant is taken by right of eminent domain. *Kennebec Water Dist. v. Waterville*, 97 Me. 185, 60 L.R.A. 856, 54 Atl. 6.

In an action for conversion of mules the price paid for them eleven months before was held not admissible as evidence of their value. *Grant v. Hathaway*, 118 Mo. App. 604, 96 S. W. 417.

The price paid for land sought to be condemned for a railroad right of way is incompetent on the question of its present value. *San Antonio & A. P. R. Co. v. Ruby*, 80 Tex. 172, 15 S. W. 1040; *Omaha Southern R. Co. v. Todd*, 39 Neb. 818, 58 N. W. 289.

3. Other sales.

a. Price paid for adjoining property.—Evidence of the sale of adjoining property of a similar character is generally admitted to establish market value,¹ although some courts hold all such evidence improper as tending to confuse the issues,² and still others leave the question to the discretion of the trial judge.³

Where, however, the question arises in condemnation proceedings, the almost universal rule is that evidence of what the condemning party paid for other lands by private treaty is not admissible⁴ because such sales are considered forced, and the tendency of recent cases is to limit the evidence admissible to show special adaptability for party condemning.⁵

¹ *East Shore Land Co. v. Metropolitan Park Commission*, — R. I. —, 86 Atl. 894; *Portland v. Investment Co.* 64 Or. 410, 129 Pac. 756. See also notes in 14 Columbia L. Rev. 171, and 12 Mich. L. Rev. 699.

² *Roberts v. Philadelphia*, 239 Pa. 339, 86 Atl. 926; *Robinson v. New York Elev. R. Co.* 175 N. Y. 219, 67 N. E. 431.

³ *Forest Preserve Dist. v. Kean*, 298 Ill. 37, 131 N. E. 117, holding that it was largely discretionary with the trial court as to whether other sales were sufficiently similar in character as to be competent.

⁴ *Curley v. Jersey City*, 83 N. J. L. 760, 43 L.R.A. (N.S.) 985, 85 Atl. 197, and cases cited in note in 43 L.R.A. (N.S.) 985.

⁵ *United States v. Boston, C. C. & N. Y. Canal Co.* (C. C. A.) — A.L.R. —, 271 Fed. 877; *New York v. Sage*, 239 U. S. 57, 60 L. ed. 143, 36 Sup. Ct. Rep. 25. See also note in 35 Harvard L. Rev. 76.

b. Other sales of personalty or services.—Other sales of similar personal property may be shown as evidence of value.¹ So amounts paid for personal services to the same employee by other employers may be shown as evidence of value in a suit for services rendered.²

¹ *Harrison v. Glover*, 72 N. Y. 451.

² *Triangle Waist Co. v. Todd*, 223 N. Y. 27, 119 N. E. 85. See also cases cited in note in 20 Columbia L. Rev. 485.

4. Offers and refusals.

As tending to show value, evidence of an offer to buy or sell, or a refusal to do so, at a specified price, is competent against the party who made it.¹

Some courts hold that bona fide offers from persons able to buy are admissible in favor of the party who refused them² or even of other parties owning adjacent property.³ But other jurisdictions hold that it is in the discretion of the court to refuse to receive such evidence in favor of the party who made or refused the offer,⁴ or evidence of what a third person, even though one under whom a party claims, offered or refused; because of the ease with which offers in bad faith might be made.⁵

¹ *Thurber v. Thompson*, 21 Hun, 472 (company's refusal to sell competent to negative imputation of fraudulent over-valuation by vendor to the company and its officers); *Dalrymple v. Hannum*, 54 N. Y. 654 (evidence that plaintiff had offered to reconvey the property in question to defendant, for a trifling sum, and of defendant's refusal, competent against defendant, to reduce damages); *Grand Rapids v. Luce*, 92 Mich. 92, 52 N. W. 635; *Springer v. Chicago*, 135 Ill. 552, 12 L.R.A. 609, 26 N. E. 514; *Findlay v. Pertz*, 20 C. C. A. 662, 43 U. S. App. 383, 74 Fed. 681 (but it is not conclusive); *Joy v. Security F. Ins. Co.* 83 Iowa, 12, 48 N. W. 1049. Compare *Castenholz v. Heller*, 82 Wis. 30, 51 N. W. 432 (action for fraud on sale of real estate in misrepresenting the location of the boundaries; evidence of price at which plaintiff offered to sell the property a year after his purchase inadmissible).

² *Faust v. Hosford*, 119 Iowa, 97, 93 N. W. 58; *Muller v. Southern Pacific Branch R. Co.* 83 Cal. 240, 23 Pac. 265; *Cottrell v. Rogers*, 99 Tenn. 488, 42 S. W. 445.

³ *Chicago v. Lehmann*, 262 Ill. 468, 104 N. E. 829, distinguishing *Sherlock v. Chicago, B. & Q. R. Co.* 130 Ill. 403, 22 N. E. 844, where an offer of an owner to sell at a certain price was held incompetent on the question of value. The degree of similarity of the adjacent property to that in suit is a matter which is left largely to the discretion of the trial court. *Northwest Park Dist. v. Hedenberg*, 267 Ill. 588, 108 N. E. 664.

⁴ *Boston Marine Ins. Co. v. Slocovitch*, 23 Jones & S. 452 (allowing such evidence as competent to negative existence of motive to destroy); *Hotchkiss v. Germania F. Ins. Co.* 5 Hun, 90 (to same effect); *Santa*

Ana v. Harlin, 99 Cal. 538, 34 Pac. 224 (that offers received for property sought to be condemned are incompetent; but if competent they must be confined to a period near the time at which the value is to be established); *Illinois C. R. Co. v. Le Blanc*, 74 Miss. 626, 21 So. 748 (error to allow such evidence); *Atkinson v. Chicago & N. W. R. Co.* 93 Wis. 362, 67 N. W. 703 (error to allow evidence of unaccepted offer for land before injury by fire set from locomotive on question of damages from such fire).

⁵ *Keller v. Paine*, 34 Hun, 167 (holding it not error to exclude such evidence); *Hine v. Manhattan R. Co.* 132 N. Y. 477, 15 L.R.A. 591, 30 N. E. 985, and cases cited.

Compare *Harrison v. Glover*, 72 N. Y. 451, reversing 9 Hun, 196 (holding that the offer of third persons, of their own goods, made in good faith and the ordinary course of business, in a form inviting an immediate acceptance which would be binding in honor, would be competent for the purpose of proving their price, when their price was referred to in the contract between the parties in suit, as a standard for themselves).

Mere offer at auction, and no bid, not sufficient foundation for opinion on value of stock. *Hanna v. Sandford*, 20 N. Y. Week. Dig. 288.

5. Consideration in deed or bill of sale.

Consideration in deed or bill of sale, not competent.¹

¹ *People ex rel. New York v. McCarthy*, 102 N. Y. 630, 8 N. E. 85.

6. Opinions.

Qualified witnesses may state their opinion as to the value of property, after giving the facts on which such opinions are based.¹ So lawyers qualified by education and experience may testify as experts to the value of legal services.² And non-experts shown to be familiar with the extent and character of services in the sale of property may properly give their opinion as to the value of the services.³ Parties who have examined clothing injured through another's negligence, and who are familiar with the values of such articles, may state their opinion as to the proportion of damages done by the injury.⁴

The owner or other person having a general knowledge of the value of household furniture or wearing apparel may testify to his opinion of such value.⁵ So witnesses may give an opinion as to the value of the use or rental of chattels⁶ or of real property.⁷

In condemnation proceedings opinion evidence is admissible to show the value of the land before and after taking.⁸ There is a conflict as to whether such witnesses may testify as to the amount of the landowner's damages, the better rule being that they cannot.⁹

¹ *Personal property:*

The owner of personal property is competent to express an opinion as to its value. *Hespen v. Union P. R. Co.* 82 Neb. 495, 118 N. W. 98.

Nonexperts may give their opinion as to the value of an article with which they are acquainted or familiar. *Southern R. Co. v. Morris*, 143 Ala. 628, 42 So. 17; *Hay v. Hawkins*, 120 Ill. App. 483.

Real estate:

Portland v. Tigard, 64 Or. 404, 129 Pac. 755, 130 Pac. 982.

Expert testimony is not necessary for the determination of the value of city property. *Jones v. Erie & W. Valley R. Co.* 151 Pa. 30, 17 L.R.A. 758, 31 Am. St. Rep. 722, 25 Atl. 134.

Opinions of witnesses as to the value of property before and after a change in a street grade are competent evidence on the question of damages caused by the change. *Blair v. Charleston*, 43 W. Va. 62, 35 L.R.A. 852, 64 Am. St. Rep. 837, 26 S. E. 341; *Swift & Co. v. Newport News*, 105 Va. 108, 3 L.R.A.(N.S.) 404, 52 S. E. 821.

² *Morehead v. Anderson*, 30 Ky. L. Rep. 1137, 100 S. W. 340; *Louisville, N. A. & C. R. Co. v. Wallace*, 136 Ill. 87, 11 L.R.A. 787, 26 N. E. 493.

³ *Jenney Electric Co. v. Branham*, 145 Ind. 314, 33 L.R.A. 395, 41 N. E. 448.

⁴ *Withey v. Pere Marquette R. Co.* 141 Mich. 412, 1 L.R.A.(N.S.) 352, 113 Am. St. Rep. 533, 104 N. W. 773, 7 Ann. Cas. 57.

⁵ *Kirsten v. Bekin Van & Storage Co.* 27 Cal. App. 586, 150 Pac. 999; *O. K. Transfer & Storage Co. v. Neill*, 59 Okla. 291, L.R.A. 1917A, 58, 159 Pac. 272; *International & G. N. R. Co. v. Davis*, — Tex. Civ. App. —, 175 S. W. 509; *State v. Madden*, 170 Iowa, 230, 148 N. W. 995; *Hollinger v. Missouri, K. & T. R. Co.* 94 Kan. 316, 146 Pac. 1034, Ann. Cas. 1916D, 802; *Barbrick v. White Sewing Mach. Co.* 180 Mich. 535, 147 N. W. 493; *Pecos & N. T. R. Co. v. Grundy*, — Tex. Civ. App. —, 171 S. W. 318. For additional cases and full discussion of the entire question of evidence to prove the value of loss of household goods; see note in L.R.A.1917D, 505.

⁶ *Ruckman v. Imbler Lumber Co.* 42 Or. 231, 70 Pac. 811; *Kennett v. Fickel*, 41 Kan. 211, 21 Pac. 93; *Burton v. Burton Stock Car Co.* 171 Mass. 437, 50 N. E. 1029; *Scott v. Vulcan Iron Works Co.* 31 Okla. 334, 122 Pac. 186; *New York & C. Min. Syndicate Co. v. Fraser*, 130 U. S. 611, 32 L. ed. 1031, 9 Sup. Ct. Rep. 665; *Munson v. Smith Woolen Machinery Co.* 118 App. Div. 398, 103 N. Y. Supp. 502.

⁷ *Hunt v. Pond*, 67 Ga. 578; *Cluck v. Houston & T. C. R. Co.* 34 Tex. Civ. App. 452, 79 S. W. 80; *Upton v. Swedish American Hospital*, 157 Ill. App. 126; *Buchanan v. Wilburn*, 60 Tex. Civ. App. 206, 127 S. W. 1198. For additional cases and full discussion of the general question of the determination of the value of the use or rental of property, see note in 44 L.R.A. (N.S.) 499.

⁸ *Montana Eastern R. Co. v. Lebeck*, 32 N. D. 162, 155 N. W. 648; *Paducah v. Allen*, 111 Ky. 361, 98 Am. St. Rep. 422, 63 S. W. 981.

⁹ *United States v. Boston, C. C. & N. Y. Canal Co. (C. C. A.)* — A.L.R. —, 271 Fed. 877; *Tabor v. New York, Providence & Boston R. Co.* 28 R. I. 269, 67 Atl. 9; *Baltimore Belt R. Co. v. Sattler*, 100 Md. 306, 59 Atl. 654, 3 Ann. Cas. 660; *Bell County v. Flint*, — Tex. Civ. App. —, 91 S. W. 329; note in 16 Columbia L. Rev. 349.

Contra: *Knapheide v. Jackson County*, 215 Mo. 516, 114 S. W. 960; *Wade v. Carolina Teleph. & Teleg. Co.* 147 N. C. 219, 60 S. E. 987; *Watson v. Colusa-Parrot Min. & Smelting Co.* 31 Mont. 513, 79 Pac. 14.

See also for general note as to structural value in condemnation case note in 41 L.R.A. (N.S.) 411.

7. Market reports.

Market reports if shown to be in circulation and relied on by the commercial world and those engaged in the trade, are admissible as evidence of market value of articles of trade.¹ And one who has read the market reports may testify as to the market value of an article.²

¹ *St. Louis & S. F. R. Co. v. Pierce*, 82 Ark. 353, 118 Am. St. Rep. 75, 101 S. W. 760, 12 Ann. Cas. 125.

See also *State ex rel. Moseley v. Johnson*, 144 N. C. 257, 56 S. E. 922, 929, applying the same rule in case of a question as to the value of stocks and bonds.

² *Southern Kansas R. Co. v. Bennett*, — Tex. Civ. App. —, 103 S. W. 1115.

8. Wages.

Where testimony conflicts as to what wages were agreed on between the parties, evidence of the customary or market price for such services is competent.¹

¹ *Edelen v. Herman*, 162 Ky. 500, L.R.A.1915C, 1208, 172 S. W. 936; *Grahowsky v. Baumgart*, 128 Mich. 267, 87 N. W. 891; *Locke v. Kraut*, 85 Conn. 486, 83 Atl. 626. See also notes in L.R.A.1915C, 1213 and 15 Columbia L. Rev. 457.

9. Trade scale and union wages.

A scale of prices agreed upon by an association or combination in the business is not competent as original evidence of value, against third persons.¹ But evidence of the union rate of wages in a particular trade has been admitted as competent on the question of value.²

¹ De Witt v. De Witt, 46 Hun, 258 (scale agreed on by nurses in a hospital, not competent to show value of nursing services).

² Schalich v. Bell, 173 Cal. 773, 161 Pac. 983. For cases *contra*, see note in 15 Mich. L. Rev. 445.

10. Tax valuation or assessment.

The valuation or assessment placed on property by the assessor for purposes of taxation is not admissible to determine the value of such property.¹

¹ Dorr v. Massachusetts Title Ins. Co. 238 Mass. 490, 131 N. E. 191; Kennerson v. Henry, 101 Mass. 152. Compare APPRAISAL.

11. Crops.

The value of growing crops may be proved by showing the value of similar crops in adjoining fields,¹ or by the opinion of farmers as to the value based on the average yield and market value.²

¹ Stockwell v. German Mut. Ins. Asso. 37 S. D. 348, 158 N. W. 450; Ft. Worth & R. G. R. Co. v. Brown, 45 Tex. Civ. App. 376, 101 S. W. 266, where opinions were admitted showing value of grass destroyed by fire. See also 15 Mich. L. Rev. 176.

² The opinion of a farmer as to the value of a growing crop, which opinion is based on the average yield and market value of the crops of the same kind, planted and cared for in the same manner in the same community, less the cost of maturing, harvesting, and marketing, and as to what the crop would have brought in its immature state at a sale in that community, is admissible in an action to recover damages for the unlawful destruction thereof. Chicago, R. I. & P. R. Co. v. Johnson, 25 Okla. 760, 27 L.R.A. (N.S.) 879, 107 Pac. 662.

12. Profits.

Profits derived from a business conducted on property in-

volved in a condemnation proceeding cannot be admitted in evidence as a basis for determining market value.¹

¹ Gauley & E. R. Co. v. Conley, 84 W. Va. 489, 7 A.L.R. 157, 100 S. E. 290. For full citation and discussion of cases see note in 7 A.L.R. 163.

13. Choses in action.

a. In general.—Obligations for the payment of money, in the absence of evidence to the contrary, are presumed to be worth their face.¹

The rule that opinions of witnesses are competent on a question of value does not apply to such obligations as commercial paper.²

Nor is evidence of the market value of promissory notes of individuals competent.³

¹ Loomis v. Mowry, 8 Hun, 311 (promissory note); Wintermute v. Cooke, 7 Hun, 476 (corporate bonds; reversed in 73 N. Y. 107, on other grounds); Smith v. Baker, 42 Hun, 504, 506 (corporate stock; *dictum*); Anderson v. First Nat. Bank, 6 N. D. 497, 72 N. W. 916; Cosand v. Bunker, 2 S. D. 294, 50 N. W. 84.

² Potter v. Merchants' Bank, 28 N. Y. 641, 86 Am. Dec. 273 (holding that the proper inquiry is as to the solvency of the obligor, and the validity of the instrument); Atkinson v. Rochester Printing Co. 43 Hun, 167; Anderson v. First Nat. Bank, 6 N. D. 497, 72 N. W. 916, and cases cited.

³ Such notes have no market value. Anderson v. First Nat. Bank, 6 N. D. 497, 72 N. W. 916.

b. Value of stocks and bonds.—There is no presumption of law that par value of stock is *prima facie* actual value,¹ or even substantial value.² Actual value may, however, be shown by evidence of market value,³ and for such purposes price current lists and market reports are admissible.⁴ Individual sales of stock are also admissible to show market value.⁵ So the actual value of corporate stock may be established by proof of its dividend earning capacity.⁶ In the absence of proof of market value, the financial condition of the corporation may be shown.⁷ Opinions of witnesses are not ordinarily competent on the ques-

tion of value of stocks such as are not dealt in but are held for investments.⁸

¹ *Virginia v. West Virginia*, 238 U. S. 202, 59 L. ed. 1272, 35 Sup. Ct. Rep. 795.

² *Fogg v. Blair*, 139 U. S. 118, 35 L. ed. 104, 11 Sup. Ct. Rep. 476; *Griggs v. Day*, 158 N. Y. 1, 52 N. E. 692.

³ *Virginia v. West Virginia*, *supra*.

⁴ *Virginia v. West Virginia*, *supra* and cases there cited.

⁵ *Dolph v. Speckart*, 94 Or. 550, 179 Pac. 657, 186 Pac. 32; *Humphreys v. Minnesota Clay Co.* 94 Minn. 469, 103 N. W. 338; *State v. Meysenberg*, 171 Mo. 1, 71 S. W. 229; note in 20 Columbia L. Rev. 485.

⁶ *Greer v. Lafayette County Bank*, 128 Mo. 559, 80 S. W. 319; *Brinkerhoff-Farris Trust & Sav. Co. v. Home Lumber Co.* 118 Mo. 447, 24 S. W. 129.

⁷ *McDonald v. Danahy*, 196 Ill. 133, 63 N. E. 648; *Gorham v. Massillon Iron & Steel Co.* 284 Ill. 594, 120 N. E. 467; *Hetrick v. Smith*, 67 Wash. 664, 122 Pac. 363; see note in 16 Columbia L. Rev. 78.

⁸ *Sistare v. Olcott*, 15 N. Y. S. R. 248; *Moffitt v. Hereford*, 132 Mo. 513, 34 S. W. 252; *Clansen v. Tjernagel*, 91 Iowa, 285, 59 N. W. 277; *Hudson v. Northern P. R. Co.* 92 Iowa, 231, 60 N. W. 608.

Proof of sequestration of the corporate property, conclusive as to worthlessness of stock. *Tockerson v. Chapin*, 20 Jones & S. 16.

14. Foreign coin.

The value of foreign coins, as ascertained by the estimate of the director of the mint, and proclaimed by the secretary of the treasury, is conclusive upon custom-house officers and importers.¹

A person may be competent to testify as to the value of coins, although he has not bought and sold such articles up to the day of the trial.²

¹ *Hadden v. Merritt*, 115 U. S. 25, 29 L. ed. 333, 5 Sup. Ct. Rep. 1169 (holding that if there was error, application must be made to the department to correct it).

² *Smith v. Minneapolis Library Board*, 58 Minn. 108, 25 L.R.A. 280, 59 N. W. 979.

WAIVER.

1. Oral evidence.

a. In general.

b. Notwithstanding stipulation requiring writing.

2. Direct testimony.

3. Acts and declarations.

4. Neither consideration nor estoppel needed.

5. One objection not waived by another.

For kindred topics, see ACQUIESCENCE; RATIFICATION.

1. Oral evidence.

a. *In general.*—Oral evidence is competent to show a waiver of strict performance, or acquiescence in nonperformance, even when the obligation is such that oral evidence of a modification of it is not competent.¹ Parol evidence is competent to show the waiver of a stipulation in a contract for liquidated damages.²

¹ Mead v. Parker, 111 N. Y. 259, 18 N. E. 729, 22 Abb. N. C. 129 (guaranty under Statute of Frauds); Watson v. Kirby, 112 Ala. 436, 20 So. 624. And see cases reviewed in note to Lee v. Hawks, 13 L.R.A. 633.

² Rock Island Plow Co. v. Rankin Bros. 89 Ark. 24, 115 S. W. 943.

b. *Notwithstanding stipulation requiring writing.*—A condition may be waived by parol, notwithstanding a provision in the instrument that nothing but a written agreement signed shall have that effect. The provision requiring a waiver to be in writing may itself be waived.¹

¹ Carroll v. Charter Oak Ins. Co. 1 Abb. App. Dec. 316, 10 Abb. Pr. N. S. 169, affirming 40 Barb. 292; Pechner v. Phoenix Ins. Co. 65 N. Y. 195, affirming 6 Lans. 411; Goodwin v Massachusetts Mut. L. Ins. Co. 73 N. Y. 480, 495; Ames v. Manhattan L. Ins. Co. 31 App. Div. 180, 52 N. Y. Supp. 759. And see cases reviewed in note to Lee v. Hawks, 13 L.R.A. 633.

An interesting application of the principle appears in connection with a stipulation frequently found in building contracts that alteration or extras must be ordered in writing, see note in 48 L.R.A. (N.S.) 564.

2. Direct testimony.

A party may testify directly to the fact that there has been no conversation or understanding between him and another waiving a right on his part.¹

¹ Collins v. Manning, 1 N. Y. S. R. 204 (reversing for error in excluding question. Opinion by Daniels, J.).

3. Acts and declarations.

When conduct is relied on as a waiver,¹ the party has a right to show what was said and understood at the time of the transaction, to rebut the inference.²

¹ For cases ruling on the competency of acts and declarations of a party to show waiver, see: Taylor v. Seaboard & R. R. Co. 99 N. C. 185, 5 S. E. 750 (to show waiver of agreement by passenger to identify himself, and have his ticket stamped by designated agent, competent to prove that agent other than the one designated recognized the ticket by permitting the passenger to identify himself and by stamping it for the return trip); Missouri, K. & T. R. Co. v. Cook, 8 Tex. Civ. App. 376, 27 S. W. 769 (evidence that freight conductor told shipper that he could ride in car with his horse, and took up a passenger ticket, competent to show waiver of condition in contract of shipment requiring shipper to remain in caboose while in motion, and leave it at his own risk). Compare Pennsylvania F. Ins. Co. v. Faires, 13 Tex. Civ. App. 111, 35 S. W. 55 (declarations of third person incompetent to show verbal waiver by agent, of condition in insurance policy requiring waiver to be in writing); Elsner v. Prudential Ins. Co. 13 Misc. 395, 34 N. Y. Supp. 246 (declarations of insurance agent authorized solely to collect premiums incompetent to show waiver of forfeiture, the policy negating their authority to waive forfeitures).

² Osborn v. Gantz, 60 N. Y. 540, affirming 6 Jones & S. 148 (waiver of condition for cash payment upon sale); Whitehead v. New York L. Ins. Co. 102 N. Y. 143, 55 Am. Rep. 787, 6 N. E. 267 (waiver of forfeiture).

4. Neither consideration nor estoppel needed.

Waiver of a forfeiture need not be based on a new agreement, nor an estoppel.¹

¹ Titus v. Glens Falls Ins. Co. 81 N. Y. 410, 8 Abb. N. C. 315, 328 (so holding of insurance policies; and that mere negotiations recognizing the existence of the contract waive as matter of law the previous forfeiture).

5. One objection not waived by another.

It is no evidence of waiver of an objection taken by a party that he also asserts a second objection based upon a distinct ground.¹

¹ *Blossom v. Lycoming F. Ins. Co.* 64 N. Y. 162. See further, on this question, *Civil Trial Brief*, 4th ed. chap. x., OFFERS OF EVIDENCE AND OBJECTIONS.

WEALTH.

See also **INSOLVENCY**.

Specific property.

To show wealth, when that fact is competent as affecting damages, one is not limited to general evidence, but may prove the value of specific property.¹

¹ *Crosier v. Craig*, 47 Hun, 83.

WEATHER.**1. Records.****2. Comparison.****1. Records.**

Weather bureau records are competent evidence to show the condition of the weather or the state of the temperature at a given time and place.¹ So the record kept at an authorized United States signal-service station is competent evidence as a record of a public officer made in the course of duty if it be properly made, identified, and proved.²

¹ *Ball v. Flora*, 26 App. D. C. 394; *Bretsch v. Carsten*, 82 App. Div. 399, 81 N. Y. Supp. 868; *Lindsay v. Cusimano*, 12 Fed. 503 (record kept 1

mile distant satisfactory); *Huston v. Council Bluffs*, 101, Iowa, 23, 36 L.R.A. 211, 69 N. W. 1130 (record kept 4½ miles away, competent to show temperature and snow fall); *Hart v. Walker*, 100 Mich. 406, 59 N. W. 174 (record kept 12 miles distant competent); *Mears v. New York, N. H. & H. R. Co.* 75 Conn. 171, 56 L.R.A. 884, 96 Am. St. Rep. 193, 52 Atl. 610 (record kept 10 miles away); *Van Wyk v. People*, 45 Colo. 1, 99 Pac. 1009 (record kept 20 miles away).

2 *Evanston v. Gunn*, 99 U. S. 660, 25 L. ed. 306.

In *Cameron v. Rich*, 39 S. C. L. (5 Rich.) 352, 57 Am. Dec. 747, a log book kept by a mate since deceased was excluded as not within the rule as to records kept in course of duty.

Compare *St. Louis v. Arnot*, 94 Mo. 275, 7 S. W. 15 (record kept by a university).

In *Evanston v. Gunn*, supra, the question how the record should be proved was expressly excluded from consideration.

By § 375 N. Y. Civ. Prac. Act, Parson's Prac. Manual of N. Y. 1921, p. 155 (formerly § 944, N. Y. Code Civ. Proc.), it is enough to produce the record certified by the officer in charge. Compare *Schile v. Brokhahus*, 80 N. Y. 614 (under a previous statute); *People v. Dow*, 64 Mich. 717, 31 N. W. 597 (holding the record not competent).

2. Comparison.

On the question whether it was cold enough to freeze an article, evidence as to the freezing of another article of the same kind is competent.¹ Evidence of freezing of one of a different kind is not.²

A question as to how the weather compared with what was the usual weather of that season is improper as calling merely for an opinion.³

¹ *Hodgkins v. Chappell*, 128 Mass. 197.

² *Ingledeu v. Northern R. Co.* 7 Gray, 86 (on the question whether it was cold enough to freeze ink, evidence that it was not cold enough to freeze apples is irrelevant).

³ *Guiterman v. Liverpool, N. Y. & P. Mail S. S. Co.* 9 Daly, 119, reversed on another point in 83 N. Y. 358.

WEIGHT.

1. Standards.
2. Evidence of underweight.

See also QUANTITY.

1. Standards.

To prove incorrectness of weight, the standards of comparison used must be shown to have conformed to the statute.¹

Comparison with official standards, although conclusive, is not necessary in determining whether a weight used by defendant was correct, but the comparison may be made with a standard known to be correct.²

¹ *McGeorge v. Walker*, 65 Mich. 5, 31 N. W. 601, citing act of July, 1836, 5 U. S. Stat. at L. 133. See § 8900, U. S. Comp. Stats. 1916, Ann. vol. 8, p. 9758.

See also the state statute. In New York it is *Birdseye, Cummings & Gilbert's Consolidated Laws of New York*, § 12, vol. 3, p. 2819.

² *State v. Frolic*, 95 Iowa, 424, 64 N. W. 264.

2. Evidence of underweight.

Evidence that twenty-one of twenty-two sacks of feed were underweight was held sufficient to prove an intent to deceive.¹

¹ *State v. 22 Sacks Daisy Horse & Mule Feed*, 205 Ala. 444, 88 So. 422.

INDEX.

ABANDONMENT,

Contracts.

- burden of proof, p. 2.
- direct testimony, p. 3.
- from silence, p. 3.
- letters, p. 3.
- opinions, p. 4.
- parol evidence of abandonment, p. 3.
- sufficiency of proof, p. 4.
- written assignment, p. 261.
- implied from conduct, p. 3.
- effect on provision as to stipulated damages, p. 5.
- recovery for partial performance, p. 5.

Domicil.

- burden of proof, p. 6.
- declarations, p. 7.
- documentary evidence, p. 7.
- mode of proof, generally, p. 8.
- presumptions, p. 6.

Easements.

- effect of nonuser generally, p. 8.
- highways.
 - burden of proof, p. 11.
 - presumptions, p. 11.
 - weight of facts, p. 12.
- of abutting owner, p. 10.
- of access to piers, p. 11.
- mills, p. 24.
- railway right of way.
 - inference of intent, p. 13.
 - materiality, p. 13.
 - mode of proof, generally, p. 13.
 - weight of facts, p. 13.

ABANDONMENT—(continued).**water rights.**

irrigation rights; ditches; prior appropriation, p. 20.

presumptions and burden of proof generally, p. 19.

right of flowage, p. 20.

ways.

declarations, p. 19.

deviation or use of substituted way, p. 16.

nonuser generally, p. 14.

obstructing of, or cutting off access to way, p. 17.

whose acts in attempting to abandon way are binding on dominant owner, p. 18.

Homestead.

burden of proof, p. 24.

declarations, p. 25.

hearsay, p. 25.

mode of proof, generally, p. 26.

opinions, p. 25.

presumptions, p. 25.

Husband and wife.

declarations, pp. 28, 494.

presumptions, p. 29.

relevancy, sufficiency, and weight of evidence, p. 29.

cruel and inhuman treatment as abandonment, p. 30.

Insurance.

declarations, p. 30.

presumptions, p. 30.

proof of right to abandon, p. 31.

Patents and trademarks.

burden of proof, p. 31.

declarations, p. 32.

delay, p. 32.

presumptions, p. 31.

Rights generally.

adverse possession, p. 34.

burden of proof, p. 33.

mining rights, p. 34.

pleading, p. 34.

presumptions, p. 33.

proof of intent, p. 35.

ABATEMENT AND REVIVAL,

order of court substituting party as conclusive evidence of succession and revival, p. 948.

ABBREVIATIONS,

judicial notice as to, pp. 36, 718, 822.

parol evidence.

general usage, p. 38.

usage of writer, p. 39.

pleading—variance, p. 40.

question to witness, p. 40.

ABDUCTION,

proof of age in prosecution for, p. 186.

ABILITY,

see also Capacity; Intoxication.

conclusions, p. 44.

direct testimony, p. 41.

experiments in court, p. 43.

experiments out of court, p. 43.

expert testimony, p. 42.

financial ability, see Insolvency.

judicial notice, p. 41.

mental ability generally, see Insanity.

presumptions, p. 41.

relevancy and materiality of evidence generally, p. 44.

witness's ability, p. 44.

ABORTION,

evidence of declarations to physician by female, p. 534n.

evidence of dying declarations in prosecution for, pp. 504n, 509n.

opinion evidence as to pregnancy, p. 921.

ABSENCE,

see also Abandonment; Desertion; Domicil; Residence.

answers to inquiries, p. 47.

entries made in one place to prove absence from another, p. 46.

from state as proof of nonresidence, p. 946.

opinions, p. 49.

presumption of continuance, p. 47.

presumption of death from, p. 466.

time of death, p. 469.

public officer's absence, p. 48.

reason or motive for absence, p. 48.

relevancy and sufficiency of evidence generally, p. 49.

reputation, p. 45.

telegrams, p. 46.

Letters.

contents of, p. 46.

fact of receipt of, p. 46.

ABSTRACTS,

see also Accounts.

from books and records, p. 54.

from lost or destroyed documents, p. 51.

from reports, p. 53.

from voluminous documents, p. 50.

title abstracts, p. 52.

admissibility under Illinois burnt records act, p. 52.

ABUTTING OWNER,

abandonment of easement by, p. 10.

ACCEPTANCE,

admissions, p. 62.

burden of proof, p. 55.

by carrier of goods for transportation, p. 59.

by corporation of beneficial grant, p. 58.

by occupancy, p. 63.

direct question, p. 62.

documentary evidence, p. 60.

judicial notice, p. 55.

of assignment of stock, p. 60.

of assignment or deed of trust for creditors, p. 57n.

of beneficial instrument or grant, pp. 56, 483.

of bill of exchange, pp. 56, 59, 61, 67.

of charter, p. 58.

of check by clearing house transaction, p. 59.

of deed, pp. 56, 63.

of draft, p. 61.

of gift, pp. 56, 563.

of goods or work, p. 63.

of goods purchased, pp. 56, 62.

by offer to resell, p. 66.

of grant, pp. 56, 58, 483.

of highway, pp. 60, 65.

of land dedicated to public use, pp. 60, 65.

of land patent, p. 64.

of lease, pp. 58n, 63.

of office of director of corporation, p. 58.

of official bond by bank, p. 58n.

of order, p. 63.

of park, p. 65.

of promissory notes, p. 55.

of provision made by will, p. 58n.

of statute, p. 55.

parol evidence concerning written acceptance, p. 61.

ACCEPTANCE—(continued).

res gestæ of receiving, p. 62.

to satisfy statute of frauds, p. 66.

Presumptions.

of beneficial instrument or grant, pp. 56, 483, 563.

by corporation or officer thereof, p. 58.

by carrier, of goods for transportation, p. 59.

of bill of exchange, p. 59.

of highways, p. 60.

Weight, effect, and sufficiency of evidence.

of bill of exchange, p. 67.

of land dedicated to public use, p. 65.

to satisfy statute of frauds, p. 66.

ACCESS,

abandonment of easement of, p. 10.

ACCIDENT,

declarations, p. 71.

direct testimony, p. 70.

fright of other horses, p. 68.

misplacing brand on stock by, p. 71.

opinions, pp. 71, 920.

presumption and burden of proof that accident happened, p. 68.

suicide or accident, p. 69.

presumption of negligence from happening of, p. 310.

verdict of coroner's jury as to, p. 70.

ACCORD AND SATISFACTION,

burden of proof, p. 72.

parol evidence to vary writing, p. 72.

presumption, p. 72.

weight, effect, and sufficiency, of evidence, p. 73.

part payment of liquidated indebtedness, p. 73.

ACCOUNT RENDERED,

presumption as to rendering of account, p. 111.

ACCOUNTS,

account stated, see Account Stated.

accounts not exclusively best evidence of facts, p. 104.

admissibility to prove that person never had dealings with another, p. 818.

as corroborative evidence, p. 451.

as evidence of financial condition, p. 686.

conclusiveness of entry in party's account as to person to whom credit was given, p. 457.

ACCOUNTS—(continued).

effect of failure to indicate denomination of money on admissibility,
p. 235.

entries in, as evidence of ownership, p. 887.

lump charges, p. 96.

opinion as to time of entries, p. 107.

proof of assignment of fund or credit by entries in account books,
p. 260.

time of entries, pp. 95, 107.

Proving in favor of one interested in keeping.

authentication and correctness of books and entries, p. 98.

oath of the party himself, p. 99.

proof by customers, p. 99.

bringing home to adverse party, p. 101.

effect of amount in controversy, p. 88.

effect of statute making party competent witness for self, p. 87.

effect of statute of limitations, p. 88.

effect of statute prohibiting party from testifying, p. 87.

entries by bookkeeper.

statutory rule, p. 87.

when bookkeeper is accessible, p. 84.

when bookkeeper is not accessible, p. 85.

when bookkeeper is dead, p. 86.

when bookkeeper is insane, p. 86.

entries by party himself, p. 76.

statutory rule, p. 78.

entries by party who has since become insane, p. 83.

entries by party who has since deceased, p. 81.

statutory rule, p. 83.

entries in partnership books by absent or deceased partner, p. 84.

entries showing intent to charge, p. 98.

form and requisites as to book and entry, p. 90.

alterations, erasures and mutilations, p. 91.

omission to affix price, weight, etc., p. 92.

loose leaf ledgers, p. 90.

card systems, p. 90.

original sales slips, p. 90.

knowledge of the person making the entries, p. 100.

entries on information verified by informant, p. 100.

in large business establishment, p. 100.

original or transferred entries, p. 92.

balances, p. 95.

entries transferred from memoranda, p. 93.

ledgers, p. 94.

ACCOUNTS—(continued).

- regularity as to course of business, p. 97.
- entries relating to party's business, p. 98.
- rule when the party keeps a clerk, p. 89.
- time for making the entries, p. 95.
 - lump charges, p. 96.
 - undated entries, p. 96.
- what accounts are provable by books, p. 102.
 - delivery of goods to third person, p. 102.
 - professional services, p. 104.
 - work done by servant, p. 104.
- bank accounts, p. 104.

Proving against one interested in keeping.

- agent's books, p. 113.
- authentication, p. 112.
- as admissions, p. 113.
- joint books, p. 113.

Proving in aid of oral testimony.

- contemporaneous entries, p. 110.
- written details of facts testified to, p. 110.

Mutual accounts.

- account rendered, p. 111.
- conclusiveness, p. 112.
- pass books, p. 111.

Discrediting.

- by opinion, p. 109.
- by specific errors, p. 109.

Explaining.

- in general, p. 107.
- by expert, p. 108.
- interpreting symbols, p. 107.

Presumptions.

- presumption as to account rendered, p. 111.
- as to time of entries, p. 107.

Secondary evidence of contents.

- generally, p. 106.
- photographic copies, p. 106.
- rebuttal of secondary evidence, p. 106.
 - calculations by competent person, p. 105.

ACCOUNT STATED,

- see also Accounts.
- account admissible without original books, p. 121.
- account rendered and not objected to, p. 115.
 - authority of agent, p. 121.
- ABB. FACTS—65.

ACCOUNT STATED—*(continued)*.

- giving note implies accounting in full, p. 120.
- impeaching, p. 121.
- objections to part, p. 119.
- part payment on account rendered, p. 118.
- reasonable time for objections, p. 119.
- reservation of right to correct errors, p. 118.

ACKNOWLEDGMENT,

- best and secondary evidence, p. 123.
- burden of proof, p. 122.
- impeachment, sufficiency of evidence, p. 128.
- parol and extrinsic evidence, p. 126.
- presumptions from, pp. 123, 559.
- privileged communications to notary, p. 128.
- unacknowledged or defectively acknowledged deed, or record thereof,
as evidence, p. 123.
- what defects disregarded, p. 128.

ACQUIESCENCE,

- acts and declarations, p. 130.
- burden of proof, p. 129.
- in boundary line, p. 286.
- in payment of forged checks remaining in bank, p. 129.
- relevancy of evidence generally, p. 130.
- silent acquiescence as ratification of agent's act, p. 215.

ACTION OR SUIT,

- estoppel by forbearing to sue, p. 527.
- proof of assignment of cause of action, pp. 258, 260, 261.
- proof of leave to sue, p. 746.

ACT OF GOD,

- burden of proving that loss resulted from, p. 311.

ACTUARIAL TABLE,

- overcoming presumption of death from absence, p. 471.

ADDRESS,

- city directory, p. 132.
- privileged communications, p. 131.

ADMISSIONS AND DECLARATIONS,

- as to desertion, p. 494.
- as to indebtedness, p. 637.
- as to measurements, p. 783.
- as to motive or purpose, p. 801.
- as to state of mind, p. 170.

ADMISSIONS AND DECLARATIONS—(continued).

as to title, p. 994.

by former owner whether available as witness or not, p. 160.

best and secondary evidence, p. 148.

book entries as admissions, pp. 113, 121.

by silence, p. 146.

change of opinion, p. 152.

conduct against admissions, p. 153.

contradicting, p. 152.

declarations describing feelings, p. 533.

dying declarations, see Dying Declarations.

entire statement or conversation, p. 152.

explaining, p. 530.

identifying the speaker, p. 135.

knowledge of facts, p. 148.

of agent as to fact or scope of agency, p. 195.

of agent to show execution of contract, terms, or breach, p. 430.

of arbitrators as to award, p. 251.

of engineer as to speed, p. 959.

of husband or wife, pp. 28, 166, 494.

of individual members of board as proof of official acts, p. 860.

of infant as to minority, p. 643.

of infant too young to be sworn as a witness, p. 165.

of insured outside of his application as evidence against beneficiary,
p. 156.

of one accused of crime during a trial or in a judicial proceeding, p.
146.

of parties as to what they consider necessary under contract, p. 816 n.

of persons incompetent as witness.

convicts and unpardoned felons as *res gestæ*, p. 166.

husband and wife as *res gestæ*, p. 166.

insane persons, p. 166.

infants too young to be sworn, p. 165.

of person whose sanity is in question, p. 682.

of principal as to fact or scope of agency, p. 195.

of witness, to corroborate his testimony, p. 454.

omission to answer letter as admission of truth of statements con-
tained in it, p. 753.

on question of abandonment by husband or wife, pp. 28, 494.

on question of abandonment of contract, p. 3.

on question of acceptance of goods, p. 62.

on question of acceptance of order for goods, p. 62.

on question of acceptance of instrument, p. 63.

on question of acquiescence, p. 130.

on question of adultery, p. 173.

ADMISSIONS AND DECLARATIONS—(continued).

- on question of agency, p. 195.
 - on question of alienation of affections, p. 170.
 - on question of authority to sign name, p. 955.
 - on question of citizenship, p. 376.
 - taking out naturalization papers subsequent to election as admission of lack of qualification to vote, p. 376.
 - on question of domicil or residence, pp. 497, 945.
 - on question of existence of contract, p. 428.
 - on question of forgery of signature, pp. 169, 619.
 - on question of gift, p. 560.
 - on question of identity, p. 632n.
 - on question of malice, p. 761.
 - on question of marriage, pp. 161, 773.
 - on question of partnership, p. 159.
 - on question of pedigree, p. 170.
 - on question of paternity of child, 171.
 - on question of proprietorship, p. 290.
 - on question of relinquishment of easement of way, p. 19.
 - on question of waiver, p. 1014.
 - on question whether possession was adverse, p. 178.
 - pending compromise, privileged, p. 149.
 - promise of buyer to take goods left at certain place as admission of acceptance, p. 62.
 - proof against one person of declarations by another to show partnership, p. 159.
 - recollection of exact words, p. 134.
 - records of one's society, p. 148.
 - reference to things not specified, p. 136.
 - reports by agent or employee to employer, to prove fact in issue, p. 168.
 - statements in presence of party, as affected by his mental or physical condition at the time, p. 167.
 - statute requiring writing, p. 136.
 - tampering with evidence and jurors as admission of bad case, p. 263.
 - to impeach dying declarations, p. 514.
 - to prove death, p. 471.
 - to show that party was a fictitious person, p. 536.
 - testimony as to declaration otherwise inadmissible, by witness in explaining statement made on cross-examination, p. 529.
 - undelivered writing to prove, p. 137.
 - witness not hearing or understanding whole conversation, p. 134.
- Declarations as to intent.**
- generally, p. 171.
 - as to motive or purpose generally, p. 801.
 - as to whether absolute deed was intended as a mortgage, p. 479.

ADMISSIONS AND DECLARATIONS—(*continued*).

- competency against other person, p. 696.
- intent to abandon domicil, p. 7.
- to abandon homestead, p. 25.
- to abandon invention, p. 32.
- to ratify, p. 934.
- of absentee to show intent in departing, p. 48.
- on question of merger, p. 790.
- testator's declarations, pp. 162, 707.

As to accident or injury.

- of injured person as to cause of injury, pp. 355, 356.
- of injured person to physician examining him in order to qualify as a witness, p. 154.
- of insured on question whether injury was accidental or intentional, p. 71.
- of member of hunting party upon question whether other member met accidental death, p. 71.
- of third person on question of accidental death, p. 71.

As to state of mind.

- as to paternity of child, p. 171.
- concerning alienation of affections, p. 170.

By person since deceased.

- against his own marriage, p. 161.
- as to boundary lines, p. 281.
- as to measurements made by him, p. 783.
- as to paternity of child, p. 171.
- by deceased subscribing witness to will, p. 164.
- by deceased member of benefit society to show abandonment of certificate, p. 30.
- confession of crime, p. 172.
- by insured outside of his application as evidence against beneficiary, p. 156.
- proving date of birth of child by declaration of father since deceased, p. 270.
- proving place of birth by declaration of person since deceased, p. 269.

By testator.

- as to intent to disinherit after-born child, p. 707.
- on issue of intention in destroying will, p. 162.
- to overcome or sustain presumption of revocation, where will cannot be found, p. 163.
- to prove existence or contents of lost or destroyed will, p. 164.
- to show undue influence, p. 162.

In pleading or judicial proceeding.

- generally, pp. 137, 143.
- admissibility of one plea or count on issue raised by another, p. 141.

ADMISSIONS AND DECLARATIONS—(continued).

- admission made on former trial for purpose of defeating continuance, p. 144.
- conclusiveness, p. 140.
- criminal pleadings.
 - guilty, p. 142.
 - nolo contendere*, p. 142.
- estoppel by admission in action, p. 526.
- in unauthenticated document used, p. 144.
- necessity of introducing pleading in evidence, p. 141.
- parties against whom the admission contained in the pleadings may be shown, p. 139.
- sworn and unsworn pleading, p. 138.
- testimony upon preliminary examination by witness not available at time of trial, p. 144.
- withdrawn or superseded pleadings, p. 140.

ADULTERY,

- admissions of alleged paramour as to, p. 173.
- circumstantial evidence, p. 172.
- cogency and relevancy of proof, p. 173.
- presumptions, p. 172.
- uncorroborated testimony, p. 173.

ADVERSE POSSESSION,

- burden of proof, p. 175.
- conclusions, p. 178.
- declarations; hearsay, p. 178.
- effect of time of acknowledgment on admissibility of deed as color of title, p. 124.
- extinguishment of easement by, pp. 9, 15.
- presumptions, as to, p. 176.
 - presumption of grant from, p. 570.
- relevancy of evidence generally, p. 178.
- weight, effect, and sufficiency of evidence, p. 180.

ADVERTISEMENTS,

- subscriber's knowledge of advertisements in newspaper, p. 744.

ADVICE,

- evidence of taking of, on question of due care, p. 304.

AFFIDAVITS,

- to prove service of notice, p. 954.

AFFINITY,

- what constitutes, and method of computing, p. 181.

AFTER-ACCOUNTABILITY,

belief in, as affecting admissibility of dying declarations, p. 510.

AFTER-BORN CHILD,

intent of testator to disinherit, p. 707.

AGE,

cross-examining witness as to capacity to judge, p. 188.

direct testimony, p. 185.

hearsay, p. 186.

inscriptions, p. 182.

inspection, p. 188.

of document, p. 189.

of horse, p. 190.

opinion, pp. 187, 864.

presumption, p. 182.

records and inscriptions, p. 182.

AGENCY,

see also Dummy; Employment.

admissibility in evidence of letters of agent, p. 752.

admissibility of agent's accounts as against principal, p. 113.

admissibility of declarations of agent, p. 430.

evidence on question whether credit was extended to agent or principal,
p. 455.

notice to agent as charging principal with knowledge, pp. 841, et seq.
notice to subagent, p. 850.

presumption as to knowledge of principal, p. 740.

presumption that agent rather than principal received principal's
mail, p. 759n.

presumption that credit was extended to principal, not to agent, p.
455.

proof that party's agent tampered with evidence, p. 965.

Proof of relation.

admissions and declarations of agent, p. 195.

in connection with evidence of ratification, p. 198.

admissions of principal, p. 195.

agency of operator of telephone, p. 971.

appearing to be in charge of business, p. 199.

charging a commission as evidence of relation, p. 201.

conditions precedent, p. 195.

continuance, presumption of, p. 210.

course of dealing, p. 202.

similarity of transactions, p. 206.

single transaction not enough, p. 207.

transactions with other persons, p. 204.

AGENCY—(continued).

- direct testimony, p. 192.
 - by agent; implied authority, p. 192.
- driver of runaway team as agent of owner, p. 200n.
- form of commercial documents, p. 200.
- joint interest as raising presumption of, p. 210.
- necessity of written authority, p. 192.
- necessity of sealed authority, p. 193.
- of wife or child, pp. 207, 208, 209.
- payment of other obligations incurred by alleged agent, p. 207.
- possession and use of property, p. 200.
- presumption of employment generally, see **Employment**.
- presumption of authority, p. 215.
- relationship of parties, p. 208.
 - child for parent, p. 209.
 - husband for wife, p. 208.
 - parent for child, p. 209.
 - wife for husband, p. 209.
- reputation, p. 191.
- similar transactions, p. 207.
- to sign name, p. 207.

Revocation.

- in general, p. 218.
- by death or incapacity, p. 219.
- general reputation, p. 218.
- separation of husband and wife, p. 218.

Authority of agent.

- best and secondary evidence of authority, p. 194.
- direct testimony as to scope of agent's duty, p. 499.
- local or trade usage, p. 210.
- opinion as to powers, p. 202.
- scope of authority, p. 210.
- to cancel contracts, p. 212.
- to indorse check, p. 212.
- authority to make "necessary" deductions in settling claims, p. 816n.
- to make a settlement having effect of account stated, p. 121.
- to receive payment, pp. 213, 214.
- to sign principal's name, p. 955.
- to take note payable to himself, p. 212.

Ratification.

- admissibility of evidence of ratification under allegation of authority p. 933.
- executory contract, p. 934.
- express ratification, p. 215.
- how proved generally, pp. 215, 934.

AGENCY—(continued).

knowledge of facts, p. 934.

knowledge of legal effect of facts, pp. 810, 935.

parol evidence of ratification of contract under seal, p. 217.

generally, p. 935.

right of one who dealt with notice of agent's lack of authority to show ratification, p. 217.

silent acquiescence, pp. 215, 935.

slight evidence sufficient where agency actually exists, p. 935.

what may be ratified, p. 936.

AIR,

abandonment of easement of, p. 10.

ALCOHOLISM,

see also Intoxication.

presumption of continuance of mental incapacity resulting from, p. 657.

ALIENATION OF AFFECTIONS,

see Husband and Wife.

ALIENS,

see Citizenship, Naturalization.

ALMANAC,

use of, in evidence, pp. 795, 961.

ALTERATIONS,

abstract or memorandum of original instrument, p. 234.

allegation, variance, p. 220.

effect of alteration on competency as evidence, pp. 91, 225, 234.

effect of alteration on validity, p. 230.

extrinsic evidence to supply obliteration, p. 233.

inspection by jury, p. 227.

materiality, pp. 226, 232.

opinion evidence, pp. 231, 232.

presumptions and burden of proof, pp. 221, 227.

proof of signature as prima facie evidence of genuineness of body, p. 227.

question for jury, p. 229.

time of, p. 222;

Explaining.

in general, p. 232.

ancient instrument, p. 234.

as made by consent, p. 233.

as made by third person, p. 232.

call for explanation, p. 227.

ALTERATIONS—(continued).

- competency of witness to explain, p. 231.
- effect of attempted explanation, p. 229.
- effect of failure to explain, p. 229.
- official document, p. 234.

AMBIGUITY,

- effect on admissibility of account in evidence, p. 236.
- Parol and extrinsic evidence.*
 - blank, p. 236.
 - creating by extrinsic evidence, p. 241.
 - deeds, p. 238.
 - identity of land or person, pp. 243, 704, 705.
 - illegibility, p. 236.
 - insurance contracts, pp. 238, 244.
 - intent generally, see Intent.
 - meaning of symbol, p. 235.
 - patent and latent ambiguity, p. 237.
 - practical construction, p. 240.
 - subject-matter of contracts, p. 241.
 - surrounding circumstances, p. 238.
 - technical meaning, p. 242.
 - usage of business, p. 240.
 - wills, pp. 238, 240, 704, 705.
 - what included in description of premises, p. 922.

AMOUNT,

- computations by experts, p. 246.
- evidence as to result of examination of voluminous accounts to show, p. 245.

ANCIENT INSTRUMENTS,

- acquiring familiarity with signatures by inspecting ancient writings, p. 584.
- explaining alterations in, p. 234.

ANIMALS,

- as to breed, see Breed.
- brands on cattle as evidence of ownership, p. 886.
- evidence as to character of dog in action for injury by, p. 368n.
- evidence as to reputation of horse causing injury, p. 368n.
- evidence on question of disease of, p. 621.
- evidence to prove age of horse, p. 190.
- injury to, by railroad train, pp. 315n, 399n, 450n.
- leaving horse unhitched in highway as *prima facie* evidence of negligence, p. 312.
- opinion as to negligence in leaving horse, pp. 298n, 347n.

ANIMALS—(continued).

- opinion as to possibility of stopping team in time to avert accident, p. 298n.
- opinion as to cause of injuries to, p. 340.
- presumption and burden of proof in case of injury to, while in carrier's custody, p. 322n.
- presumption of negligence in case of injury by runaway horse, p. 312.
- proof of habit of, p. 573n.

ANONYMOUS LETTER,

- sufficiency to charge with notice, p. 823.

ANTICIPATORY REBUTTAL,

- see Rebuttal.

APPLICATION OF PAYMENTS,

- circumstantial evidence, p. 247.
- direct testimony, p. 247.
- oral evidence, p. 247.
- presumption and burden of proof, p. 246.

APPRAISAL,

- admissibility in evidence, p. 248.

APPROVAL,

- by corporation, p. 249.
- by judge, p. 248.
- oral evidence, p. 248.
- presumption of, p. 249.

ARBITRATION AND AWARD,

- authority of agent to submit to, pp. 204n, 216n.
- parol evidence generally, p. 250.
- presumptions and burden of proof, p. 249.
 - presumption of payment of award, from lapse of time, p. 898.
- sufficiency of evidence to impeach, p. 252.
- testimony of arbitrators, p. 251.

ARCHIVES,

- judicial notice of facts shown by public archives, p. 729.

AREA,

- opinion evidence as to, p. 864.

ARMY AND NAVY,

- judicial notice of regulations of military forces, p. 855.

ARTESIAN WELLS,

- judicial notice of, nature and sources of, p. 718.

ASSAULT AND BATTERY,

evidence as to character, p. 366n.

evidence of exclamations of pain, p. 535.

ASSENT,

see also Consent.

to correctness of account stated, pp. 115, 116.

Assent without signing.

direct testimony, p. 256.

instrument delivered, but to be surrendered again, p. 255.

instrument delivered to be retained as evidence, p. 253.

presumption, p. 253.

Nonassent notwithstanding signing.

conditional delivery, p. 251.

direct testimony, p. 257.

neglect to read, p. 256.

presumptions, p. 256.

ASSESSMENTS,

judicial notice of abbreviations in, p. 37n.

ASSIGNMENT,

abandonment of, p. 261.

form, p. 259.

illegality of object, p. 261.

mental capacity of assignor, p. 647.

motive or purpose, p. 261.

of cause of action, pp. 258, 260, 261.

of debt, pp. 252, 260.

of collateral as implying assignment or principal obligation, p. 260

of principal as carrying collateral, p. 260.

proof by entries in books of account, p. 260.

reservation of interest in assignor, p. 261.

Oral evidence.

in general, p. 258.

applying description, p. 260.

as to consideration, pp. 414, 416.

notwithstanding written evidence exists, p. 261.

qualifying the schedules, p. 261.

that assignment was intended as collateral security, p. 262.

ASSIGNMENT FOR CREDITORS,

acceptance of lease by assignee, p. 63.

admissibility in evidence of deed of assignee for creditors, p. 993n.

by corporation, testimony of directors as to motive, p. 695.

presumption of assent of creditors to, p. 57.

ASSOCIATIONS,

- admissibility of account books of, as against or in favor of member, p. 113.
- proof of membership in, see Membership.

ASTRONOMER,

- opinion of, as to how far vessel could be seen on certain day and hour, p. 986n.

ATTACHMENT,

- direct testimony by one suing out writ, as to malice, p. 800n.
- presumption of intent to evade local exemption laws in resorting to courts of other state, p. 700.
- proof of ownership by one purchasing at attachment sale, p. 888.

ATTORNEYS,

- admissibility of account books in evidence, p. 104.
- competency of attorney to testify to client's handwriting, p. 587.
- judicial notice as to age of, p. 718.
- notice to attorney as notice to client, p. 841.
- opinion as to propriety of legal advice, p. 297n.
- opinion as to value of legal services, p. 1007.
- privileged communication to, see Evidence.
- right to explain nonproduction of evidence, p. 530.
- right to testify as to client's intention in bringing suit, p. 694.

AUTHENTICATION,

- of account books, pp. 98, 112.
- of copies offered in evidence, pp. 387, 388.
- of express notice, p. 750.
- of mortality tables offered in evidence, p. 699.
- of newspaper statement offered in evidence, p. 721.
- of standards of comparison on question of disputed handwriting, p. 533.
- use in evidence of unauthenticated document as an admission, pp. 138, 144.

AUTHORITY,

- of agent, see Agency.
- to affix seal, p. 952.
- to sign name, pp. 576, 955.

AUTHORSHIP,

- proof of authorship of letters offered in evidence, p. 748.

AUTOMOBILES,

- opinion evidence as to speed, p. 957.

AUTOPSY,

testimony as to result, by expert who has failed to follow statute, p. 262.

testimony by one of several physicians to fact observed by another, p. 262.

AWARD,

see Arbitration and Award.

B**BAD CASE,**

evidence of acts in nature of an admission that party has bad case, p. 263.

BAILMENT,

presumption of negligence from loss of or damage to property in charge of bailee, pp. 313n, 314.

BANKS,

account of individual as provable against him, p. 104.

agency of president to receive deposits, p. 205n.

authority of assistant bank teller to certify checks, p. 205n.

authority of cashier, p. 205n.

cashier's knowledge of list of shareholders, p. 743n.

bank account with specified person as evidence that such person is not fictitious, p. 536.

deposit as a means of tracing funds, p. 493.

entry in bank books as evidence of payment, p. 896.

judicial notice as to business of, p. 287.

pass book as account stated, p. 112.

presumption of regularity of business, p. 940.

proof of deposit in, in order to trace funds, p. 493.

proof of genuineness of bank notes, p. 558.

right to interest on deposit, p. 712.

BAPTISMAL CERTIFICATE,

proving date of birth by, pp. 182, 270.

BASTARDY,

evidence of character, pp. 318n, 320n.

evidence of offer by defendant to contribute money to send prosecutrix away, p. 151.

inspection of child on issue of paternity, p. 780.

BELIEF,

see also Intent.

asking hostile witness for impression, p. 264.

belief as characterizing one's own act, p. 263.

BELIEF—(continued).

- belief at the time of the transaction, p. 265.
- in after-accountability as affecting admissibility of dying declarations, p. 510,
- in spiritualism, witchcraft, etc., as evidence of insanity, p. 684.
- qualifying words as to belief, p. 265.
- reason for belief, p. 265.
- testifying to one's own belief, p. 263.
 - cross-examination, p. 264.

BENEVOLENT SOCIETIES,

- presumption as to necessity for assessment, p. 815.
- proof of membership in, see Membership.

BEST AND SECONDARY EVIDENCE,

- foundation for secondary evidence of contents of writing, p. 148.
- of accounts, see Accounts.
- of agency, p. 194.
- of bill of sale, p. 888.
- of contents of lost or destroyed document, pp. 51, 52.
- of contents of mortality tables, p. 798.
- of contents of original instrument to show subsequent alteration, p. 234:
 - of contents of telegram, p. 967.
 - of contents of voluminous document, pp. 50, 51.
 - of date of presentation of instrument for record, p. 539n.
 - of date when postoffice was established, p. 760.
 - of dying declarations, p. 511.
 - of filing of chattel mortgage, p. 539n.
 - of membership in corporation, p. 788.
 - of mortgage, p. 888.
 - of naturalization, p. 811.
 - of order of court, pp. 879, 880.
 - of quantity or measure, p. 780.
 - photographs as secondary evidence, p. 908.
 - rebuttal of secondary evidence, p. 106.
 - scale book of logs on question of quantity of lumber cut, p. 780.
 - testimony of others as to handwriting of person, where latter is himself available as witness, p. 579.

Copies.

- alterations in certified copy, effect on admissibility, p. 234.
- authentication, defect in, p. 444.
 - form of, p. 443.
- carbon copies of documents, p. 294.
- copy proceeding from adverse party, p. 438.
- imperfect or erroneous copy, p. 444.

BEST AND SECONDARY EVIDENCE—*(continued)*.

letter press copies of handwriting for purpose of comparison, pp. 603, 616.

made by mechanical means, pp. 444, 603.

mistake in certified copy, p. 793.

of census returns, pp. 184, 185.

of filed or recorded instrument, p. 439.

effect of statute making copy equal evidence, p. 442.

instrument not entitled to record, pp. 123, 442.

sufficiency of foundation for admission, p. 441.

of lost or destroyed will, p. 445.

of lost paper or record, p. 757.

of photograph, p. 904.

of photographs of finger prints, p. 541.

of photographs of palm prints, p. 542.

of record of death, p. 474.

of record of naturalization in other state, p. 812.

of statute, p. 548.

of tally of logs, p. 781.

oral evidence to vary, p. 444.

photographic copies of documents or instruments, p. 906.

photographic copies of handwriting for purpose of comparison, p. 603.

proof of order of court by, p. 879.

where original is beyond jurisdiction of court, p. 439.

BIAS,

calling witness's attention to declarations before proof of, p. 268.

competency of proof of, generally, p. 266.

cross-examining on details, p. 267.

effect of, on weight of testimony of expert, p. 669.

presumption of, p. 266.

repelling imputation of, p. 268.

BIBLE,

admissibility in evidence of entries in, pp. 182, 270, 465.

judicial notice of contents of, p. 718.

BIGAMY,

admissibility in prosecution for, of corroborative evidence, p. 448n.

presumption of validity of former marriage in prosecution for, p. 779n

BILL HEAD,

admissibility on question of identity, p. 628.

BILL OF EXCEPTIONS,

proof of former testimony by, p. 983.

BILLS AND NOTES,

- acceptance of, pp. 59, 61, 67.
- alleged maker's denial of signature to, after death of payee, p. 588n.
- acceptance of promissory notes as payment, p. 55.
- alterations in. see Alterations.
- application of payments on, see Application of Payments.
- authority of agent to receive payment of, p. 214.
- authority of agent to take note payable to himself, p. 212.
- burden of proving that condition on which bill of exchange was accepted has been complied with, p. 56.
- evidence of market value of promissory notes of individuals, p. 1011.
- evidence of notes of similar character in action on note, p. 427n.
- opinion evidence as to value of, p. 1011.
- parol evidence as to acceptance of, p. 61.
 - as to consideration, pp. 414, 416n.
 - of stipulation collateral to, pp. 379, et seq.
 - to show condition, p. 382.
- payable to order of fictitious person, p. 474.
- possession as evidence of ownership, pp. 884, 885.
- presumption as to good faith of holders, pp. 565, 569.
 - of acceptance of bill of exchange, p. 59.
 - of accounting from giving of note, p. 120.
 - of receipt of letter containing notice of protest, p. 758n.
 - of surrender of note, p. 963n.
- proof of disputed handwriting, see Handwriting.
- relevancy of evidence on question of execution of, p. 426.
- signature to, see also Signature.
- suretyship of one who appears to be principal, p. 962n.

BILLS OF LADING,

- presumption of assent to contents, p. 254n.
- as evidence of shipment, p. 756.

BIRTH,

- date of birth, p. 270.
- hearsay, declarations, p. 269.
- premature or still birth, p. 269.
- presumption, p. 269.

BLASTING,

- forcing frozen dynamite into drill hole, p. 297n.
- opinion as to whether blast covered in manner prescribed would throw rocks certain distance, p. 347n.
- opinion evidence as to negligence or care in, p. 303n.
- ABB. FACTS—66.

BLOODHOUNDS,

evidence of trailing of persons or animals by, p. 272.
reliability of, p. 272.

BLOOD,

evidence of "Wasserman" Test, p. 271.
opinion evidence as to direction from which blood on clothing came,
p. 310n.
as to whether blood stain was human or animal, p. 271.
as to whether stain is blood, p. 271.
submitting blood-stained clothing to jury, pp. 271, 354.

BLOW,

opinion evidence as to direction of, p. 349.

BOARDS OF TRADE,

judicial notice as to, p. 287.

BOLTING SAW,

opinion as to necessity of carriage attachment, p. 296n.

BOMBS,

admissibility in evidence, p. 355.

BONA FIDE HOLDERS,

see also Good Faith.
one claiming under grant to fictitious person as, p. 538.

BONDS,

authority of agent to receive payment of, p. 214.
effect of alteration in, on admissibility in evidence, p. 228n.
oral evidence as to consideration of indemnity bond, p. 414.
as to intent not to deliver, without principal's signature, p. 702n.
as to obligation which sureties intended to assume, p. 702n.
of independent agreement between sureties and obligees, p. 380n.
possession of coupons as proof of ownership of bonds, p. 885n.
presumptions of acceptance of, pp. 56, 58.
presumption of payment from possession of, p. 897.

BOOKS OF ACCOUNT,

see Accounts.

BOUNDARIES,

acquiescence in fence as boundary, p. 130.
documentary evidence, p. 276.
field notes, p. 276.
hearsay; declarations, p. 281.
how proved in general, p. 274.
judgment as proof of, p. 276.

BOUNDARIES—(continued).

- judicial notice as to, see Judicial Notice.
- maps, p. 276.
- opinions and conclusions, p. 280.
- parol evidence, p. 279.
- plan of premises, p. 408.
- plats, p. 276.
- practical location, p. 285.
- presumptions and burden of proof, p. 275.
- recitals in deeds, p. 276.
- surveys, p. 276.
- variance, p. 284.

BRANDS,

- on cattle as evidence of ownership, p. 886.

BREACH OF PROMISE,

- evidence as to character in action for, p. 367.
- evidence as to feelings of parties, p. 532n.
- evidence of defendant's financial condition, p. 387.

BREED,

- admissibility of herd book on question of, p. 286.
- expert testimony as to, p. 286.

BRIBERY,

- of officers calling jurors as admission that party has bad case, p. 263

BRIDGES,

- abandonment of, p. 12n.
- opinion as to effect of bridge as obstruction of water, p. 346n.
 - as to manner of driving piles, p. 347n.
 - as to proper construction of, p. 419n.
 - as to capacity, p. 864.
- other accidents, p. 304.
- photograph of bridge defectively constructed, p. 406.

BROKERS,

- agency generally, see Agency.
- ratification by principal of acts of, p. 216n.

BUILDING CONTRACTS,

- proof of abandonment of, p. 5n.

BUILDINGS,

- opinion evidence as to proper construction of, pp. 296n, 418, 420.

BURDEN OF PROOF,

abandonment of rights, p. 33.

of adverse possession, p. 34.

of contract, p. 2.

of domicil, p. 6.

of highway, p. 11.

of homestead, p. 24.

of mill privilege, p. 24.

of water rights, p. 19.

absence of liability for loss or injury to goods in carrier's hands, p. 311.

acceptance of deed, p. 55.

acceptance of promissory, notes as payment, p. 55.

acquiescence by party, p. 129.

acquiescence by principal in agent's act was with knowledge of facts, p. 217n.

adverse possession, p. 175.

alienage, p. 811.

alteration of instrument, p. 221.

boundaries, p. 275.

breach of warranty, p. 948.

change of domicil, p. 6.

child's capacity or incapacity to appreciate danger, p. 293.

compliance with condition, p. 56.

condition precedent imposed upon existence of agency, p. 195.

compromise, p. 383.

consent, p. 408.

consideration, pp. 411, 415.

contract, establishing, p. 423.

contributory negligence, p. 326.

credit, p. 455.

death, p. 466.

delivery and acceptance of goods sold, p. 56.

delivery of deed to grantee, p. 56.

direction as to application of payment, p. 246.

error in account stated, p. 118.

estoppel, p. 525.

existence of alleged fictitious person, p. 537.

fraud, p. 424n.

genuineness of signatures on statutory petition, p. 559.

good faith, p. 565.

ignorance of trade usage, p. 780.

infancy, p. 643.

insanity, p. 645.

insolvency, p. 687.

BURDEN OF PROOF—(continued).

- intent as to consequences of act, p. 698.
 - of testator, p. 699.
 - that deed should be mortgage, p. 475.
 - to create monopoly, p. 700.
 - to evade law, p. 699.
- intoxication of testator at time of executing will, p. 716.
- invalidity of acknowledgment, p. 122.
 - of contract, p. 423.
- knowledge, p. 739.
 - passenger's knowledge of memorandum on ticket, p. 255.
- larceny, p. 566.
- malice, p. 763.
- marriage, p. 775.
- membership in association or corporation, p. 786.
- merger, p. 789.
- mistake in written instrument, p. 794.
- navigability of stream, p. 813.
- necessity of removal of railroad track, p. 814.
- necessity of taking land by eminent domain, p. 814.
- negligence, p. 308.
- negative, p. 817.
- new promise relied on to take action out of statute of limitations, p. 821.
- payment, p. 896.
- rebutting apparent acceptance of goods purchased, p. 56.
- regularity of award, p. 249.
- residence, pp. 6, 947.
- signature by marks, p. 770.
- solvency, p. 687.
- suretyship of one appearing to be principal, p. 962.
- survivorship, p. 964.
- tender, p. 972.
- that deed was intended as a mortgage, p. 475.
- time of alteration of instrument, p. 222.
- to reform writing on ground of accident, p. 68.
- truth of reason for act proved to have been given at the time thereof, p. 530.
- validity of gift, p. 560.
- validity of acknowledgment, p. 122.
- waiver of provision in contract, p. 423.
- want of care or prudence, p. 308.

BUSINESS,

- abbreviations used in, see Abbreviations.
- expert testimony as to trade name or designation, p. 809.

BUSINESS—*(continued)*.

- judicial notice as to course of, p. 287.
 - as to railroad business, p. 718.
 - abbreviations and symbols, p. 718.
 - of commercial designation of article, pp. 720n, 808.
 - of usual stock in trade, p. 719.
- practice of particular house, p. 289.
- presumption of regularity of, p. 940.
- presumption of residence from fact of doing business at particular place, p. 945.
- proprietorship, p. 290.
- scope of particular trade, p. 289.
- trade schedule of prices as evidence of value, p. 1009.
- usage of, see Usage and Custom.

C**CAPACITY,**

- see also Ability.
- mental capacity, see Insanity.
- of bridge, p. 291.
- of culvert, p. 291.
- of irrigating ditch, p. 291.
- of machine, p. 291.
 - comparison with similar machines, p. 292.
- of minor servant to comprehend and avoid danger, p. 293.
- qualification of witness, p. 291.
- of sewer, p. 291.

CARBON COPIES,

- admissibility in evidence, pp. 294, 444.

CARD SYSTEMS OF ACCOUNTS,

- admissibility as book of original entry, p. 90.

CARE,

- see also Competency and Skill.
- as to habit, see Habit.
- circumstantial evidence, p. 308.
- cogency of evidence, p. 335.
- information on which person acted as evidence of, p. 569.
- other accidents, p. 304.
- precautions, p. 305.
 - subsequent to the fact, p. 306.
- required of children, p. 333.
- taking advice, p. 304.
- variance between pleading and proof, p. 307.

CARE—(continued).*Presumptions and burden of proof.*

in general, pp. 308, 332.

contributory negligence, p. 326.

presumption of want of care from fact of loss or injury, p. 310.

statutes making injury prima facie evidence of negligence, p. 324.

Opinions and conclusions.

as to care in making measurement, p. 782.

direct testimony of person as to his conduct, p. 302.

form of question to witness, p. 300.

in matter of common life, p. 297.

in matter of special knowledge, p. 295.

observation dependent on minutiae p. 302.

what might have been done, p. 301.

whether injury might have been avoided, p. 302.

CARELESSNESS,

see Care; Competency and Skill.

CARRIERS,

burden of proof as to delivery of property to carrier, p. 755.

burden of proof as to liability for loss of goods at common law, p. 754.

under contract, p. 755.

condition of track at other places, pp. 402, 403.

existence in depot platform of other holes than the one causing injury,
p. 403n.

judicial notice as to business of, pp. 287, 718.

as to authority and duties of brakemen and conductors, p. 719.

as to custom to issue mileage books, p. 288.

as to practice of checking baggage, p. 288.

as to time necessary for transportation, pp. 719, 723.

opinion evidence as to cause of derailment, pp. 337 et seq.

as to necessity of jettison, p. 815.

as to proper method of loading cars, p. 297.

as to proper method of unloading, p. 299.

as to whether rails properly loaded would have fallen from cars,
p. 302.

as to proper method of stowing marble in sea-going vessels, p.
300.

as to possibility of saving goods lost through collision of steam-
boat, p. 347.

as to whether cargo on boat was properly covered, p. 299.

as to whether goods on vessel could have been injured if stowed
as testified to, p. 347.

passenger's knowledge of memorandum on ticket, p. 255.

presumption and burden of proof in case of injury to live stock, p. 322.

CARRIERS—(continued).

- presumptions from injury to passenger, pp. 318, 319.
- presumption and burden of proof in case of loss to passenger in sleeping car, pp. 312, 313.
- presumption of acceptance by, of goods for transportation, p. 59.
 - of assent to contents of bill of lading, p. 254.
 - of assent to contents of receipt for passage money, p. 254.
 - of negligence from injury to passenger, pp. 310, 318.
 - of negligence from loss or damage, pp. 311, 324.
 - of shipper's knowledge of terms of carrier's receipt, p. 742.
- sufficiency of time to get off train, p. 987.
- waiver of agreement by passenger to identify himself and have ticket stamped, p. 1014.
 - of condition requiring shipper of freight to remain in caboose, p. 1014.

CARRYING WEAPONS,

- showing bias of witness in prosecution for, p. 266.

CARS,

- opinion as to proper method of loading, p. 297n.
- as to proper method of unloading, p. 299n.
- as to whether rails properly loaded would have fallen from, p. 302.

CASE,

- admissibility of evidence under general denial, p. 492.

CATTLE,

- see also *Animals*.
- brands on, as evidence of ownership, p. 886.

CAUSE,

- admissions, p. 356.
- declarations as part of *res gestæ*, p. 355.
- demonstrative evidence, p. 354.
- conditions of admissibility, p. 354.
 - experiments to corroborate opinion, p. 340.
- expert testimony, p. 337.
 - as to matter involving special knowledge, p. 337.
 - as to cause of death, disease or injury, p. 340.
 - as to cut in door being made by skilled hand, p. 338.
 - case unknown to expert, p. 346.
 - cause of suicide, p. 346.
 - form of question, p. 344.
 - on matters of common inference, conjecture, p. 339.
 - what would have been, p. 346.

CAUSE—(continued).

- findings of coroner, p. 356.
- nonexpert opinions, p. 347.
 - direction of blow, force, or fluid, p. 349.
- of death, pp. 339n, 340.
- of injuries to animals, p. 341.
- of personal injuries generally, pp. 340, 347, 348, 354.
- of suicide, p. 346.
- of wound, p. 340.
- other similar occurrences or injuries, p. 350.
- absence of similar accidents or injuries, p. 350.
- repairs after injury as proof of cause, p. 358.
- suggestion of another cause than one alleged, p. 353.
 - cross-examination, p. 354.
 - rebutting evidence of other cause, p. 354.

CAUTION,

- see Care.

CENSUS,

- certified copies of returns as evidence on question of age, p. 183.
- judicial notice of, p. 641.

CERTIFICATES,

- certificate of baptism to show age, pp. 182, 270.
- certificate of birth to show age, p. 182.
- marriage certificate, p. 676.
- of measure as proof of measure, p. 683.
- proper filing of certificate of nomination, p. 475n.

CERTIFIED COPIES,

- see Copies.

CHANGING RULES OF EVIDENCE,

- contractual changes, p. 360.
- requiring testimony of eyewitness to death or personal injury, p. 361.
- to accept oath or certificate of third person as conclusive evidence, p. 362.
- to accept obligees statement as proof of amount, p. 362.
- to dispense with presumption of death from seven years' absence, p. 360.
- to leave question of party's performance to other party, p. 363.
- to waive privilege against corporal inspection, p. 363.
- to waive privilege of communication between physician and patient, p. 363.
- statutory changes, p. 359.
 - as to weight, p. 359.

COIN,

value of foreign coin, p. 1012.

COLLATERAL AGREEMENT,

proof of oral agreement collateral to written contract, p. 379.

COLLATERAL ISSUES,

admissibility, p. 378.

COLLATERAL SECURITY,

see Pledge and Collateral Security.

COLLISION,

opinion as to whether collision could have been avoided, p. 347n.

presumption of negligence from, p. 319n.

COLOR,

opinion as to, p. 865.

COMBINATIONS,

illegal combinations, see Monopoly and Combinations.

COMMERCIAL PAPER,

in general, see Bills and Notes.

opinion as to value of, p. 1011.

COMMINGLING OF ASSETS,

identity of fraud traced through, p. 634.

COMMON FACT,

presumption of knowledge of, p. 739.

COMPARISON,

of handwriting, see Handwriting.

of horse power of engine with that of water wheels, p. 623.

of two newspapers, p. 924.

of weather, p. 1016.

on question of quality of article, p. 931.

to prove measurement, p. 780.

to prove quantity not exactly known, p. 933.

to prove value of lost article, p. 1003.

COMPETENCY AND SKILL,

direct testimony, p. 371.

general reputation, p. 372.

inspection of witness to determine, p. 372.

intoxication, p. 373.

mental capacity, see Insanity.

single instances of carelessness, p. 373.

COMPROMISE AND SETTLEMENT,

offers made for purpose of compromise as admissions of liability, p. 149.

presumptions and burden of proof as to, p. 383.

CONCEALMENT,

circumstantial evidence, p. 383.

positive acts, p. 383.

sufficiency of proof of, p. 383.

CONDITION,

waiver of, see Waiver.

CONDITION OF PERSONS, PLACES AND THINGS,*Condition of persons.*

condition in life, p. 384.

financial condition, p. 386.

contributions to family support, p. 388.

general reputation, p. 391.

industrious habits, p. 388.

profits of business, p. 388.

physical condition.

direct testimony, p. 391.

inspection in court, p. 393.

inspection out of court, p. 394.

photographs, p. 391.

Condition of places and things.

certificate of inspection, p. 405.

combining testimony of several witnesses, p. 399.

condition at another time or place, p. 400.

laying foundation for the evidence, p. 403.

diagram, p. 407.

direct testimony, p. 397.

as waiver of privilege, p. 392.

what witness observed, p. 399.

experiments, p. 405.

inspection in court, p. 404.

maps, pp. 406, 407.

official inspection, p. 405.

opinions, p. 397.

plan, p. 407.

photographs, p. 406.

view by court or jury, p. 405.

CONFIDENTIAL COMMUNICATIONS,

communications between child delinquent and juvenile court judge, p. 929.

CONFIDENTIAL COMMUNICATIONS—(continued).

- communications between husband and wife generally, p. 927.
- communications between husband and wife to show ground for separation, p. 953.
- to prove address of husband or wife, p. 131.
- communications to notary when acknowledging mortgage as privileged, p. 128.
- privilege as rendering attorney incompetent to testify to witness's handwriting, p. 587.
- confidential communication generally, p. 929.
- to give address of client communicated to him confidentially, p. 131.
- telegrams as, p. 966.
- to physician, pp. 660, 928.
- waiver, p. 392.

CONFIDENTIAL RELATIONS,

- between donor and donee, p. 560.
- burden of proving validity of contract between parties sustaining, p. 818.

CONSENT,

- see also Assent.
- common consent as basis of usage, p. 1001.
- presumption and burden of proof, p. 408.
- unexpressed willingness, p. 408.

CONSIDERATION,

- bona fide purchaser for value, who is, p. 411.
- effect of disproving, p. 411.
- executory agreement, p. 415.
- failure to pay, p. 411.
- inadequate consideration, p. 409.
- legal, to displace recital of illegal, consideration, p. 416.
- necessity of, to sustain waiver, p. 1014.
- oral evidence as to, pp. 379n, 382n, 412, 415, 416.
- presumption and burden of proof, pp. 410, 411, 415.
- previous agreement as to, p. 416.
- sufficiency, p. 409.

CONSPIRACY,

- circumstantial evidence to show, p. 417.
- acts and declarations of conspirators, p. 417.

CONSTITUTION,

- judicial notice of Constitution of United States, p. 724.

CONSTRUCTION,

demonstrative evidence, p. 421.

inspection in court, p. 421.

judicial notice, p. 418.

Opinions and conclusions.

direct testimony, pp. 420, 421.

matters of common observation, p. 419.

matters requiring special knowledge, p. 418.

quality of work, p. 420.

CONSTRUCTIVE DELIVERY,

of instrument, p. 485.

CONTEMPT,

judicial notice of decree in proceedings to punish violation thereof as contempt, p. 729.

CONTINUANCE,

of absence from state, p. 47.

of agency, p. 210.

of domicile, as to, pp. 6, 496, 947.

of habit, p. 574.

of insanity, p. 654.

of lucid interval, p. 658.

of life, pp. 466, 469.

of membership, p. 786.

of ownership, p. 889.

of possession, p. 918.

of relation of employer and employee, p. 524.

CONTINUANCE AND ADJOURNMENT,

evidence of admission made on former trial for purpose of defeating continuance, p. 144.

CONTRACTS,

acceptance of, see Acceptance.

admissibility in evidence of written memorandum obtained by fraud, p. 432.

alterations in, see Alterations.

ambiguity in general, see Ambiguity.

cancelation, authority of agent as to, p. 212.

character evidence in action for breach, pp. 365, 366.

consideration, see Consideration.

custom or usage, evidence of, pp. 435, 997.

declarations of agent, p. 430.

delay in rescinding as an election to affirm, p. 941.

delivery, presumption, p. 424.

CONTRACTS—(continued).

- direct testimony as to terms or understanding, p. 425.
 - disputed handwriting, see Handwriting.
 - evidence to vary terms implied by law, p. 433.
 - failure to read, as affecting right to assert fraud, p. 257.
 - fictitious name, p. 538.
 - fraud or false representations inducing making of, p. 642.
 - general denial, what admissible under, p. 431.
 - ignorance of effect, p. 432.
 - implied, pp. 422, 522.
 - intent of parties, see Intent.
 - misnomer in, p. 792.
 - opinion as to effect, p. 425.
 - oral evidence to show collateral agreement, p. 379.
 - to show legality or illegality, p. 636.
 - to show that contract was made merely to influence others, p. 432.
 - other transactions, p. 427.
 - parties to, pp. 425, 431.
 - performance, direct testimony as to, p. 902.
 - stipulation that thing shall be done to satisfaction of party, p. 949.
 - presumptions and burden of proof generally, p. 423.
 - presumption as to nonresidence of parties to contract executed out of state, p. 946.
 - presumption of invalidity of contract between parties in confidential relations, p. 818n.
 - previous similar transactions, p. 427.
 - probability or improbability of transaction, p. 426.
 - ratification, see Ratification.
 - res gestæ*, p. 428.
 - sanity and competency of party to, see Insanity.
 - technical terms, p. 424.
 - trade terms, p. 424.
 - usage, evidence of, pp. 435, 997.
 - validity, burden of proof, p. 423.
 - waiver, burden of proof, p. 424.
 - with whom, pp. 426, 431.
 - witness's understanding as to, p. 425.
 - writing not signed as evidence of terms, p. 429.
- Statute of frauds.**
- acceptance of goods to take case out of statute, pp. 56, 63, 66.
 - necessity that authority of agent be in writing, p. 193.
 - parol evidence to vary writing, see Evidence.
 - unsigned memorandum as writing, p. 429.
 - writing signed by one party only, p. 429.

CONTRACTS—(continued).

writing signed but not delivered, p. 429.

Abandonment of.

agent's authority to cancel, p. 212.

burden of proof, p. 2.

direct testimony, p. 3.

letters, p. 3.

opinions, p. 4.

parol evidence, p. 3.

sufficiency of proof, p. 4.

CONTRADICTION,

of witness, see Witnesses.

CONTRIBUTORY NEGLIGENCE,

see Negligence.

CONVERSATION,

calling for entire, p. 438.

denial and rebuttal, p. 437.

fact of conversation does not let in substance, p. 437.

interpreted conversation, p. 436.

signs, p. 437.

COPIES,

admissibility in evidence, see Best and Secondary Evidence.

CORONER,

evidence of verdict or findings of, to show cause of death, pp. 70, 356.

in workmen's compensation cases, p. 357.

CORPORATIONS.

acceptance by, of beneficial grant or right, p. 58.

acceptance of appointment as director, p. 59.

acceptance of charter, p. 58.

approval of instrument by presumption as to, p. 249.

authority of receiver of, to sue, p. 746.

custom of, p. 573.

intent of, right of officer or agent to testify to, p. 694.

knowledge of corporation or its officers, presumption of, pp. 739, 743n.

knowledge of one dealing with, presumption, p. 740.

of powers contained in charter of foreign corporation, p. 745n.

notice to agent or officer as notice to corporation, p. 848.

where agent is personally interested or is perpetrating a fraud,
p. 845.

ratification by corporation of contract executed by officers individ-
ually, p. 217.

ABB. FACTS—67.

CORPORATIONS—(continued).**Seals.**

direct testimony as to identity of, p. 951.

judicial notice of, p. 951.

presumption that seal was affixed by proper authority, p. 953.

Stock and stockholders.

abandonment of contract for sale of stock, p. 4n.

assignment and acceptance of shares of stock, p. 60.

debts contracted on faith of subscription, p. 799n.

deceit inducing purchase of stock, p. 641n.

genuineness of stock certificates, p. 559.

membership, proof by records, p. 784.

presumption as to, pp. 786, 788.

secondary evidence as to, p. 788.

transfer of stock to dummy, p. 498.

value of stock, p. 1011.

CORROBORATION,

contradicting corroboration, p. 454.

corroboration before contradiction, p. 447.

of hearsay, p. 446.

of testimony as to date, p. 461.

reason for positiveness, p. 446.

Corroboration let in by contradiction.

accounts, p. 451.

character of witness, p. 451.

conduct of adverse party, p. 450.

ex parte declarations in own favor, p. 453.

prior consistent statements, p. 453.

probability of truth, p. 447.

subsequent memorandum, p. 451.

COST,

competency of evidence of, on question of value, p. 1004.

COTENANCY,

possession by cotenant as notice, p. 836.

sufficiency of evidence to show ouster of tenant by cotenant, p. 180.

COTTON,

judicial notice as to cotton producing region of state, p. 719.

COTTON OIL MILLS,

judicial notice as to, p. 719.

COUNTERCLAIM,

see Set-Off and Counterclaim.

COUNTIES,

- judicial notice as to location of, p. 732.
- of names of, p. 808.
- of population of, p. 719.

COURTS,

- binding effect on Federal courts of state statute as to proof of handwriting, p. 530.
- discretion as to admitting corroborative evidence, p. 447.
- judicial notice by, see Judicial Notice.
- order of, see Order of Court.

COVENANTS,

- burden of proving that sum paid, by one suing for breach of, to remove encumbrance, was necessary, p. 814.
- identity of person as grantee in deed, p. 632n.
- presumption of satisfaction for breach of, p. 72.
- sufficiency of evidence to show satisfaction for breach, p. 73.

CREDIBILITY,

- of dying declarations, p. 515.
- of witness, see Witnesses.

CREDIT,

- account not conclusive on question to whom given, p. 457.
- direct testimony on question to which of two persons credit was given, p. 456.
 - concurrent intent, p. 456.
 - one act on the faith of another, p. 457.
- general reputation of insolvency, p. 458.
- other like purchases, p. 458.
- presumptions and burden of proof, pp. 455, 457, 459.
- rebuttal of presumption of, p. 459.
- res gestæ*, p. 458.
- subsequent credit, p. 457.
- to agent or principal, p. 455.

CRIMINAL CONVERSATION,

- admissibility in action for, of judgment in divorce, p. 960.
- evidence as to character in action for, p. 366n.

CRIMINAL LAW,

- admissions, see Admissions and Declarations.
- adultery, evidence in criminal prosecutions for, p. 173.
- bastardy, see Bastardy.
- bloodhounds, evidence of trailing by, p. 272.
- bloodstains, opinion as to, p. 271.

CRIMINAL LAW—(continued).

- character evidence, see Character.
- constructive presence of accused, p. 923.
- dying declarations, see Dying Declarations.
- embezzlement, see Embezzlement.
- forgery, see Forgery.
- homicide, see Homicide.
- identity, see Identity.
- intent, see Intent; Motive and Purpose.
- other crimes, evidence of, p. 520.
- photograph of accused person, p. 905.
- rape, see Rape.
- record of measurements of accused person, p. 781.
- robbery, see Robbery.

CROPS,

- judicial notice as to season for planting and season for maturity, p. 719.
- parol reservation of, p. 381n.

CRUEL AND INHUMAN TREATMENT,

- as abandonment of wife, p. 30.

CUMULATIVE TESTIMONY,

- in rebuttal, p. 939.

CUSTOM,

- generally, see Usage and Custom.
- habit, see Habit.

D**DAMAGES,**

- proof of condition in life as affecting, p. 384.
- proof of financial condition of defendant, p. 387.
- proof of financial condition of plaintiff, p. 386.
- waiver of stipulation for liquidated damages, p. 1013.

DAMS,

- abandonment of rights in, pp. 19, 24.

DATE,

- collateral record and memoranda, p. 460.
- conclusiveness of date on postmark, p. 464.
- contradicting or corroborating, pp. 461, 463.
- hearsay evidence to fix, p. 459.
- judicial notice as to, p. 718.
 - as to day on which date falls, p. 461.
 - of meaning of abbreviations of, p. 36.

DATE—*(continued)*.

- of birth, p. 270.
- of delivery of instrument, p. 488.
- of filing, p. 464.
- of letter received to fix date of occurrence, p. 460.
- part of document admitted to fix, effect, p. 461.
- presumptions as to, pp. 463, 488.
- refreshing memory, p. 460.

DEAF AND DUMB,

- presumption of capacity to contract marriage, p. 652.

DEATH,

- effect of, on admissibility of books of account in evidence, pp. 81, 84, 86.
- proof of testimony of witness since deceased, p. 979.
- revocation of agency by, p. 219.
- testimony of interested witness or party to handwriting of deceased, p. 587.

Proof of fact of.

- mode of proving generally, p. 465.
- circumstantial evidence, p. 465.
- entries in family Bible, p. 465.
- entry in register, pp. 465, 474.
- fact of family wearing mourning, p. 465.
- hearsay; general report, p. 471.
- inscription on tombstone, p. 465.
- letters of administration, p. 473.
- order of substitution, p. 472.
- presumptions and burden of proof as to, p. 466.
 - from absence, p. 467.
 - as affected by actuarial tables, p. 471.
 - time of death, pp. 469, 964.
- probate of will, p. 473.
- recitals in deed or ancient document, p. 465.
- record of other state, p. 474.
- undelivered letter, p. 474.

Cause of.

- see also Cause.
- findings of coroner to show, p. 356.
- opinion evidence as to, pp. 340 et seq.
 - cause of suicide, p. 346.
- transcript from official record to prove, p. 54.

Action for causing.

- character evidence, p. 368.

DATE—*(continued)*.

direct testimony by defendant as to purpose in firing fatal shot, p. 801.

earning capacity of deceased, p. 387.

financial condition of person for whose benefit action is brought, p. 386.

photograph, p. 905.

DEBTOR AND CREDITOR,

as to financial condition of debtor, see Insolvency, Solvency, and Financial Condition.

creditor's testimony that debtor's representations induced him to delay proceedings, p. 800n.

indebtedness generally, see Indebtedness.

payment of debt, see Payment.

presumption of acceptance by creditors of deed of trust or assignment, p. 57n.

resorting to courts of other state to collect debt, p. 708.

DEBTS,

see Indebtedness.

DECLARATIONS,

see Admissions and Declarations.

DEDICATION,

evidence as to intent to dedicate, p. 693.

sufficiency of evidence to show acceptance of, p. 65.

DEEDS,

acceptance of, pp. 56, 63.

acknowledgment of, see Acknowledgment.

admissibility in evidence, see Documentary Evidence.

of copies of deeds, see Best and Secondary Evidence.

alterations in, see Alterations.

ambiguity in, see Ambiguity.

as mortgage, see Defeasance.

consideration in, as proof of value, p. 1007.

consideration for, generally, see Consideration.

delivery of, see Delivery.

disputed handwriting, see Handwriting.

extrinsic evidence to show that deed was intended to take effect as a will, p. 709.

founded on judicial proceedings as evidence of title, p. 902.

judicial notice of abbreviations in, p. 37n.

knowledge of contents presumed from signing of, p. 741.

mental capacity of grantor, see Insanity.

DEEDS—(continued).

- misnomer in, p. 792.
- oral evidence of collateral agreement or stipulation, pp. 380, 381.
 - of condition, p. 702n.
 - that deed was intended to be a mortgage, p. 412.
 - to explain description of land, p. 922.
 - to identify grantee, p. 632.
- presumption of grant, p. 570.
- receipt in, for purchase money as evidence of payment, p. 895.
- record of, as notice, p. 851.
- to fictitious person, p. 538.

DEFEASANCE,

- admissions, p. 479.
- cogency of proof, p. 480.
- declarations, p. 479.
- direct question, p. 478.
- documentary evidence, p. 479.
- general denial, p. 480.
- oral evidence, p. 476.
- presumption; burden of proof, p. 475.

DELAY,

- in asserting inventor's claims, p. 32.
- in rescinding as an election to affirm, p. 941.

DELIVERY,

- conditional delivery, pp. 486 et seq.
- constructive delivery, p. 485.
- contemporaneous records and entries, p. 482.
- direct testimony, p. 481.
- parol evidence, p. 485.
 - to show purpose of delivery, p. 485.
 - to show conditional delivery, p. 485.
- rebutting delivery by proof of a condition, p. 486.
 - in case of sealed instrument, p. 486.

Presumptions:

- delivery of telegram, p. 968.
- from possession of instrument, p. 482.
- from record, p. 483.
- date of, p. 488.
- in case of voluntary settlement, p. 484.
- from mailing, p. 485.
- undated instrument, p. 489.
- of correctness of date in private unauthenticated paper, p. 489.

DEMAND AND REFUSAL,

- on servant, p. 490.
- oral and written, p. 490.
- reasons for refusal, p. 490.

DEMONSTRATIVE EVIDENCE,

- appearance and conduct of defendant in lunacy proceedings, p. 683.
- clothing, pp. 271, 628.
- diagrams, pp. 407, 903.
- footprints, p. 629.
- hair found near remains of deceased, p. 628.
- maps, pp. 276, 406, 407, 903.
- phonographs, p. 902.
- photographs, p. 903.
- plans, pp. 407, 903.
- plats, pp. 276, 406, 903.
- surveys, p. 276.

Experiments.

- experiment in court to demonstrate physical ability or inability, p. 43
 - to corroborate opinion, p. 340.
 - to show condition of things, p. 405.
 - to show loss of sensation, p. 536.
- experiments out of court, pp. 43, 353.

Inspection.

- exhibition of physical object to show cause of injury, p. 354.
- exhibiting instrument to expert, p. 346.
- inspection and operation of machine in court, p. 421.
- on issue of identity of person, pp. 625, 634.
- on issue of paternity, p. 891.
- on issue of pregnancy, p. 921.
- on question of quality, p. 931.

Photographs

- admissibility generally, p. 903.
- of places, pp. 406, 407, 903.
- of testator, on question of testamentary capacity, p. 681.
- on question of identity, p. 627.
- on question of paternity, p. 790.
- to show physical condition, pp. 391, 904.
- photographic copies of disputed writing, pp. 603, 612.
- proof of correctness, p. 907.
- X-ray photographs, pp. 392, 909.

DENIALS,

- explanation of, p. 529.
- form in pleading, p. 491.
- general denial, proof under, pp. 480, 491.
- specific denial, p. 493.

DEPARTMENT STORES,

judicial notice of nature, p. 719.

DEPOSITIONS,

admissibility in evidence, p. 877.

diligence in procuring, p. 980.

presumption as to residence of deponent, p. 947.

DERAILMENT,

opinion evidence as to cause of, pp. 337n, 340n.

presumption of negligence from, p. 319n.

DERRICKS,

opinion as to care and use of, pp. 296n, 299n.

DESCRIPTION,

oral evidence for purpose of applying or correcting, pp. 260, 705.

DESERTION,

see also Abandonment.

declarations, p. 494.

intention, p. 494.

remonstrance, p. 494.

DESTROYED BOOKS,

admissibility of balances transferred to ledger before destruction, p. 95.

DESTROYED DOCUMENTS,

admissibility in evidence of abstract made from, pp. 51, 52.

DIAGRAM,

admissibility in evidence, p. 407.

DICTAGRAPH,

evidence of conversation taken by, p. 495.

weight of, p. 495.

DILIGENCE,

as question for jury, p. 937.

in procuring deposition of witness whose testimony in former proceeding is offered in evidence, p. 980.

DIRECTION,

opinion evidence as to direction of blow or force, p. 345.

DIRECTORY.

admissibility in evidence to show address, p. 132.

DIRECT TESTIMONY,

- as to abandonment of contract, p. 3.
- as to ability, p. 41.
- as to acceptance of goods purchased, p. 62.
- as to age, p. 185.
- as to agency, p. 192.
- as to agreement to apply balance on account to cross demand, p. 247.
- as to assent, p. 256.
- as to blood-stains, p. 271.
- as to competency and skill, p. 371.
- as to condition of places and things, p. 397.
- as to cross, check, or other mark in account book, p. 107.
- as to delivery of instrument or property, p. 481.
- as to effect of injury or operation, p. 516.
- as to feelings, p. 531.
- as to financial condition, p. 386.
- as to good faith, p. 564.
- as to habit, p. 572.
- as to handwriting, see Handwriting.
- as to health by person affected, p. 619.
- as to hearing of sounds, p. 622.
- as to identity, pp. 626, 951.
- as to inducement, p. 641.
- as to intent, pp. 497, 519, 559, 690.
- as to intoxication, p. 714.
- as to knowledge, pp. 257, 936, 1001.
- as to malice, p. 761.
- as to marriage, p. 772.
- as to motive or purpose, p. 799.
- as to one person's treatment of another, p. 996.
- as to ownership, p. 883.
- as to payment, p. 894.
- as to performance of agreement, p. 902.
- as to person with whom contract was made, p. 431.
- as to position of object, p. 915.
- as to possession of lands or chattels, p. 916.
- as to proper construction of machine or other structure, p. 420.
- as to quality, p. 930.
- as to quantity, p. 932.
- as to residence, p. 944.
- as to scope of duty, p. 499.
- as to scope of particular trade, p. 289.
- as to speed, p. 957.
- as to suretyship of one signing note, p. 962.
- as to technical phrases and abbreviations, p. 40.

DIRECT TESTIMONY—(continued).

- as to terms of agreement, p. 425.
- as to time and distance, p. 985.
- as to title, p. 990.
- as to usage or custom, p. 999.
- as to waiver, p. 1013.
- as to whether act by another was accidental or done on purpose, p. 70.
- as to whether deed was intended to be absolute or as a mortgage, p. 478.
- as to which of two persons credit was given to, p. 456.
- by expert generally, p. 870.
- that conversation occurred within hearing of another person, p. 622.

DISCOVERY AND INSPECTION,

- compelling adversary to produce article in court, p. 404.
- compelling production of telegrams, p. 966.
- compulsory physical examination, p. 393.

DISCREDITING,

- accounts, p. 109.
- witness, see Witnesses.

DISCRETION,

- of court as to admission of evidence, pp. 51, 447.

DISEASE,

- see Health and Disease.

DISORDERLY HOUSES,

- evidence as to general reputation of house, p. 369.
- general reputation of frequenters and inmates, p. 369.
- specific acts to show character of house, p. 370.

DISTANCE,

- at which object visible, p. 985.
- comparison, p. 985.
- judicial notice as to, p. 732.
- time necessary for specified distance, p. 988.
- within which sparks from engine will set fire, p. 988.
- opinion evidence as to.
 - between two points, p. 989.
 - between two points on a railroad, p. 989.
 - covered by a train, p. 989.
 - of an object above the ground, p. 989.

DITCHES,

- abandonment of rights in, pp. 19, 20.

DIVORCE AND SEPARATION,

as to adultery, see Adultery.

competency of judgment in, to prove status, p. 960.

evidence as to general reputation in action for, pp. 366, 368.

evidence of intemperance in action for, p. 574n.

presumption of existence of, p. 778n.

presumption of marriage from decree of separation, p. 775.

proof of conversation between husband and wife to show ground for separation, p. 953.

DOCUMENTARY EVIDENCE,

abstract of contents of original instrument to show subsequent alteration, p. 234.

abstracts of records, pp. 52, 54.

account and account books, see Accounts.

admission of part of document as requiring admission of whole, pp. 53, 461.

affidavits to prove service of notice, p. 954.

almanac, p. 795.

ancient document, recitals in, p. 465.

assessment roll to show title, p. 993.

bank pass book, p. 536.

baptismal certificate, p. 270.

church record, pp. 270, 465.

collateral records and memoranda as evidence of date, p. 460.

computations, by experts, p. 246.

deeds, p. 7.

effect of time of acknowledgment on admissibility of, p. 124.

founded on judicial proceedings, p. 992.

recitals in, p. 276.

unacknowledged or defectively acknowledged deed, p. 123.

depositions, p. 977.

deposit ticket, p. 493.

document delivered in same envelope as document already in evidence, p. 752.

duplicate of original contract to show alterations, p. 234.

effect of alteration on competency of instrument, p. 225.

alterations in certified copy on admissibility, p. 234.

entries in family Bible, p. 465.

entries in records in ordinary course of business, p. 890.

entries of official acts by person since deceased to show presence at certain place at certain time, p. 46.

entries of order of court in common rule book or in minutes before record is made up, p. 880.

entry in book or memorandum to prove forgotten fact, p. 556.

DOCUMENTARY EVIDENCE—(*continued*).

- entry of order of court to permit proof of, p. 881.
- envelope in which document was delivered, p. 752.
- extracts from books and records, p. 54.
- field notes, p. 276.
- findings of coroner, p. 356.
- government survey, p. 813.
- herd book on question of breed, p. 286.
- inscriptions on sign, card, and label to show proprietorship, p. 290.
- judgment, pp. 917, 960.
- judgment roll on question of boundary, p. 279n.
- market reports as evidence of value, p. 1009.
- marriage certificate, p. 773.
- memorandum of measurements, p. 781.
- mistake in certified copy offered in evidence, p. 793.
- mortality tables, p. 796.
 - authentication of, p. 798.
- newspapers, p. 822.
 - offering one copy of issue of newspaper, p. 924.
- official appraisal, p. 248.
- official certificate as to lack of entry in public record, p. 819.
- official certificate of inspection, p. 405.
- official records or registers, p. 860.
- as evidence of date, p. 460:
 - as to weather, p. 1015.
 - of death, pp. 465, 474.
 - of unacknowledged or defectively acknowledged instrument, p. 123.
 - proof of seal by record, p. 953.
- on question whether deed was absolute or intended as a mortgage, p. 479.
- order made in special proceeding, p. 879.
- part of connected correspondence, p. 746.
- passport on question of citizenship, p. 376.
- printed rules on question of duty and performance thereof, pp. 499n, 500.
- receipt as evidence of payment, p. 894.
- recital in deed or ancient document, pp. 276, 465.
- recitals in official instrument as evidence of official character, p. 858.
- records and inscriptions to show age, p. 182.
- records on question of delivery of instrument, p. 482.
- reports by agent or employee to employer, p. 168.
- reports of subordinates as against public officer or corporation, p. 857.
- statute books and codes to show foreign law, p. 548.

DOCUMENTARY EVIDENCE—(continued).

- stock book fraudulently kept on question of genuineness of stock certificates, p. 559.
- telegrams, p. 46.
- testimony given in former proceedings, pp. 974 et seq.
- to show change of domicil, p. 7.
- to show nationality of vessel, p. 810.
- unsigned writing as evidence of terms of contract, p. 429.
- verdict of coroner's jury in action for negligent killing, p. 70.
- wills, p. 7.
- containing admissions, p. 746.
- from debtor in reply to demand of payment as proof of new promise, p. 821.
- letter uncalled for and returned as evidence of death, p. 474.
- letters and telegrams constituting connected correspondence, p. 968.
- mere possession of letters addressed to one as rendering them competent against him, p. 753.
- of agent, p. 752.
- on question of acceptance of goods purchased, p. 60.
- proof of authorship of letters, p. 747.
- to show abandonment of contract, p. 3.
- to show abandonment of domicil, p. 7.
- to show date of occurrence, p. 460.
- to show intent of absentee in departing, p. 48.
- to show reason for absence from home, p. 46.
- to show making of contract, p. 431.

DOCUMENTS,

- as standard of comparison of handwriting, pp. 598 et seq.
- opinion evidence as to age of, p. 189.

DOGS,

- evidence as to character of dog in action for injury by, p. 368n.
- proof of habit of, p. 573.
- trailing of person by bloodhounds, p. 272.

DOMICIL,

- see also Residence.
- burden of proof, p. 6.
- declarations, p. 7.
- documentary evidence, p. 7.
- intent, pp. 497, 693.
 - of insane person, p. 498.
- mode of proof, generally, p. 8.
- presumptions, pp. 6, 496.
- res gestæ*, p. 497.

DOUBLE,

proof of existence of "double" on question of identity, p. 634.

DOWER,

direct testimony on question of claim of, p. 377.

election between testamentary provision and dower, p. 708.

evidence to show motive for endeavoring to defeat, p. 805n.

DRAINS AND SEWERS,

abandonment of servitude of drainage, p. 19.

DRAWBRIDGE,

negligence in leaving gate on, open, p. 306n.

DRUNKENNESS,

see also Alcoholism.

customary manner of acting, p. 715.

direct testimony, p. 714.

intemperate habits generally, p. 714.

of defendant in divorce proceeding, p. 574.

of plaintiff in personal injury action, p. 573.

of servant, proof of, on question of competency, p. 373.

mental incapacity resulting from, see Insanity.

presumption and burden of proof, p. 716.

single instance of, p. 573.

weight of evidence, p. 716.

DUMMY,

bound by evidence competent against real party in interest, p. 498.

transfer of stock to, p. 498.

DUTY,

direct testimony.

performance, p. 500.

scope of duty, p. 499.

presumption of performance of, p. 855.

printed rules or instructions, p. 500.

DYING DECLARATIONS,

civil cases, p. 503.

communications by signals, pp. 512, 956.

form and completeness of declaration; oral or written, p. 511.

in favor of defendant, p. 505.

mental and physical condition, p. 507.

belief in after-accountability, p. 510.

questions for court or jury, p. 513.

right to impeach or contradict and to sustain declarant, p. 514.

subject of declarations, p. 505.

DYING DECLARATIONS—(continued).

- time elapsing between declaration and death, p. 511.
- weight to which entitled, p. 515.
- when there is other evidence of the same facts, p. 512.
- whose declarations admissible, p. 505.

DYNAMITE,

- forcing frozen dynamite into drill hole, p. 297n.

E**EARNING CAPACITY,**

- proof of, in action for death or personal injury, pp. 386, 387.

EASEMENTS,

- possession of easement in land as notice, p. 839.
- Loss or abandonment.*
 - effect of nonuser generally, p. 8.
 - highway, p. 11.
 - mill privileges, p. 24.
 - of abutting owner, p. 10.
 - railway right of way, p. 13.
 - water rights.
 - flowage, p. 20.
 - irrigation; ditches; prior appropriation, p. 20.
 - presumptions and burden of proof generally, p. 19.
- ways.
 - declarations, p. 19.
 - deviation or use of substituted way, p. 16.
 - nonuser generally, p. 14.
 - obstructing or cutting off access, p. 17.
 - whose acts in attempting to abandon are binding in dominant owner, p. 18.

EFFECT,

- effect of injury or operation.
 - expert witness, p. 516.
 - nonexpert witness, p. 518.
 - testimony of person injured, p. 516.

EJECTMENT,

- to recover mining claim, pleading, p. 34.

ELECTION,

- extrinsic evidence of testator's intent to put beneficiary to election, p. 708.

ELECTION OF RIGHT OR REMEDY,

- decisive act, p. 519.

ELECTION OF RIGHT OR REMEDY—(continued).

delay in rescinding as an election to affirm, p. 941.
direct testimony, p. 519.

ELECTIONS,

burden of proving that election officer is not member of political party
to which he is attributed, p. 787.
evidence as to filing of certificate of nomination, p. 539n.
judicial notice as to primary elections, p. 731.
of number of votes cast at election, p. 731.
of qualifications of voters, p. 731.
of result of local option election, p. 731.
opinion evidence as to cause of marks on ballots, p. 339n.
proof of declarations to show noncitizenship, p. 377.
taking out naturalization papers subsequent to election as admission of
lack of qualification to vote, p. 376.
voting as evidence of abandonment of domicile in other place, pp. 8n,
27n.

ELECTRIC CARS,

opinion as to proper management of, p. 296n.

ELECTRICITY,

care in installation of electric wires in building, p. 297n.
judicial notice as to properties and uses of, p. 718.
precaution necessary in repairing broken wires, p. 297n.
presumption of negligence from breaking of wire, p. 313n.
from escape of electricity, from street railway, p. 313n.
from happening of injury, pp. 316n, 317n, 321n.

ELECTRIC WIRES,

see Electricity.

ELEVATORS,

expert testimony as to proper construction of, p. 418n.
presumption of negligence from injury to passenger on, p. 310.

ELKINS ACT,

good faith as defense to prosecution under, p. 565.

EMBEZZLEMENT,

circumstantial evidence, p. 520.
other crimes, p. 520.

EMINENT DOMAIN,

burden of proof as to necessity of taking land, p. 814.

EMPLOYMENT,

see also Master and Servant; Principal and Agent.
ABB. FACTS—68.

EMPLOYMENT—(continued).

- appearance of being in service, p. 521.
- presumption of employment.*
 - from control of property, p. 521.
 - from services rendered, p. 522.
 - of continuance of relation, p. 524.

ENCROACHMENTS,

- upon highway, as evidence of abandonment, p. 11.

ENGINES,

- evidence as to horse power of, p. 623.
- expert evidence as to proper construction of, p. 419n.

ENTRY,

- of court order, p. 880.

EQUITABLE ESTOPPEL,

- see Estoppel.

ERASURES,

- in account books, effect on admissibility in evidence, p. 91.

ESCROW,

- parol evidence of escrow agreement, pp. 380n, 381n.

ESTOPPEL,

- as basis of waiver, p. 1014.
- burden of proof, p. 525.
- by admission in action, p. 526.
- by forbearing to sue, p. 527.
- by silence, p. 526.
- by taking position before the court, p. 527.
- design to mislead, p. 525.
- injury to other party, p. 525.
- of one in possession, to assert claim against purchaser or encumbrancer, pp. 839, 840.
- reliance of other party, p. 525.

EVIDENCE,

- admissions, see Admissions and Declarations.
- best and secondary evidence, see Best and Secondary Evidence
- burden of proof, see Burden of Proof.
- communications, see Confidential Communications.
- conversation, proof of, generally, see Conversation.
- declarations, see Admissions and Declarations.
- demonstrative evidence, see Demonstrative Evidence.
- direct testimony, see Direct Testimony.

EVIDENCE—(*continued*).

- documentary evidence, see Documentary Evidence.
- handwriting, proof of, generally, see Handwriting.
- hearsay evidence generally, see Hearsay; *Res Gestæ*.
- identity, proof of, see Identity.
- insanity, see Insanity.
- intent, see Intent; Motive and Purpose.
- judicial notice, see Judicial Notice.
- knowledge, proof of, see Knowledge.
- malice, see Malice.
- marriage, proof of, see Marriage.
- measurements, proof of, see Measure.
- motive, see Motive and Purpose.
- name, see Name and Designation.
- negative, proof of, see Negative.
- opinion evidence, see Opinions and Conclusions.
- ownership, proof of, see Ownership.
- parol and extrinsic evidence concerning writings, see Parol and Extrinsic Evidence.
- pleadings as evidence, see Pleading.
- presumptions, see Presumptions.
- residence, proof of, see Residence.
- title, see Title.
- value, see Value.
- tampering with evidence, p. 965.
- usage and custom, see Usage and Custom.
- Relevancy and materiality generally.*
 - abandonment by husband or wife, p. 29.
 - of homestead, p. 26.
 - of inventor's claims, p. 32.
 - of railroad right of way, p. 13.
 - absence of person from state, pp. 45, 46.
 - of alleged accomplice, p. 49.
 - acceptance of deed or lease, p. 63.
 - of order, p. 63.
 - acquiescence, p. 130.
 - adultery, p. 173.
 - adverse possession, p. 178.
 - agency, pp. 200–202, 204.
 - authority of agent, pp. 210, 955.
 - belief or impression produced on witness's mind at time of occurrence, p. 265.
 - under which witness did act, p. 263.
 - reasons for belief, p. 265.
 - bloodhounds, trailing by, pp. 272, 630.

EVIDENCE—(continued).

boundary, p. 274.

practical location, p. 285.

capacity of machine, p. 292.

to earn wages, p. 44.

cause of death, p. 356.

similar occurrences or injuries to show cause, p. 350.

character, particular instances to show, p. 370.

general reputation as to, pp. 304, 364.

comparison of shoes of person with footprints, p. 629.

condition in life, number of children, etc., p. 384.

correctness of weight, p. 1017.

corroborative evidence, see Corroboration.

death, p. 465.

domicil, change, pp. 8, 496, 497.

evidence competent against real party in interest as competent against
dummy, p. 498.

experiments, p. 541.

family traditions, p. 944.

finding of stolen property on person, p. 629n.

findings of coroner, p. 356.

finger prints, p. 540.

fictitious person, p. 537.

bank account with person as showing that he is not a fictitious
person, p. 536.

footprints, p. 542.

genuineness of letters, p. 557.

habits, pp. 303, 304n, 715.

ignorance of party of effect of contract made, p. 432.

impeachment or contradiction of witness, see Witnesses.

infancy, physical appearance, p. 643.

inscription on tombstone, p. 465.

interest, rate of, p. 712.

judgment awarding possession as evidence against third person, p. 917.

lack of entry in public record, p. 818.

mention to third person of facts forgotten by witness, p. 556.

necessity of an administrator, p. 817.

omitting name of person from testimony, p. 808.

other crimes, p. 620.

other like purchases, on question to whom credit was given, p. 458.

other similar transactions on question as to terms of contract, or
meaning thereof, p. 427.

probability or improbability of transaction, p. 426.

palm prints, p. 541.

proprietorship, p. 290.

EVIDENCE—(continued).

quality, p. 806.

quantity, p. 932.

reason for act, p. 936.

reasons for refusal of demand, p. 490.

reputation, p. 364.

 for sobriety, p. 304.

 for truth and veracity of one making dying declarations, p. 514.

similarity of tracks of horse, p. 629n.

speed, p. 959.

time and distance, p. 985.

trailing by dogs, pp. 272, 630n.

wealth, p. 1015.

whether it was cold enough to freeze, p. 1016.

with whom contract was made, p. 431.

written memorandum obtained by fraud, p. 432.

Negligence; care.

condition at another time or place, p. 400.

evidence that person was short-sighted and wore spectacles on issue of
 contributory negligence, p. 44.

general habits, p. 303.

other accidents, p. 304.

precautions of person charged with negligence, p. 305.

 subsequent to the fact, p. 306.

Explanation and rebuttal.

admissibility generally of evidence in rebuttal, pp. 938 et seq.

anticipatory rebuttal, p. 939.

cumulative testimony in rebuttal, p. 939.

explaining admission, p. 530.

explaining and corroborating denial, p. 529.

explaining impeaching evidence, p. 530.

explaining nonproduction of evidence, p. 530.

rebutting evidence as to intent, p. 711.

rebutting evidence of abandonment of real property, p. 35.

rebutting evidence of delivery of instrument by proof of condition,
 p. 484.

rebutting evidence of other cause than one claimed, p. 354.

rebutting evidence tending to contradict dying declarations, p. 514.

rebutting of evidence that testatrix was weak in body and mind, p. 44.

rebuttal of presumption of credit, p. 459.

rebuttal of secondary evidence of contents of accounts, p. 106.

rebuttal of testimony denying conversation, p. 437.

to repel imputation of bias of witness, p. 268.

EVIDENCE—(continued).*Weight, effect and sufficiency.*

abandonment by husband or wife, p. 29.

of contract, p. 3.

of easement of way, p. 16.

of highway, p. 12.

of homestead, p. 26.

of railroad right of way, p. 13.

absence from state, p. 50.

acceptance of bill of exchange, p. 67.

of goods, to satisfy statute of frauds, p. 66.

of land dedicated to public use, p. 65.

accord and satisfaction, pp. 72, 73.

adultery, pp. 172, 173.

adverse possession, p. 180.

agency, p. 199.

application of payments, p. 247.

bank pass book as account stated, p. 112.

concealment, p. 383.

conspiracy, p. 417.

death, p. 465.

dying declarations, p. 515.

effect of injury or operation, pp. 516, 518.

embezzlement, p. 520.

expert's opinion, pp. 667, 768, et seq.

fraud in inducing contract, p. 642.

freedom from contributory negligence, p. 308n.

gift, p. 563.

government survey, p. 813.

identity, p. 628.

insanity, pp. 531, 653, 667 et seq. 676, 680.

intent testimony of party as to, p. 690 et seq.

in annexing fixtures, p. 542.

that deed should be mortgage, p. 480.

interest, right to, and rate thereof, p. 712.

intoxication or intemperate habits, p. 715.

judicial decisions in other state as to constitutionality of one of its statutes, p. 549.

knowledge, p. 738.

mistake, p. 795.

mortality tables, p. 798.

naturalization, p. 812.

opinions as to sanity, pp. 667 et seq. 676, 680.

opinion evidence as to identity, p. 635.

order of courts as evidence of succession and revival, p. 948.

photographs, p. 908.

positive of greater weight than negative testimony, p. 716.

EVIDENCE—(continued).

presumption as to correctness of date, p. 468.

ratification, p. 935.

to justify setting aside award, p. 252.

to impeach certificate of acknowledgment, p. 128.

to repel presumption of delivery of instrument, p. 483.

of receipt of letter, p. 759.

to show that absolute deed was intended as a mortgage, p. 480.

to throw upon adverse party burden of showing existence of alleged fictitious person, p. 537.

usage, pp. 1000, 1001.

want of care or prudence, pp. 307, 308, 333.

Admissibility under particular pleadings; variance.

admissibility under general denial, pp. 34, 431, 491.

admissibility of excuse for nonperformance under allegation of performance, p. 528.

amending pleading to meet proof, p. 963.

difference between description in complaint in ejectment and proof as to boundaries, p. 284.

evidence in rebuttal, p. 938.

necessity of pleading illegality to permit proof of, p. 636.

necessity of pleading meaning of abbreviations to let in oral evidence as to meaning, p. 40.

production of altered instrument where allegation follows the original, p. 220.

proof of abandonment of right, without special plea, p. 34.

proof of allegation of threatening by acts as well as words, p. 984.

proof of subsequent ratification under allegation of authority, p. 933.

variance as to name, pp. 40, 792.

in negligence case, p. 307.

EXCUSE,

- for nonperformance, p. 528.

for not tendering, p. 528.

necessity of alleging, p. 528.

EXECUTION,

as condition precedent to creditor's suit, p. 1002n.

EXECUTORS AND ADMINISTRATORS,

admissibility in evidence of administrator's deed to show title, p. 993n.

letters of administration as proof of death, p. 473.

necessity of action against administrator before creditor's action to set aside fraudulent conveyance by decedent, p. 1002.

necessity of an administrator, p. 817.

presumption of consent of executors to specific legacy, p. 409.

proof of administrator's financial condition in action on bond, p. 387.

EXECUTORY AGREEMENT,

oral evidence as to consideration, p. 415.

EXEMPTIONS,

presumption of intent to evade exemption laws, p. 700.

EXHIBITION,

of child, on issue of paternity, p. 891.

of instrument to expert, p. 346.

of machine in court, p. 421.

of person, pp. 393, 625, 635.

of physical object to show cause of injury, p. 354.

EXPERIMENTS,

in court, pp. 43, 405, 536.

out of court, p. 43.

to corroborate opinion evidence, p. 340.

EXPERT TESTIMONY,

see Opinions and Conclusions.

EXPLANATION,

admissions, p. 530.

burden of proving truth of, p. 530.

fact stated not thereby proved, p. 530.

of account, p. 104.

of alteration in instrument, pp. 227, 229, 232, 234.

of denial, p. 529.

of impeaching evidence, p. 530.

of misspelling of fictitious name, p. 537.

of nonproduction of evidence, p. 530.

of redirect, p. 529.

EXPLOSIONS,

burden of proof in action for injury from, p. 309n.

evidence of leaks in gas pipe at other places than that at which explosion occurs, p. 403.

opinion evidence as to cause of, p. 338n.

presumption of negligence from, p. 313n.

EXPRESS COMPANY,

judicial notice as to business of, p. 287.

judicial notice as to time necessary for transportation of express matter, p. 719.

presumption of shipper's knowledge of terms of express company's receipt, p. 742n.

F

FACTS PUTTING ON INQUIRY,

reason for disregarding of, by one charged with want of good faith,
p. 569.

FALLING OBJECTS,

presumption of negligence from injury to passenger by, p. 320n.

FALSE IMPRISONMENT,

evidence as to character in action for, p. 366.

evidence to prove motive for detention, p. 805.

FEAR,

evidence as to manifestations of, see Feelings.

FEDERAL CONSTITUTION,

judicial notice of, p. 724.

FEDERAL COURTS,

compliance with state laws on proof of handwriting, p. 603.

FEELINGS,

declarations describing feeling, p. 533.

direct testimony, p. 531.

experiment in court, p. 536.

feigning, p. 535. ●

natural manifestations of present feeling, p. 533.

FEIGNING,

expert testimony as to whether person was feigning pain, p. 535.

FENCES,

effect of erection of, across easement of way, p. 17.

erection of, in highway as evidence of abandonment, p. 12.

FICTITIOUS PERSONS,

see also Dummy.

bank account as evidence that person is not fictitious, p. 536.

declarations, p. 536.

effect of use of fictitious name, p. 538.

explanation, p. 537.

fictitious grantee, p. 538.

inquiries, p. 537.

FIELD NOTES,

admissibility in evidence on question of boundaries, p. 276.

FIGURES,

judicial notice of abbreviations of, p. 36.

FILING,

date of, p. 464.

mode of proving, p. 539.

FINANCIAL CONDITION,

see Insolvency, Solvency. and Financial Condition.

FINGER PRINTS,

see also Palm Prints and Foot Prints.

compulsory taking, p. 541.

evidence, p. 540.

experiments, p. 541.

photographs, p. 541.

FIREARMS,

direct testimony as to condition of, p. 398.

FIRE INSURANCE,

see Insurance.

FIRES,

opinion as to negligence in causing, pp. 298n, 299n.

as to proper safeguards to prevent spreading of, p. 299n.

as to whether building would have been destroyed by, p. 346n.

precautions of person charged with negligence as to, p. 305n.

presumption of negligence from happening of, p. 314n.

set by sparks from railroad locomotive, see Railroads.

FIXTURES,

direct testimony of party as to whether fixtures could be removed
without injury, p. 542.

evidence to show intent as to, p. 542.

FLOUR,

evidence as to quality of, p. 930n.

FLOWAGE,

loss or abandonment of right of, pp. 20, 24.

FLUME,

abandonment of easement in land for, p. 21.

F. O. B.,

judicial notice of meaning of, p. 37n.

FOOD,

evidence as to adulteration of milk, p. 930n.

evidence as to quality of flour, p. 930n.

expert testimony as to effect of eating unwholesome meat, p. 517.

FOOT PRINTS,

see also Palm Prints and Finger Prints.
evidence, p. 542.
as evidence of identity, p. 629.

FOREIGN LAW,

a question of fact, p. 549.
copy of statute; omissions and alterations, p. 548.
impeaching, p. 549.
judicial decisions, as to constitutionality, p. 549.
judicial notice of, p. 724.
oral evidence, as to construction, p. 546.
 what law is, p. 546.
presumptions as to, p. 544.
presumption of knowledge of, p. 744.
proof of, pp. 548 et seq.
statute books and Codes, p. 548.
usage in territories before acquisition by United States, p. 547.

FORFEITURE,

waiver of, see Waiver.

FORGERY,

by use of fictitious name, p. 538.
declarations out of court by persons whose names are charged to have
 been forged, p. 169.
disputed handwriting, see Handwriting.
negligence in loaning money on forged note, p. 306n.
ratification of forged signature, p. 205n.

FORGOTTEN FACT,

aiding memory by otherwise irrelevant inquiry, p. 550.
memoranda refreshing memory, p. 551.
 inspection and cross-examination, p. 555.
 voluminous writings, p. 555.
 witness unable to read or write; reading to in presence of jury,
 p. 556.
 writing not an original, p. 554.
mention to third person, p. 556.
routine or habit, p. 551.

FORM,

of assignment, p. 259.
of denial in pleading, p. 491.
of dying declarations, p. 511.
of question to one giving opinion, pp. 300, 344.

FORMER TESTIMONY,

see Testimony Given in Former Proceeding.

FOUNDATION,

for admission of dying declarations, p. 513.

for admission of secondary evidence, p. 441.

for contradiction of dying declarations, p. 514.

FRAUD AND DECEIT,

as ground for admission of oral evidence to vary receipt, p. 901.

burden of proof, pp. 424, 565.

character evidence in action to set aside deed for, p. 366n.

cogency of evidence as to, p. 642.

failure to read contract as affecting proof, p. 257.

fraudulent concealment of cause of action, p. 383.

identity of, traced through commingling of assets, p. 634.

impeachment of order of court for, p. 882.

in securing execution of will, p. 650.

intent, p. 693.

notice to agent as notice to principal where agent is perpetrating a fraud, p. 845.

notice to charge with, p. 840.

oral evidence as to, p. 641.

plaintiff's testimony that he relied on defendant's representations, p. 800.

presumption as to, p. 424n.

FRAUDULENT CONVEYANCES,

necessity of bringing action against administrator before instituting action to set aside conveyance, p. 1002n.

FUGITIVE,

presumption that fugitive is nonresident, p. 946.

G**GAMING,**

evidence as to intent in purchasing on margin, p. 693.

oral evidence that contract was a wager contract, p. 636.

presumption as to intent to make gaming contracts, p. 700.

GAS,

burden of proving negligence in action for injury by escape and explosion of, p. 309n.

evidence of leaks in other places than that at which explosion occurs, p. 403n.

GENERAL DENIAL,

see Denial.

GENUINENESS,

- acknowledged instrument, p. 490.
- bank notes, p. 558.
- burden of proof, p. 559.
- direct testimony as to genuineness of mark, p. 769.
- handwriting, see Handwriting.
- letter, p. 557.
 - reply, p. 558.
- petition, p. 559.
- several signatures, effect of proving some not genuine, p. 559.
- standards for comparison of handwriting, p. 605.
- statutory petition, p. 559.
- stock certificates, p. 559.

GEOGRAPHY,

- judicial notice as to geographical matters, p. 731.

GIFT,

- consideration, see Consideration.
- declarations of donor, p. 560.
- delivery, see Delivery.
- direct testimony, p. 559.
- mental capacity of donor, p. 647.
- sufficiency of proof of, p. 563.
- Presumption and burden of proof.*
 - acceptance of gift, pp. 56, 563.
 - validity of gift, p. 560.

GOD,

- belief in, as affecting admissibility of dying declarations, p. 510.

GOOD FAITH,

- direct testimony, p. 564.
- information on which person acted, p. 569.
- presumption and burden of proof, p. 565.
- reason for disregard of notice putting on inquiry, p. 569.
- right to prove affirmatively, p. 564.

GOVERNOR,

- judicial notice of proclamation by, p. 726.

GRAIN,

- opinion as to how much a given field will produce, p. 347n.

GRANT,

- presumption of, pp. 176, 570, 571.
 - from possession and use, p. 571.
- presumption of acceptance of, p. 56.

GRANT—(*continued*).

to fictitious person, p. 538.

GRIEF,

evidence as to, generally, see *Feelings*.

GUARANTY,

oral evidence as to consideration, p. 415.

H

HABITS,

as to care or negligence, p. 303.

direct testimony, p. 572.

limits of time, p. 573.

presumption of continuance, p. 574.

proof of, on question of identity, p. 628n.

reputation, p. 574.

single instance; and repetition, p. 572.

HAIR,

as aid in identification of person, p. 628n.

HAND CARS,

opinion evidence as to speed, p. 957.

opinion as to whether danger of riding on, was obvious, p. 299n.

HANDWRITING,

see also *Mark*.

necessity of proving handwriting in signature to bank notes where genuineness is questioned, p. 558.

Testifying as to one's own handwriting.

cross-examination, p. 577.

concealing part of writing, p. 578.

direct testimony; authorizing signature, p. 576.

writing in court, p. 576.

Testimony of experts, with or without the aid of standards or comparison.

cross-examination for purpose of contradiction, p. 597.

cross-examination on differences, p. 597.

direct opinion founded on comparison, p. 592.

expert defined, p. 592.

qualification of witness, p. 594.

testimony to peculiar characteristics, p. 595.

Testimony of nonexpert from knowledge of handwriting.

acquaintance with handwriting; general rule, p. 579.

competency of witness generally, p. 580.

cross-examination for purpose of contradiction, p. 591.

form of question, p. 580.

HANDWRITING—(continued).

lost disputed writing, p. 587.

means of knowledge.

having received letters, p. 584.

having seen ancient documents, p. 584.

having seen communication received in usual course of business,
etc., p. 583.

having seen genuine writing, pp. 580, 582.

having seen write, p. 581.

having knowledge from family correspondence, p. 585.

not secondary evidence, p. 579.

ordinary witness cannot make comparison, p. 588.

privilege of professional relation, p. 587.

testimony competent, though not positive, p. 585.

testimony of interested witness or party to handwriting of deceased,
etc., p. 587.

testing knowledge, p. 589.

refreshing memory on cross-examination, p. 590.

requiring to pick out genuine writing, p. 590.

witness prepared out of court, p. 586.

refreshing memory, p. 586.

Standards of comparison, with or without the aid of experts.

authentication of standards of comparison, p. 606.

comparison by jury or referee, p. 611.

disputed writing and standard to be produced before comparison, p.
603.

document not already in the case, p. 598.

genuineness of standards, a question for the court, p. 605.

irrelevant documents as standards, p. 600.

writing of third person, p. 602.

papers in the records, p. 599.

taking to the jury room, p. 612.

what is considered as in evidence, p. 599.

what law controls, p. 602.

Photographs, letter-press copies, magnifying glass, and superimposition

letter-press copies, p. 616.

magnifying glass, p. 616.

photographic copies, p. 612.

tracing and superimposition, p. 616.

Circumstantial evidence and admissions.

admission of alleged signer, p. 619.

aptitude to imitate, p. 617.

condition of alleged writer, p. 618.

opportunity, p. 618.

peculiar usages of language, p. 617.

HEALTH AND DISEASE,

- direct testimony by person affected, p. 619.
- disease of animals, p. 621.
- expert testimony, p. 620.
- matter of observation, p. 619.
- mental condition of person, see *Insanity*.
- opinion as to cause of disease, p. 341n.

HEARING,

- of conversation by third person, evidence as to, p. 622.
- of sound, direct testimony as to, p. 622.

HEARSAY; RES GESTÆ,

- admissions or declarations, see *Admissions and Declarations*.
- as to abandonment of homestead, p. 25.
- as to age, p. 186.
- as to boundary, p. 281.
- as to credit, to whom given, p. 458.
- as to date, p. 459.
- as to death, p. 471.
- as to domicil, p. 497.
- as to gift, p. 560.
- as to name, p. 808.
- as to ownership, p. 886.
- answers given to inquiries to show absence of person, p. 47.
- certificate of expert as to breed as hearsay, p. 286.
- corroboration of, p. 446.
- dictagraph, conversation over, p. 495.
- declarations.
 - by convicts and unpardoned felons, p. 166.
 - by husband and wife, p. 166.
 - by insane persons, p. 166.
- dying declarations, see *Dying Declarations*.
- gestures, p. 533.
- in proof of fact that disputed transaction occurred, p. 478.
- moans, p. 533.
- natural manifestations of present feeling, p. 533.
- outcries, p. 533.
- record of height and measurements of accused person as hearsay, p. 781.
- telephone conversation, pp. 969, 970.
- testimony given in former proceedings, pp. 974 et seq.
- unsigned writing as part of *res gestæ* of contract, p. 429.
- what admissible as part of *res gestæ* to show to whom credit was given, p. 458.

HEARSAY; RES GESTÆ—(*continued*).*General reputation.*

as to agency, p. 191.

 revocation of agency, p. 218.

as to absence of person from state, p. 45.

as to boundary, p. 281.

as to care and skill, p. 372.

as to character, pp. 364, et seq. 452.

as to death, p. 471.

as to insanity, p. 682.

as to marriage, p. 774.

as to ownership, p. 886.

as to residence, p. 944.

as to solvency or insolvency, pp. 458, 687.

as to title, pp. 178, 991.

to show knowledge of fact, p. 745.

Confidential communications.

between husband and wife, pp. 131, 953.

telegrams as, p. 966.

to notary, p. 128.

to attorney, pp. 131, 587.

to physician, p. 660.

HEIR,

testator's intent to disinherit, p. 707.

HERD BOOK,

admissibility in evidence, p. 286.

Abandonment of.

burden of proof, p. 11.

presumptions, p. 11.

weight of facts, p. 12.

HIGHWAYS,

acceptance of, pp. 60, 65.

easements of abutting owner, loss or abandonment of, p. 10.

intent to dedicate land for street, p. 692.

judicial notice of custom to construct vaults under sidewalks, p. 719

 of existence of location of streets, p. 732n.

 of names of, p. 808.

opinion as to necessity of straightening road, p. 816n.

 as to value of property before and after change of grade, p. 1008.

photograph of streets and premises injured by change of grade, p. 406

Injuries on.

condition at other places, pp. 402n, 403n.

condition at other time, pp. 400, 401,

 ABB. FACTS—69.

HIGHWAYS—(continued).

- direct testimony as to condition of, p. 397n.
- opinion evidence in action for injury, pp. 71, 296.
- other accidents, pp. 304, 352n.
- photograph of defective highway, p. 406.

HISTORY,

- judicial notice as to historical matters, p. 731.

HOLIDAYS,

- judicial notice of legal holidays, p. 718.

HOMESTEAD,

- admissibility of intent of wife as to selection on question of intent of husband, p. 695.
- defective acknowledgment by wife of deed conveying, p. 125.

Abandonment.

- burden of proof, p. 24.
- declarations, p. 25.
- hearsay, p. 25.
- intent to abandon, p. 693.
- mode of proof generally, p. 26.
- opinions, p. 25.
- presumptions, p. 25.

HOMICIDE,

- admissibility of evidence for purpose of corroboration, p. 450n.
- declaration by defendant, p. 801n.
- dying declarations, see **Dying Declarations.**
- findings of coroner, p. 356.
- of motive, pp. 801n, 805.
- threats of violence by accused, p. 762n.

HORSE,

- age of, p. 190.
- breed, see **Breed.**
- evidence of reputation of horse in action for injury by, p. 368.
- opinion as to negligence in leaving horse, pp. 298, 347.
- opinion as to possibility of stopping team in time to avert accident, p. 298.
- presumption of negligence in case of runaway, p. 312.

HORSE POWER,

- comparison of engine with water wheels, p. 623.
- use of tables to show number of horse power obtained from given quantity of water, p. 623.

HOTEL REGISTER,

- proof of signature thereon, p. 613.

HOUSE OF ILL FAME,
see Disorderly Houses.

HUSBAND AND WIFE,
acknowledgment of deed by married woman, pp. 122, 125 et seq.
adultery, see Adultery.
agency of husband for wife, pp. 204n, 208.
 effect of separation, p. 218.
 presumption of, p. 209.
agency of wife for husband, p. 209.
 effect of separation, p. 218.
competency of widow to testify to husband's handwriting, p. 588n.
confidential communications between, see Confidential Communications.
criminal conversation, see Criminal Conversation.
declarations of wife in conspiracy, p. 417.
delivery of deed from husband to wife, p. 481n.
divorce, see Divorce and Separation.
dying declarations of wife in prosecution of husband for her murder,
 or vice versa, p. 505.
evidence of intent of wife on question of intent of husband, p. 695.
marriage, see Marriage.
possession by husband and wife or by one of them as notice, p. 836.
presumption of assent of married woman to contents of instrument in
 her possession, p. 254n.
presumption that wife adopted seal opposite signature of her husband,
 p. 952.
proof of citizenship of foreign-born woman, p. 377.
Alienation of affections.
 declaration by defendant in action for alienating wife's affections, p.
 801n.
 declarations of husband in action by wife for, pp. 28, 801n.
 direct testimony by plaintiff in action for alienation of affections of his
 wife as to fact of alienation, p. 800n.
 evidence as to motive of defendant in action for alienating wife's
 affections, p. 803n.
 evidence to show motive of husband in action for enticing away an-
 other woman's husband, p. 803n.
Abandonment.
 declarations, pp. 28, 494.
 presumptions, p. 29.
 relevancy, sufficiency, and weight of evidence, p. 29.
 compelling wife's abandonment of infant children by former marriage
 as abandonment of wife, p. 30.

HYPOTHETICAL QUESTION,
to expert, see Opinions and Conclusions.

I

IDENTITY,

see also Misnomer; Ownership.

answering to name, p. 628.

commingled assets, identity of fraud traced through, p. 634.

direct testimony, p. 625.

identifying from voice, p. 626.

uncertainty, p. 626.

extrinsic evidence to identify legatee or devisee, pp. 635, 704.

fraud, tracing through commingling of assets, p. 634.

inspection in court, p. 624.

marks and brands on cattle, p. 886n.

name as evidence of identity, p. 630.

necessity that witness identify person to whose admission he testifies,
p. 135.

of land or other property devised or bequeathed by will, pp. 704 et seq.

of parties and subject-matter to permit evidence of testimony of
former proceeding, p. 978.

of person speaking over telephone, pp. 969, 970.

of seal, p. 951.

opinion evidence, p. 635.

oral evidence, p. 631.

to identify document referred to in will, p. 243.

to identify land described in instrument, p. 243.

to identify person, p. 243.

photographs, pp. 627, 904.

pointing out person without naming him, p. 624.

slight evidence, p. 628.

Rebuttal of evidence as to.

existence of a "double," p. 634.

inspection and experiment, p. 634.

name, difference of, p. 635.

testing witness, p. 634.

IGNORANCE,

proof of ignorance of party as to effect of contract, p. 432.

ILLEGALITY,

oral evidence of, p. 636.

proof of, under general denial, p. 492.

ILLICIT RELATIONS,

gift to person with whom one is living in illicit relations, p. 561.

IMPEACHMENT,

of award, see Arbitration and Award.

IMPEACHMENT—*(continued)*.

- of assignment, p. 261.
- of dying declarations, p. 514.
- of order of court, p. 882.
- of statute of other state, p. 549.
- of witness, *see* Witnesses.

IMPLIED CONTRACT,

see Contracts.

IMPRESSIONS,

opinion as to, p. 865.

INCOMPETENT PERSONS,

- as to proof of insanity, *see* Insanity.
- entries in account books by party who has since become insane as evidence, pp. 83, 86.
- incapacity as revocation of agency, p. 219.
- mental condition of person making dying declarations, p. 507.
- removal to insane asylum as abandonment of legal residence, pp. 6n, 8.
- intent as to domicil, p. 498.

INDEBTEDNESS,

- see also* Debtor and Creditor.
- admission as to, p. 637.
- direct testimony by witness as to state of account, p. 637.
- presumption that limitation of municipal indebtedness has not been exceeded, p. 637.

INDEMNITY LANDS,

filing of lease of, p. 539.

INDIANS,

presumption that person has acquired status of a tribal Indian, p. 810.

INDICTMENT,

admission by plea to, p. 142.

INDORSEMENT OF BILL OR NOTE,

- evidence to show absence of contract, p. 640.
- parol evidence to explain.
 - unqualified, p. 638.
 - qualified, p. 639.
- under Negotiable Instruments Law, p. 640.

INDUCEMENT,

- cogency of evidence as to fraud inducing contract, p. 642.
- oral evidence of false representations inducing making of contract, p. 641.
- to doing of act, evidence to show, p. 457.

INFANTS,

- acceptance of beneficial grant, p. 56.
- admissions of infancy, p. 643.
- capacity to appreciate and avoid danger, p. 293.
- domicil of minor child, p. 496.
- dying declarations of, p. 505.
- evidence of declarations of infant too young to be sworn as witness, p. 165.
- hearsay evidence to prove age, p. 186.
- inspection of, by jury on issue of paternity, p. 891.
- necessaries, burden of proof as to, p. 814.
 - opinion evidence as to, p. 815.
- photograph of putative father on issue of paternity, p. 905.
- physical appearance as evidence of infancy, p. 643.

INFORMATION,

- on which person acted as evidence of good faith, p. 569.

INITIALS,

- judicial notice of meaning of, p. 36n.

INJUNCTION,

- bond, evidence to show that damage was caused otherwise than by injunction, p. 353.

INNKEEPERS,

- presumption of negligence from injury or loss, p. 311.

INNOCENCE,

- presumption of, p. 817.

INQUIRY,

- by purchaser or mortgagee of land occupied by one other than grantor or mortgagor, p. 827.
- for purpose of finding alleged fictitious person, p. 537.

INSANE PERSONS,

- see Incompetent Persons; Insanity.

INSANITY,

- appearance and conduct of defendant in lunacy proceedings, p. 683.
- belief in spiritualism, witchcraft, etc., p. 684.
- conduct and circumstances, p. 683.
- declarations, p. 682.
- general reputation, p. 682.
- in blood relatives, p. 682.
 - hereditary insanity, p. 682.
 - nonhereditary insanity, p. 682.

INSANITY—(continued).

photographs, p. 681.

presence of defendant in lunacy proceedings, p. 683.

Presumptions and burden of proof.

in general, p. 645.

capacity of one contracting marriage, p. 652.

continuance of insanity, p. 654.

alcoholism and alcoholic insanity, p. 657.

habitual insanity, p. 654.

temporary insanity, p. 656.

nature of presumption, p. 658.

continuance of lucid interval, p. 658.

presumption of insanity from suicide, p. 653.

with relation to contracts and conveyances, p. 646.

with relation to wills, p. 648.

as to fraud and undue influence, p. 650.

burden of proof after probate, p. 651.

Expert opinions.

admissibility generally, p. 659.

cross-examination; contradiction, p. 666.

from observation or examination, p. 661.

from the evidence, p. 662.

on hypothetical questions or statements, p. 663.

evidence in support of hypothesis, p. 664.

form of questions, p. 664.

hypothesis; upon what based, p. 663.

privilege of witnesses, p. 660.

qualification of experts, p. 665.

weight, p. 667.

as affected by character, bias, and nature of the question, p. 669.

as affected by facts and opportunity to observe, p. 668.

as compared with nonexpert opinions, p. 670.

as compared with other expert opinions, p. 669.

as question for the jury, p. 671.

Noneexpert opinions.

general rules, p. 671.

acquaintance necessary, p. 674.

cross-examination, rebuttal, and impeachment, p. 676.

time to which opinion relates, p. 675.

weight, p. 676.

who may give, p. 673.

Opinion of subscribing witness.

admissibility generally, p. 678.

INSANITY—(*continued*).

contradiction; weight, p. 680.

necessity of giving, p. 619.

INSCRIPTIONS,

admissibility in evidence to show age, p. 182.

INSOLVENCY, SOLVENCY, AND FINANCIAL CONDITION,

accounts, p. 686.

competency of witness to testify to, p. 386.

direct testimony, p. 685.

hearsay and general reputation, pp. 391, 458, 687.

opinions, p. 865.

presumption and burden of proof, p. 688.

proof of financial condition, as affecting damages, p. 386.

relevant facts, p. 686.

relevancy of evidence as to, on question of execution of contract, p. 427n.

INSPECTION,

by adverse counsel of memoranda used to refresh memory of witness, p. 555.

evidence of official inspection on question of condition of thing or place, p. 405.

of altered instrument by jury, p. 221.

of machine, p. 421.

of witness to determine qualifications and intelligence, p. 373.

on issue of age, p. 188.

on issue of identity, p. 625.

on issue of quality, p. 931.

on issue of pregnancy, p. 921.

to determine condition of things, pp. 404, 405.

to determine physical condition, pp. 393, 394, 921.

view by jury, p. 405.

INSURANCE,

abandonment of insured vessel, p. 31.

abandonment of policy or certificate, p. 30.

age of insured, p. 159.

assent by insured to contents of policy retained, p. 254n.

to rules in book delivered to him, p. 254.

declarations of agent to show waiver of forfeiture, p. 1014.

evidence as to what effect facts respecting habits of the insured would have on the minds of the insurers, p. 800n.

insurable interest of person claiming under grant from fictitious person, p. 538n.

INSURANCE—(*continued*).

judicial notice of custom of insurance agent to represent several companies, p. 289n.

life tables used by insurance companies, p. 798.

parol evidence as to intent to protect second mortgagee, p. 702.

of collateral agreement with agent, p. 380n.

of waiver by agent of condition in policy, p. 1014.

to explain contract, p. 244.

to vary contract, p. 382n.

presumption that insured read application, p. 741n.

receipt of mailed notice of assessment, pp. 758n, 760n.

receipt of notice of falling due of premiums, p. 760n.

underwriter's knowledge of Lloyd's lists, pp. 743n, 744n.

statements by assured outside of his application as evidence against beneficiary, p. 156.

testimony of officer of company that policy was issued on representations of insured, p. 800n.

Risks and causes of loss, injury and death.

by-law refusing payment where fact of death is based on presumption from absence, p. 467.

character of insured where arson is claimed as defense, p. 366n.

declarations of insured on question of intent to insure life and then commit suicide, p. 802n.

findings of coroner to show cause of death, p. 356.

presumption and burden of proof as to suicide, p. 69.

presumption of insanity from suicide, p. 653.

prima facie proof of death from bodily injuries through external, violent, and accidental means, p. 68.

question whether injury was intentional or accidental, p. 71.

rebuttal of defense of suicide, p. 353n.

INTEMPERANCE,

see Drunkenness.

INTENT,

see also Motive and Purpose.

as to law which shall control contract, p. 696.

as to residence. see Residence.

concurrence of intent, p. 698.

constructive intent. p. 698.

declarations; *res gestæ*, pp. 162, 696, 790.

in annexation of fixtures, p. 542.

in desertion, p. 494.

in embezzlement, p. 520.

of absentee in departing, p. 48.

other similar acts to show, pp. 697, 805.

INTENT—(continued).

proof of reason for act where intent is material, p. 936.

rebutting, p. 711.

to abandon husband or wife, p. 28.

to authorize or adopt seal, p. 952.

to change domicil, pp. 7, 496, 497.

to make election of right or remedy, p. 519.

to make gift, p. 559.

to ratify, p. 934.

To abandon rights or property.

generally, p. 33.

domicil, pp. 7, 496, 497.

easement, p. 8.

 easement of way, p. 14.

 railway easement, p. 13.

homestead, p. 24.

invention, p. 32.

patent or trademark, p. 31.

real property, p. 35.

water rights, p. 19.

Right to testify as to one's own intent.

application of rule, p. 692.

exceptions and limitations, p. 691.

general rule, p. 690.

test of admissibility, p. 691.

weight and conclusiveness, p. 694.

Right to testify as to intent of other person.

in general, p. 694.

manifested by demeanor, p. 696.

Parol or extrinsic evidence to show.

as to entries in account books, p. 101.

as to merger of contract or title, p. 790.

as to wills generally, p. 704.

as to writings generally, p. 701.

may beneficiary be put to his selection by extrinsic evidence of testator's intention, p. 708.

to show intent of testator in respect to disinheriting an afterborn child, p. 707.

to show intent that real property should be charged with payment of legacies where will is silent on that point, p. 707.

to show that deed absolute in form was intended as a mortgage, p. 480.

to show whether instrument in form of deed was intended to operate as deed or will, p. 709.

to show that instrument not on its face a will was intended to take effect as such, p. 710.

INTENT—(continued).

to show writing was intended as sham, p. 703.

to show that instrument on its face a will was not intended as such,
p. 710.

to show that written assignment was made as collateral security, p.
262.

to show that writing on draft was intended as acceptance, p. 61.

to show that written contract was not intended to bind party, but
merely to influence others, p. 432.

to show what assets were intended to pass by assignment or bill of
sale, p. 261.

Presumptions and burden of proof.

intention as to consequences of act, p. 698.

intent as to merger, p. 789.

intent of testator, p. 699.

to create monopoly, p. 700.

to evade law, p. 699.

INTEREST,

of witness, see *Bias*.

parol evidence, p. 712.

previous understanding, p. 712.

relevancy of evidence generally, p. 712.

weight, effect, and sufficiency, p. 713.

INTERIOR DEPARTMENT,

judicial notice of regulations of, p. 855n.

INTERNAL REVENUE,

judicial notice of regulations by internal revenue commissioner, p. 855n.

meaning of abbreviation in record of special taxes, p. 40n.

INTERPRETED CONVERSATION,

admissibility in evidence, p. 436.

INTERSTATE COMMERCE COMMISSION DECISIONS.

judicial notice of by state courts, p. 730.

INTOXICATING LIQUORS,

judicial notice of intoxicating character of mixed drink, p. 718.

opinion that beer was lager beer, p. 930.

INTOXICATION,

see *Alcoholism; Drunkenness*.

INVENTION,

abandonment of, pp. 31, 32.

IRRIGATION,

- judicial notice of necessity of, p. 814.
- loss or abandonment of right of, p. 20.
- opinion evidence as to capacity of ditch, p. 864.

J

JETTISON,

- expert testimony as to necessity of, p. 815.

JOINT DEBTORS AND CREDITORS,

- parol evidence as to intent of parties in settling with one of several joint tort feasons, p. 703 n.

JOLTS,

- presumption of negligence from injury to passenger by, p. 320n.

JUDGE,

- approval of instrument by, proof of, p. 248.
- judicial notice by, see Judicial Notice.
- Competency as witness.*
 - in trial over which he presides, p. 717.
 - in other trials, p. 717.

JUDGMENT,

- admissibility in evidence of abstract of, p. 54.
- as evidence, p. 717.
- awarding possession as evidence against third person, p. 917.
- conclusiveness as to third parties of decree as to facts adjudicated, p. 960.
- presumption of payment of, from lapse of time, p. 898.
- proof of status by judgment as against one not a party, p. 960.
- record of, as notice, p. 852n.

JUDGMENT ROLL,

- admissibility on question of boundary, p. 279n.
- oral evidence to explain description in, p. 922.

JUDICIAL DECISIONS,

- judicial notice of, p. 729.

JUDICIAL NOTICE,

- ability of person with one hand, p. 41.
- abbreviations and symbols, pp. 36, 718, 822.
- acceptance of provisions of statute, p. 55.
- age of attorneys, p. 718.
- artesian wells, nature and sources of, p. 718.
- belief that vaccination is a preventative of smallpox, p. 718.

JUDICIAL NOTICE—(continued).

- by jury, p. 734.
- capacity to bear child, p. 920.
- chief commercial centers of state, p. 719.
- coincidence of days of week with days of the month, p. 719.
- commercial designation of an article, p. 808.
- computation of time, p. 719.
- contents of Bible, p. 718.
- cotton producing regions of state, p. 719.
- electricity, and its properties and uses, p. 718.
- height of human body and measurements of its several parts, p. 718.
- intoxicating character of any liquor by name including mixed drinks, p. 718.
- laws of mathematics, p. 718.
- legal holidays, p. 718.
- meaning of words, p. 718.
- mortality tables, p. 718.
- nature and usual course of business, p. 287.
- of decisions of Interstate Commerce Commission by state courts, p. 730.
- of reports by railroad companies, p. 730.
- of regulations under Selective Draft Act, p. 726.
- of best method of pasteurizing, p. 720.
- of the duties of traffic policemen, p. 719.
- of ease with which milk is infected, p. 720.
- of means employed by medical profession to preserve organ taken from human body, p. 720.
- of nature, motive power and fuel of motor trucks, p. 719.
- of nature of department stores, p. 719.
- of uses of safety deposit boxes, p. 719.
- oil mills, in state, p. 719.
- on what day of the week a given day of the month and year fall, p. 461.
- printers' abbreviations, p. 822.
- relation of Dominion of Canada to Great Britan, p. 810.
- seals, official, p. 951.
 - of private corporations, p. 951.
- season for planting, p. 719.
- season at which crop matures, p. 719.
- stock in trade, p. 719.
- synonym of English name in Chinese language, p. 808.
- telephone, p. 969.
- that photograph fairly represents subject, p. 903.
- time, computation of, p. 719.
- time for shipment by railroad from one place to another, pp. 719, 823.
- time necessary for transportation of express matter, p. 719.

JUDICIAL NOTICE—(continued).

time taken by mails between principal cities, p. 757.

usual stock in trade, p. 719.

that certain day of month falls on Sunday, p. 718.

that month in statute means calendar month, p. 718.

that telegraph messages must be written, p. 719.

that vaccination is believed to be a preventive of smallpox, p. 718.

that men do business honestly, p. 719.

that men of financial ability are asked to serve as bank directors, p. 719.

that money has less purchasing power than formerly, p. 719.

Railroad and street railway matters.

railroad business, generally, p. 718.

authority of brakeman to put trespassers off freight train, p. 719.

authority of conductor to carry passenger without payment of fare, p. 719.

duty of brakemen to obey conductor's orders, p. 719.

existence and termination of Federal control, pp. 718, 725n.

membership of railroad corporation in traffic association, p. 786.

necessity of spark arrester on steam engine, p. 814.

time for shipment by railroad from one place to another, pp. 719, 823.

that street railway is common carrier of passengers, p. 719.

necessity of protection of operators of cable or horse cars, p. 719.

that trolley lines had not superseded horse cars at certain date, p. 719.

Religious matters.

general doctrines maintained by religious sects, p. 718.

nature and powers of Roman Catholic Church, p. 718.

that attendants of church are not limited to members, p. 786.

that religious world is divided into sects, p. 718.

Custom or usage.

general custom, p. 724n.

of usage of banks, p. 288.

local usage, p. 724n.

municipal affairs, p. 724n.

of political parties, p. 731.

to assess realty at not to exceed 75 per cent of value, p. 719.

to construct vaults under sidewalks, p. 719.

Laws, treaties, etc.

acts of Congress, p. 724.

action of executive branch of government in enforcement of treaties or public laws, p. 726n.

by Supreme Court of United States, p. 724.

Constitution of United States, p. 724.

entries in legislative journals, pp. 725, 727.

foreign laws, p. 725.

JUDICIAL NOTICE—(*continued*).

laws of state where court sits, p. 724.

laws of other state, p. 725.

laws prevailing in country before acquisition by United States, p. 725.

municipal ordinances, p. 725.

proclamation by executive, pp. 726n, 729.

rules and regulations prescribed by other departments of government,
pp. 724, 726n, 855.

system of law in other jurisdiction, p. 725.

territorial extent of jurisdiction, p. 726n.

treaties with the United States, p. 724.

Official and judicial character and actions.

census, p. 729.

decisions of courts in other state, p. 729.

decree in proceedings to punish violation of same as contempt, p. 729.

facts shown by public archives, p. 729.

official proclamations and messages of the executive, p. 726.

record in other case, p. 729.

Political, historical and geographical matters.

county boundaries and land surveys, p. 732.

customs and usages of political parties, p. 731.

distance between certain places, p. 732.

ebbing and flowing of tide at certain place, p. 732.

existence of certain river, p. 732.

geography of state, p. 731.

local political divisions, p. 731.

location of certain county, p. 732.

location of lands described by government subdivision, p. 733n.

matters of general public history, pp. 726n, 731.

names of counties and streets, p. 808.

navigability, pp. 732, 812.

necessary qualifications of voters, p. 731.

nonexistence of town of given name, p. 732n.

number of votes cast at state elections, p. 731.

place, because of historical and geographical familiarity of its name,
p. 731.

population of counties, towns, and cities, etc., p. 719.

primary elections, p. 731.

result of local option election, p. 731.

removal of county seat, p. 732.

situation of streets, squares, and public grounds of Boston, p. 733.

size of town, p. 732.

source, course, and destination of river, p. 732.

township line, p. 732n.

that locality between two towns is within specified county, p. 733n.

JUDICIAL NOTICE—*(continued)*.

that railroad runs through given county, p. 731.

that water between two islands in given bay is in specified county,
p. 732n.

JUDICIAL SALE,

admissibility in evidence of deed to show title, p. 992.

conclusiveness of recitals in sheriff's deed, p. 859n.

judicial notice of abbreviations in, p. 37n.

oral evidence to explain ambiguity in deed, p. 922n.

proof of ownership by one purchasing at, p. 888.

recitals in decree, p. 858n.

JURY,

inspection by, see *Inspection*.

judicial notice by, p. 734.

questions for, see *Trial*.

right of jury to compare handwritings, p. 611.

taking exhibits to jury room, p. 612.

tampering with juror, pp. 263, 965.

view by, p. 405.

JUSTICE OF THE PEACE,

judicial notice of meaning of letters "J.P.," pp. 37n, 39n.

parol evidence as to meaning of letters "P. & D." in docket entry, p.
39d.

presumption of due appointment of, p. 857n.

K**KNOWLEDGE,**

circumstantial evidence, p. 738.

direct testimony, pp. 736, 1001.

general reputation, p. 745.

guilty knowledge, proof of, in prosecution for theft of steer, p. 71.

of facts by party making admissions, p. 148.

of facts by party ratifying, pp. 934, 935.

of financial condition of third person, p. 687.

of person making entries in account books as to their correctness, p.
100.

in large business establishment, p. 100.

of principal, p. 740.

of servant, p. 740.

possession, p. 739.

previous transactions to show, p. 738.

probability of knowledge, p. 737.

right of jurors to act upon personal knowledge, p. 734.

KNOWLEDGE—(continued).***Presumptions and burden of proof.***

from possession, p. 739.

of common fact, p. 739.

of contents of instrument, presumed from access to, or claim under,
p. 742.

of contents, presumed from signing or receiving, p. 740.

of contents of newspaper, p. 743,

of corporation or its officers, p. 739.

of law, p. 744.

foreign law, p. 744.

of one dealing with corporation, p. 740.

of testator of contents of will, pp. 650, 741.

of usage, p. 1000.

L**LANDLORD AND TENANT,**

extinguishment of landlord's easement by act of tenant, p. 18.

memorandum of agreement signed by one party only, p. 430n.

opinion evidence as to cause of fall of building killing tenant, p. 338n.

opinion evidence as to cause of lowering of rents, p. 340.

possession of tenant as notice, p. 831.

presumption of lessee's knowledge of entries made in his passbook by
lessor, p. 742n.

Lease.

acceptance of, p. 63.

presumption as to, p. 58.

evidence of pecuniary condition of lessees, p. 387n.

oral evidence to explain description of premises in lease, p. 922n.

proof of parol lease changing term, p. 4n.

LAPSE OF TIME,

presumption of grant from, p. 570.

LAW,

intent as to law which shall control contract, p. 696.

judicial notice of, p. 724.

presumptions and burden of proof as to intent to evade, p. 699.

presumption of knowledge of, p. 744.

proof of foreign law, see Foreign Law.

LEASE,

in general, see Landlord and Tenant.

of homestead, as proof of abandonment, p. 27n.

LEDGER,

admissibility in evidence, p. 94.

ABB. FACTS—70.

LEFFEL'S TABLES,

use of, to show number of horse power obtained from given quantity of water, p. 623.

LEGACIES,

in general, see Wills.

intent to charge real property with payment of, p. 707.

LEGAL HOLIDAYS,

judicial notice of, p. 718.

LEGALITY,

oral evidence of, p. 636.

LEGISLATURE,

judicial notice of entries in legislative journals, p. 725.

LETTER-PRESS COPIES,

admissibility in evidence, see Best and Secondary Evidence.

LETTERS,

admissibility in evidence, generally, see Documentary Evidence.

admissibility of copies of, in evidence, see Best and Secondary Evidence.

authorship, p. 748.

presumption as to, p. 748.

date as evidence of time of receipt, p. 750.

delivery, p. 750.

letter and inclosure let in each other, p. 752.

letter from debtor as proof of new promise, p. 821.

letters of an agent, p. 752.

mailing, p. 750.

presumptive evidence, p. 758.

what constitutes mailing, p. 757.

matters as to mails generally, see Postoffice.

mere possession as rendering competent against possessor, p. 753.

offering part of connected correspondence, p. 746.

omission to answer as admission of truth of statements, p. 753.

proof of authenticity, p. 748.

proof other than by proof of handwriting or typewriting, p. 557.

receipt, presumption of, pp. 750, 758.

reply letters, p. 748.

undelivered letter as evidence of death, p. 474.

LIBEL AND SLANDER,

character evidence in action for, pp. 366 et seq.

specific instances to show character, pp. 370 et seq.

charging unchastity, p. 921n.

LIBEL AND SLANDER—(continued).

condition in life, p. 385.

declarations, pp. 762n, 802n.

financial standing of defendant, p. 390n.

identity, p. 629n.

inspection of plaintiff on issue of pregnancy, p. 921.

knowledge of, by one selling paper containing, p. 744.

truth of charges, burden of proving, p. 818n.

Intent; malice.

declarations, on question of motive, p. 801n.

direct testimony as to, pp. 692, 761.

presumptions and burden of proof as to malice, p. 763.

proof of repetition of charge on question of malice, p. 762.

relevancy of evidence on question of malice, p. 768.

testimony in action against corporation of officers as to intent, p. 695.

LICENSE,

payment of license fee as evidence of possession, p. 917.

LIENS,

mode of proving filing, p. 539.

LIFE INSURANCE,

see Insurance.

LIFE TABLES,

see Mortality Tables.

LIFE TENANTS,

extinguishment of easement as against remainderman by act of life tenant, p. 19.

LIGHT,

abandonment of easement of, p. 10.

distance at which light can be seen on water, p. 986.

LIMITATION OF ACTIONS,

absence from state, p. 50.

effect of fact that account is barred by limitations on admissibility of account books in evidence, p. 88.

fraudulent concealment of cause of action, p. 383.

new promise, burden of proving, p. 821.

proof by letter from debtor, p. 821.

presumption that one making new promise knew facts establish his exemption for liability, p. 821.

LIMITATION OF INDEBTEDNESS,

presumption that limitation has not been exceeded, p. 637.

LIS PENDENS,

as notice, p. 852.

LIVERY,

evidence of reputation of horse in action against liveryman for injury,
p. 368n.

LIVE STOCK,

in general, see Animals.

injury to, by railroad train, pp. 315, 399, 450.

presumption and burden of proof in case of injury to, while in carrier's
custody, p. 322n.

LOAN,

in reliance on statement of third person as to borrower's financial
condition, p. 641n.

LOBBY SERVICES,

oral evidence that contract was in consideration of, p. 636n.

LOCAL OPTION ELECTION,

judicial notice of result, p. 731.

LOGGING RAILROAD,

opinion as to proper manner of constructing trestle, p. 297n.

LOGS AND LOGGING,

admissibility in evidence of scale book or tally, pp. 780, 781.

log marks as evidence of ownership, p. 886.

proof of quantity of logs cut or sold, pp. 780, 781.

LOOSE LEAF LEDGERS,

admissibility as books of original entry, p. 90.

LOSS OF OR DAMAGE TO FREIGHT,

see Carriers.

LOST ARTICLE,

proof of value of, p. 1003.

LOST DOCUMENTS,

admissibility in evidence of abstract made from, p. 61.

LOST INSTRUMENT,

proof of handwriting, p. 586.

LOST RECORD,

mode of proving, p. 757.

LUMP CHARGES,

effect of, on admissibility of account, p. 96.

LUNACY,
see *Insanity*.

M

MACHINE,
evidence as to capacity of, p. 291.
opinion as to dangerous character of, p. 298n.
as to proper construction of, p. 420.
as to possibility of discovering defect in, p. 301n.

MAGNIFYING GLASS,
use of, to determine genuineness of handwriting, p. 616.

MAILS,
see *Postoffice*.

MALICE,
direct testimony, p. 761.
indicative conduct and declarations, p. 761.
motive as affecting cause of action, pp. 802, 803.
relevancy of evidence generally, pp. 762, 768.
Presumptions and burden of proof.
in action for malicious prosecution, p. 766.
in libel or slander case, p. 763.

MALICIOUS PROSECUTION,
malice, presumption and burden of proof as to, p. 766.
relevancy of evidence on question of, pp. 762, 768.
motive of defendant, pp. 803, 804.
probable cause, pp. 804, 805.
testimony of defendant as to his intent, p. 692.

MALPRACTICE,
burden of proof in action for, p. 309.

MANDAMUS,
necessity of proof that party can perform duty required, p. 1002.

MAPS,
admissibility in evidence, pp. 276, 406, 407, 903.

MARGIN,
direct testimony as to intent in purchasing commodities on, p. 700

MARK,
absence of attesting witness, p. 771.
attestation after death, p. 771.
burden of proof, p. 771.

MARK—(continued).

- competency of witness to genuineness, p. 769.
- direct testimony as to genuineness, p. 769.
- handwriting generally, see Handwriting.
- intelligence of execution, p. 771.
- interpreting unintelligible marks in account books, p. 107.
- opinion as to, p. 865.
- opinion evidence as to genuineness, p. 769.
- understanding of writing, p. 771.

MARKETABLE TITLE,

- opinion as to, p. 995.

MARRIAGE,

- admissions and declarations, p. 773.
 - declarations of one since deceased against his own marriage, p. 161.
- by mail, p. 779.
- certificates, p. 773.
- cohabitation and repute, p. 774.
- deceiving woman into void marriage, p. 391n.
- direct testimony, p. 772.
- eye-witnesses, p. 772.
- intent, to evade law, p. 699.
- mental capacity of party contracting, p. 652.
- oral proof that marriage was consideration for deed, p. 410.
- presumptions and burden of proof, p. 775.
 - intent to evade law, p. 699.
 - presumptions flowing from marriage ceremony, p. 776.

Annulment.

- for mental incapacity of party, p. 652.
- on ground of impotence, physical examination, p. 394.

MARRIAGE CERTIFICATE,

- statement in, as evidence of age of party, p. 182.

MASTER AND SERVANT,

- appearance of being in service, p. 521.
- assent to contents of statement of account between employer and employee, p. 254n.
- assumption of risk, reliance upon promise to repair, p. 693.
- capacity of minor servant to comprehend and avoid danger, p. 293.
- character evidence in action by servant for discharge, p. 365n.
- competency of servant, opinion evidence as to, p. 372n.
 - proof of intoxication on question of, p. 373.
- condition of ladder from which employee fell, p. 397n.
- contributory negligence, p. 300.

MASTER AND SERVANT—(continued).

- demand on servant in possession, p. 490.
- employee's knowledge of entries in employer's book, p. 743n.
 - of latent danger, p. 740.
 - of rules, p. 743n.
- evidence for purpose of corroboration in action for wages, p. 448n.
- fellow servants, burden of proving lack of care in selection of, p. 310n.
- judicial notice as to proper means of protecting operators of street cars, p. 719.
- opinion as to condition of railroad track, p. 399.
 - as to danger of brakeman's position on car, p. 300.
 - as to necessity of safety switch, p. 816.
 - as to what might have been done to rescue imprisoned miners, p. 301.
- other similar transactions in action on contract of hiring, p. 427n.
- presumption of employment, p. 521.
- presumption as to contract on continuance in service, p. 424.
- presumption of negligence from injury to servant, pp. 314, 317.
- scope of servant's duty, p. 499.

MATERIALITY,

- of alterations in instrument, p. 220.

MATHEMATICS,

- judicial notice of laws of, p. 718.

MEASURES,

- best and secondary evidence, p. 780.
- burden of proving ignorance of usage, p. 780.
- comparison of measures, p. 780.
- declarations, p. 783.
- documentary evidence, p. 781.
- foundation for evidence of, p. 783.
- measurements of accused person, p. 781.
- measurer proving own measure, p. 780.
- of switch, p. 783.
- opinions and conclusions, p. 782.
- parol evidence, p. 782.
- relevancy, p. 783.
- usage, p. 780.
- of logs, p. 780.

MECHANICS' LIENS,

- proof of filing of, p. 539.

MEDICAL BOOKS,

- admissibility, p. 784.

MEDICAL EXPERTS,

opinions of, see *Insanity; Opinions and Conclusions*.

MEETING,

presumption that meeting was regularly called, p. 856.

MEMBERSHIP,

best and secondary evidence, p. 788.

judicial notice, p. 786.

parol evidence, p. 789.

presumptions and burden of proof, p. 786.

attendance at meeting, p. 788.

office holding, p. 788.

record of, p. 784.

MEMORANDA,

admissibility in evidence for purpose of corroboration, p. 451.

as evidence of date, p. 460.

unsigned memorandum as evidence of terms of contract, p. 429.

use of, to refresh memory of witness, p. 551.

MENTAL CONDITION,

in general, see *Feelings; Insanity*.

of person making dying declarations, p. 507.

opinion evidence as to, p. 865.

MERCANTILE ABBREVIATIONS,

see *Abbreviations*.

MERCANTILE AGENCIES,

judicial notice of nature and functions of, p. 287.

MERGER,

declarations and acts, p. 790.

extrinsic evidence, p. 790.

presumptions and burden of proof, p. 789.

MESSAGE,

answer competent, p. 791.

effect of oral message, p. 791.

how answer proved, p. 791.

MEXICO,

judicial notice of laws of, p. 727n.

MILK,

evidence as to adulteration, p. 930.

judicial notice of ease of infection, p. 720.

judicial notice of best method of pasteurizing, p. 720.

MILLS,

- abandonment of water rights by nonuser, p. 24.
- horse power of, see Horse power.

MINES,

- abandonment of rights by lessee, p. 34.
- abandonment of rights in dam and ditch for mining purposes, p. 19.
- direct testimony as to condition of instrumentality, p. 397n.
- opinion as to competency of superintendent, p. 372n.
 - as to proper method of timbering drift, p. 296n.
 - as to what might have been done to rescue imprisoned miners, p. 301n.
- pleading in ejectment to recover mining claim, p. 34.
- presumption of negligence from injury to employee, p. 317.

MISNOMER,

- as to name generally, see Name.
- in contract or deed, p. 792.
- in judicial proceedings, p. 792.

MISTAKE,

- as an excuse, p. 794.
- as ground for admission of oral evidence to vary receipt, p. 901.
- burden of proof, p. 794.
- cogency of proof, p. 795.
- in certified copy, p. 793.
- in record of instrument, p. 851.
- oral evidence, p. 794.
 - to correct misdescription in will, pp. 704 et seq.
- recount to show mistake in count, p. 932.

MISTRESS,

- gift to, presumption as to validity, p. 561.

MOBS,

- evidence as to character of deceased in action for killing by, p. 370.

MONEY,

- judicial notice of decreased purchasing power, p. 719.
- proof of genuineness of bank notes, p. 558.
- value of foreign coin, p. 1012.

MONOPOLY,

- presumption of intent to create, p. 700.

MONTH,

- judicial notice of meaning of term, p. 718.

MONUMENTS,

parol evidence to identify, p. 279.

MOON,

use of almanac to show time of rising or setting, p. 795.

MORTALITY TABLES,

admissibility generally, p. 796.

authentication, p. 798.

conclusiveness, p. 797.

judicial notice as to, p. 718.

necessity, p. 797.

secondary evidence of contents, p. 798.

MORTGAGE,

acts of mortgagor as extinguishing easement as against mortgagee.
p. 19.

authority of agent to receive payment of, p. 214.

burden of proving acceptance of deed by which mortgage is assumed,
p. 56.

competency of mortgagor, p. 647.

consent of mortgagee to dedications of streets and alleys, p. 409n.

delivery of, generally, see *Delivery*.

good faith of mortgagee in refusing to accept tender, p. 565n.

intent that mortgage should merge in fee, presumption, p. 789.

parol evidence as to acknowledgment of, p. 127.

as to rights of second mortgagee, p. 702n.

of collateral agreement of assignee of, p. 381.

payment, presumption of from lapse of time, p. 901n.

authority of agent to receive, p. 214.

possession of real property as notice, pp. 824 et seq.

ratification of extension by agent, p. 934n.

recitals in, as evidence of abandonment of homestead, p. 28n.

record of, as notice, p. 851.

secondary evidence of, p. 888.

Deed as mortgage.

admissibility under general denial of evidence to establish defeasance,
p. 480.

admissions and declarations as to whether deed was intended as a
mortgage, p. 479.

burden of proving that deed absolute on its face was intended as a
mortgage, p. 475.

direct evidence as to whether deed was intended as a mortgage, p. 478.

documentary evidence on question whether deed was intended as mort-
gage, p. 479.

oral evidence that deed was mortgage, pp. 412, 476.

MORTGAGE—(continued).

- presumption that deed absolute in form was not a mortgage, p. 475.
- sufficiency of evidence to show that deed was intended as, p. 480.

MOTIVE AND PURPOSE,

- see also Intent.
- admissibility of evidence as to, p. 447.
- effect of, on validity of assignment, p. 261.
- declarations to show, p. 801.
- direct testimony, p. 799.
- motive as affecting cause of action, p. 802.
- motive in suing, p. 803.
- relevant facts, p. 803.

MOTOR TRUCKS,

- judicial notice of nature, motive power and fuel, p. 719.

MOURNING,

- evidence of wearing of, to show death, p. 465.

MOVING PICTURES,

- as evidence, p. 806.
- method of proving, p. 807.
- reconstructed picture, p. 806.

MUNICIPAL CORPORATIONS,

- judicial notice of local custom in municipal affairs, p. 724.
 - of ordinance, p. 725.
 - of population of, p. 719.
- presumption of acceptance by, of redemption of property made for its benefit, p. 59.
- presumption that limitation of indebtedness has not been exceeded, p. 637.

MURDER,

- see Homicide.

MUTILATION,

- admissibility in evidence of mutilated book of accounts, p. 91.

MUTUAL ACCOUNTS,

- see Accounts.

N**NAME AND DESIGNATION,**

- see also Misnomer.
- answering to, as evidence of identity, p. 628.
- difference of name as disproving identity, p. 635.

NAME AND DESIGNATION—*(continued)*.

- identity of name as raising presumption of identity of person, p. 630
- forgotten name, p. 808.
- hearsay, p. 808.
- interrogating to discover names of witnesses, p. 808.
- judicial notice, p. 808.
- omitting from testimony or document, p. 808.
- parol evidence to explain ambiguity arising from, p. 809.
- trade designation, p. 809.

NAPHTHA,

- negligence in shipping, p. 306n.

NATIONALITY,

- as to naturalization, see **Naturalization**.
- judicial notice as to, p. 810.
- of person, p. 810.
- of vessel, p. 810.

NATURALIZATION,

- best and secondary evidence, p. 811.
- certified copy of record of other state, p. 812.
- presumptions and burden of proof, p. 811.
- record conclusive, p. 812.

NAVIGABILITY,

- government survey to show, p. 813.
- judicial notice as to, pp. 732, 812.
- presumptions and burden of proof, p. 813.

NECESSARIES AND NECESSITY,

- burden of proof, p. 814.
- judicial notice, p. 814.
- necessity of an administrator, p. 817.
- opinion, p. 815.
- presumptions, p. 815.

NEGATIVE,

- burden of proof, p. 817.
- custom of officer to disprove alleged official account, p. 819.
- lack of entry in account, p. 818.
- lack of entry in public record, p. 819.
- nonobservation of witness, p. 820.
- official act, p. 819.
- presumption of innocence, p. 817.

NEGLIGENCE,

- see also **Accident; Cares; Personal Injuries**.

NEGLIGENCE—(continued).

as to turntables, p. 306.

character evidence in action for, p. 367.

compulsory physical examination, pp. 393, 394.

condition in life, p. 384.

conditions at other time or place, p. 400.

contributory negligence, pp. 326, 332.

declarations of pain or suffering in action for personal injury, p. 533.

effects of injury, p. 516n.

exhibition of person to jury in action for injury, p. 393.

feelings of injured persons, see Feelings.

inspection in court of articles causing injury, p. 404.

natural manifestations of suffering by injured person, p. 533.

opinion as to possibility of stopping team in time to avert accident,
p. 298n.

sufficiency of pleading to permit proof of gross negligence, p. 308.

variance between pleading and proof, p. 307.

NEW PROMISE,

burden of proof, p. 821.

letter in reply to demand of payment, p. 821.

presumption of knowledge of facts, p. 821.

NEWSPAPERS,

newspaper statement as evidence, p. 822.

offering in evidence one copy of issue, p. 924.

presumption of knowledge of contents of, p. 744.

presumption that two newspapers were printed by same person, p.
924.

NITROGLYCERIN,

presumption of negligence causing explosion, p. 313n.

NOMINAL CONSIDERATION,

effect of recital of, p. 411.

NOMINATION,

evidence of filing certificate of, p. 539.

NONOCCUPANCY,

presumption of abandonment of property from, pp. 26n, 33.

NONRESIDENCE,

see Residence.

NONUSER,

abandonment of easement by, p. 8.

easement of way, p. 14.

NONUSER—(*continued*).

highway by, pp. 11, 12.

railroad right of way, p. 13.

loss of water rights by, p. 19.

NOTARIES PUBLIC,

judicial notice of meaning of letters "L.S.," p. 37.

of meaning of letters "N.P.," p. 37.

of seal of, p. 951.

opinion of notary taking acknowledgment as to grantor's sanity, p. 677.

presumption of authority to administer oath, p. 853.

NOTICE,

anonymous letter as, p. 823.

authentication, p. 851.

information from stranger as, p. 823.

lis pendens as, p. 852.

of revocation of agency, p. 218.

reason for disregarding notice by one charged with bad faith, p. 569.

record and index as, p. 851.

to charge with fraud, p. 840.

Notice to agent.

in general, p. 841.

agent with conflicting duties, p. 850.

knowledge not acquired in principal's business, p. 842.

knowledge acquired prior to agency, p. 843n.

notice to officers of corporation, p. 848.

notice to subagent, p. 850.

where agent is personally interested or is perpetrating a fraud, p. 845.

Possession as notice.

general rules as to effect of possession, p. 824.

application of rules to easements, p. 839.

effect of statutes requiring actual notice as an equivalent of registration, p. 826.

estoppel of possessor to assert claim, p. 839.

family relations generally as affecting possession, p. 838.

grantor's possession after conveyance, p. 834.

mortgagee or lienor in possession, p. 835.

of what possession is notice, p. 828.

possession by *cestui que trust*, p. 835.

possession by cotenants, p. 836.

possession by husband and wife, p. 836.

possession by tenant, p. 831.

possession by vendee under unrecorded deed, p. 833.

possession under contract of purchase, p. 832.

NOTICE—(continued).

requisites and sufficiency of possession, p. 829.

rules as to scope of the inquiry, p. 827.

NUISANCE,

evidence of other cases of sickness caused by, p. 351.

O**OATH,**

of officer, p. 853.

of witness whose testimony is offered in subsequent proceedings, p. 979.

presumption of authority to administer, p. 853.

to document or instrument, p. 853.

OBJECTION,

proof of waiver of, p. 1015.

OBSTRUCTION,

of highway, as evidence of abandonment, p. 12.

of way, as evidence of loss or abandonment, p. 17.

OCCUPANCY,

of building as acceptance, p. 63.

ODOR,

opinion as to, p. 865.

OFFERS,

to buy or sell as evidence of value, p. 1006.

OFFICERS,

admissibility against, of reports of subordinates, p. 857.

admissibility of official records or registers in evidence, p. 860.

customs of, p. 819.

declarations of members of public board as proof of official acts, p. 860.

judicial notice of official acts, see Judicial Notice.

oath of office, p. 853.

presumption of absence of, at certain time, p. 48.

of performance of duty by, p. 855.

that meeting was regularly called, p. 856.

that person acting in official capacity was duly appointed, p. 857.

recitals in official instrument as evidence of official character, p. 858.

reports of subordinates, as evidence, p. 857.

seals of, see Seals.

OIL,

presumption of intent to create monopoly, p. 700.

OPERATION,

evidence as to effects of, pp. 516, et seq.

OPINIONS AND CONCLUSIONS,

see also Direct Testimony.

as to abandonment of contract, p. 4.

as to ability.

acts which person is able or unable to do, p. 41.

degree of physical and mental ability, p. 42.

questioning witness as to his own ability, p. 44.

testimony of one injured that he was unable to work because of injury as a conclusion, p. 44.

as to acceptance of contract, p. 424.

as to acceptance of goods delivered, p. 62.

as to accuracy of party keeping accounts, p. 109.

as to adverse nature of possession, p. 178.

as to age, pp. 185, 187, 188.

age of document, p. 189.

as to alterations in instrument, p. 231.

as to assent, p. 256.

as to bloodstains, p. 271.

as to boundary, p. 280.

as to breed, p. 286.

as to capacity of machine or structure, p. 291.

as to care or prudence, pp. 295, 297, 302.

care in making measurement, p. 782.

what might have been done, pp. 301, 919.

whether injury might have been avoided, p. 302.

whether, if witness had been driving, accident would have happened, p. 71.

as to cause of casualty, pp. 337, 347.

of bloody spots on fence rail, p. 348.

of break in buggy wheel, p. 348.

of change in stream's channel, p. 348.

of damage to cotton, p. 348.

of defect in machine or structure, p. 337.

of depression in earth, p. 348.

of disease, p. 348.

of failure of street car to stop, p. 348.

of fall of building, pp. 348, 864.

of fall of woman, p. 348.

of fright of horse, p. 348.

of horse running away, p. 348.

of overflow of river, p. 348.

of physical condition, p. 348.

OPINIONS AND CONCLUSIONS—(*continued*).

- of slipping of rock strata. pp. 348, 864.
- of suicide, p. 346.
- of wreck of train, pp. 348, 864.
- as to color, p. 865.
- as to competency and skill, p. 371.
- as to condition of places and things, p. 397.
- as to construction of structure, p. 418.
- as to cubic contents of bank of earth, p. 782.
- as to credit, to which of two persons given, p. 456.
- as to delivery of instrument or property, p. 481.
- as to dimensions, p. 864.
- as to directions, p. 864.
- as to distance, p. 864.
- as to distance at which object is visible, p. 985.
 - within which sparks from engine will set fire, p. 988.
 - within which train may be stopped, p. 986.
- as to feelings, p. 531.
- as to feigning pain, p. 535.
- as to financial condition, pp. 685, 865.
- as to force, p. 864.
- as to future suffering, p. 866.
- as to genuineness of expressions of pain, p. 535.
- as to genuineness of mark, p. 769.
- as to good faith, p. 564.
- as to grade and elevation, p. 864.
- as to habits, p. 714.
- as to handwriting, see Handwriting.
- as to health and disease, pp. 619, 620.
- as to hearing of sounds, p. 622.
- as to identity of person or thing, pp. 265, 625, 865.
 - identifying from voice, p. 626.
 - uncertainty, p. 626.
- as to insanity, pp. 659, et seq.
- as to intent generally, see Intent.
 - intent to make gift, p. 559.
 - to abandon homestead, p. 25.
 - to remove from state, p. 49.
 - whether instrument intended to be deed or mortgage, p. 478.
- as to intoxicating character of drink, p. 264.
- as to intoxication, p. 714.
- as to knowledge, p. 737.
- as to libel and slander, p. 866.
- as to light, p. 864.
- as to location, p. 864.

ABB. FACTS—71.

OPINIONS AND CONCLUSIONS—(*continued*).

- as to malice, p. 761.
- as to measurement necessary to be made under contract, p. 782.
- as to mental incapacity, pp. 659 et seq.
- as to motive or purpose, p. 799.
- as to necessities, p. 815.
- as to necessity of jettison, p. 815.
 - of safety switch on railroad, p. 816n.
 - of straightening road, p. 816n.
- as to number of acres in a fractional quarter section, p. 782.
- as to number of cubic feet in a wall, p. 782.
- as to odor, p. 865.
- as to mental state as indicated by appearance of person or animal, p. 865.
- as to nature of sound, p. 865.
- as to number, p. 864.
- as to performance of agreement, p. 902.
- as to performance of duty, p. 902.
- as to place and thing, p. 397.
- as to position of object or person, pp. 345, 864, 915.
- as to possession of lands or chattels, p. 916.
- as to pregnancy, p. 921.
- as to quality, p. 930.
- as to quantity, pp. 782, 864, 932.
- as to resemblance to persons, animals or inanimate objects, p. 865.
- as to results of autopsy, p. 262.
- as to sanity, pp. 659 et seq.
- as to scope of agent's powers, p. 202.
- as to scope of duty, p. 499.
- as to scope of particular trade, p. 289.
- as to speed, pp. 864, 957.
- as to strength, p. 864.
- as to temperature, p. 864.
- as to temperate or intemperate habits, p. 714.
- as to time necessary for specified work, p. 988.
 - to cover specified distance, p. 988.
 - to stop train, p. 986.
 - to get off train, p. 987.
- as to time generally, p. 864.
- as to time spent, p. 985.
- as to time when entries in account book were made, p. 107.
- as to tracks, marks and impressions, p. 865.
- as to usage or custom, p. 999.
- as to value of coin, p. 1012.
- as to value of property or services, pp. 1007 et seq.

OPINIONS AND CONCLUSIONS—(continued).

as to weight, p. 864.

as to what is necessary under contract, p. 815.

as to what parties agreed to, p. 426.

as to what would have been or happened under certain circumstances, p. 346.

as to whether act of another was accidental or done on purpose, p. 70.

as to whether blood was human or animal, p. 271.

as to whether person may have heard conversation, p. 622.

as to whether treatment was kindly, p. 996.

comparison of weather with usual weather of certain season, p. 1016.

Opinion of nonexperts.

on nontechnical subject, p. 861.

in general, p. 861.

ability of person to do thing, p. 863.

animal conduct, p. 863.

area of land, p. 864.

capacity of bridge, p. 864.

capacity of irrigation ditch, p. 864.

description of objects, p. 862.

estimates, p. 863.

habits of conduct, p. 863.

human conduct, p. 862.

mental state, p. 865.

possibility of thing being done, p. 863.

Opinion of experts.

critical opinion of other testimony incompetent, p. 874.

distinction between opinion and observation with judgment, p. 866.

direct testimony, p. 870.

explanation by expert of entries in account books, p. 108.

impugning expert's examination, on which opinion is based, p. 876.

on what questions expert testimony competent generally, p. 869.

party as expert, p. 869.

qualification of expert generally, p. 868.

qualifying statement of fact by words "I would judge," "I think," p. 239.

understanding of witness as to meaning of signs, p. 829.

weight and conclusiveness of expert's opinion, p. 877.

Examination and cross-examination of witness.

basis of facts assumed in question, pp. 872, 873.

cross-examination, p. 875.

doubt, questioning as to, p. 875.

doubtful facts, p. 873.

facts without evidence, p. 873.

form of question to witness, pp. 300, 344.

questions preliminary to opinion, p. 867.

OPINIONS AND CONCLUSIONS—(*continued*).

- reason for opinion, calling for an examination in chief, p. 875.
- reducing hypothetical question to writing, p. 874.

ORDER OF COURT,

- best and secondary evidence, p. 880.
- conclusiveness of recitals in, p. 880.
- copy as proof of, p. 879.
- date and term, presumption as to, p. 881.
- entry for purpose of proving, p. 881.
- ground of, presumption as to, p. 882.
- impeaching, p. 882.
- informal order, p. 880.
- jurisdictional facts, recital of, p. 881.
- order in special proceeding, admissibility, p. 879.
- substituting third person in place of original party, p. 948.
- what is a court order, p. 881.

ORDINANCES,

- judicial notice, p. 882.
- mode of proving, p. 882.
- parol evidence, p. 883.

ORIGINAL SALES SLIPS,

- admissibility, p. 90.

OWNERSHIP,

- see also Title.
- continuance, presumption of, p. 889.
- direct testimony, p. 883.
- entries in account, p. 887.
- hearsay, p. 886.
- marks, signs, brands, etc., p. 886.
- possession, pp. 884, 991.
 - of written instrument, p. 884.
- presumption of, pp. 884, 888, 991.
 - of continuance of, p. 889.
- source of ownership, p. 888.
- producing document, p. 888.

P

PALM PRINTS,

- see also Finger Prints and Foot Prints.
- evidence, p. 541.
- experts, p. 541.
- photographs, p. 542.

PARENT AND CHILD,

- authority of son to sign father's name to note, p. 205n.
- child as agent of parent, pp. 205n, 207.
- domicil of minor child, presumption as to, p. 496.
- gift from parent to child, presumption as to validity, p. 561.
- inspection of child on issue of paternity, p. 891.
- residence of children with parent as notice of their rights in the property, p. 838.
- use of photograph of putative father on issue of paternity, p. 905.

PARKS,

- acceptance of land dedicated for, p. 65.

PAROL AND EXTRINSIC EVIDENCE,

- as to abandonment of contract, p. 3.
- as to acknowledgment, p. 126.
- as to award, pp. 250, 251.
- as to assignment of debt, p. 258.
- as to boundary, p. 279.
- as to collateral agreement, p. 379.
 - as to application of payment, p. 247.
 - to vary written acceptance, p. 61.
- as to consideration, pp. 412, 415, 416.
- as to date of execution of instrument, p. 463.
- as to date of presentation of instrument for record, p. 539n.
- as to delivery of deed, p. 485.
- as to demand, p. 490.
- as to filing of chattel mortgage, p. 539n.
- as to false or fraudulent representations, p. 641.
- as to foreign law, p. 546.
- as to identity of person, land, or document, pp. 243, 633, 704, 705.
- as to legality or illegality, p. 636.
- as to length in which wood purchased was to be cut, p. 782.
- as to marketableness of title, p. 995.
- as to mistake, p. 794.
- as to mode of measuring logs, p. 782.
- as to rate of interest, p. 712.
- as to result of examination of voluminous books, records, etc., p. 245.
- as to suretyship, p. 961.
- as to taking of oath of office, p. 853.
 - time of taking, p. 854.
- as to usage, pp. 61, 240, 996, et seq.
- as to waiver, p. 1013.
- conversation with bearer of written demand, p. 490.
- in case of fraud, p. 381.
- of admission of execution of writing, p. 136.

PAROL AND EXTRINSIC EVIDENCE—(*continued*).

- of admission of having performed act for validity of which statute prescribes writing, p. 136.
- of dying declarations, p. 511.
- supplying words in instrument lost by mutilation, p. 233.
- that logs were to be scaled by scaler assigned by one of the parties, p. 782.
- to contradict minutes of society as to suspension of member, p. 789.
- to contradict, vary or explain receipt, p. 901.
- to correct misnomer, p. 792.
- to identify grantee in deed blank as to grantee, p. 632.
- to modify indorsement of bill or note, pp. 638, et seq.
- to show agreement as to who was bound by contract, p. 381.
- to show express warranty under uniform Sales Act, p. 381.
- to show immateriality of alteration in instrument, pp. 232, 233.
- to show official approval of instrument required by statute, p. 248.
- to show ratification by corporation of contract made by officers, p. 217.
- to show taking of necessary oath to document, p. 853.
- to show writing was intended as sham, p. 703.
- to show that acceptance of a draft was refused, p. 61.
- to show that acceptance of bill of exchange was stipulated not to waive counterclaims, p. 61.
- to show who were members of partnership at certain time, p. 789.
- to supply defects in title, p. 994.
- to vary copy of instrument offered in evidence, p. 444.
- to vary terms in contract implied by law, p. 433.
- to vary written receipt that property was received in satisfaction of claim, p. 72.

Condition.

- condition attached to acceptance absolute on its face, p. 61.
- condition attached to delivery of deed absolute on its face, p. 488.
- condition attached to delivery of unsealed instrument, p. 486.
- to show that signer of obligation signed on condition that others should also sign, p. 257.

Meaning; intention; explanation.

- see also Intent.
- ambiguous instruments, p. 632.
- creating ambiguity by extrinsic evidence, p. 241.
- abbreviations, pp. 38 et seq.
- blank, filing, p. 236.
- illegible word or character, p. 236.
- identity of document, p. 243.
 - of land described, pp. 243, 704, 705, 922.
 - of person, pp. 243, 704.
 - of property assigned, p. 260.

PAROL AND EXTRINSIC EVIDENCE—(continued).

- insurance contracts, p. 214.
- intent to vary or interpret written instrument, pp. 691, 701.
 - intent and meaning of entries in account books, p. 107.
 - as to merger of contract or title, p. 790.
 - of testator, pp. 204 et seq.
 - to show that deed absolute in form was intended as a mortgage, p. 476.
 - to show that written assignment was made as collateral security, p. 262.
 - to show that writing on draft was intended as acceptance, p. 61.
 - to show what assets were intended to pass by assignment or bill of sale, p. 261.
 - to explain ambiguity arising from insufficient description of person or corporation, or from change of name, p. 809.
- latent ambiguity, p. 237.
- patent ambiguity, p. 237.
- practical construction, p. 240.
- signature, explaining, p. 955.
- surrounding circumstances, p. 238.
- symbols, p. 235.
- technical meaning of word, p. 242.
- usage, pp. 240, 997.
- wills, p. 704.

PARTIAL PERFORMANCE,

- recovery for on abandonment of contract, p. 5.

PARTIES,

- order of substitution as prima facie evidence of death, p. 472.

PARTITION,

- burden of proving alienage of interested persons, p. 811.

PARTNERSHIP,

- entries in books of firm as evidence against or in favor of member, p. 113.
- entries in partnership books by absent or deceased partner, p. 84.
- effect of county clerk's failure to record partnership certificate left for record, p. 852.
- presumption of partner's knowledge of entries in books, p. 743.
- proof against one person of declarations by another to show partnership, p. 159.

PART PAYMENT,

- of liquidated indebtedness as accord and satisfaction, p. 73.

PASS BOOKS,

admissibility in evidence, p. 111.

PASSPORT,

admissibility in evidence on question of citizenship, p. 376.

PASTEURIZING MILK,

judicial notice of best method, p. 720.

PATENTS AND TRADEMARKS,*Abandonment.*

burden of proof, p. 31.

declarations, p. 32.

delay, p. 32.

presumptions, p. 31.

PATERNITY,

evidence of resemblance to putative father, p. 893.

inspection of child on issue, p. 891.

photograph of putative father on issue of, p. 905.

presumption of legitimacy of child born in lawful wedlock, p. 889.

PAYMENT,

acceptance of promissory note as, p. 55.

application of, see Application of Payments.

as raising presumption of surrender of obligation, p. 963.

authority of agent to receive, pp. 213, 214.

burden of proof, p. 896.

entry in bank books, p. 806.

oral evidence to vary receipt, p. 901.

receipts, p. 894.

Presumption.

from lapse of time, p. 898.

from possession of instrument, p. 897.

PECUNIARY CONDITION,

see Insolvency, Solvency, and Financial Condition.

PEDIGREE,

declarations as to, admissibility, p. 170.

PERFORMANCE,

opinion evidence as to, p. 902.

PERJURY,

evidence as to character in action for attempted subornation of witnesses, p. 367.

party's attempt to suborn false testimony as admission that he has bad case, p. 263.

PERSONAL INJURIES,

- see also Accident; Negligence.
- cause of, generally, see Cause.
- character evidence in action for, p. 367.
- compulsory physical examination, pp. 393, 394.
- condition in life, number of children, etc., p. 384.
- conditions at other time or place, p. 400.
- contributory negligence of injured person, p. 44.
- declarations of pain or suffering, pp. 533 et seq.
- earning capacity of plaintiff or deceased, pp. 386, 387.
- effects of, pp. 516 et seq.
- exhibition of person to jury, p. 393.
- experiments in court in action for, p. 43.
- feelings, see Feelings.
- financial condition of plaintiff or defendant, p. 386.
- habits of plaintiff, p. 573n.
- inability to work after accident, p. 44.
- inspection in court of article causing, p. 404.
- natural manifestations of suffering, p. 533.
- opinion evidence as to cause of, pp. 338, 340, 341, 348.
- as to contributory negligence, p. 44.
 - as to position of person at time of injury, p. 915.
- other injuries, p. 350.
- photographs, p. 905.
- speed of train or vehicle; see Speed.
- statements made in presence of injured party, p. 167.
- verdict of coroner's jury, p. 70.

PERSONAL PROPERTY,

- intent to abandon presumption of, p. 33.
- ownership, see Ownership.
- possession of, see Possession.
- value of, see Value.

PETITION,

- presumption and burden of proof as to genuineness of, p. 559.

PHONOGRAPHS,

- operation of, before jury, p. 902.

PHOTOGRAPHS,

- admissibility generally, p. 903.
- as substitute for original writing in comparison of handwriting, p. 603.
- copy of photograph, p. 904.
- correctness, p. 907.
- effect and conclusiveness, p. 908.
- judicial notice, p. 903.

PHOTOGRAPHS—*(continued)*.

- of accounts and papers, p. 106.
- of documents or instruments, pp. 444, 906.
- of finger prints, p. 541.
- of persons generally, p. 904.
- of places or things, p. 406.
- on question of identity, p. 627.
- on question of testamentary capacity, p. 681.
- photographs as secondary evidence, p. 908.
- to show physical condition, p. 391.
- use of photographic copies of disputed writings for purpose of comparison, p. 612.
- x-ray photographs, p. 909.
- reconstructed, p. 806.

PHYSICAL APPEARANCE,

- as proof of infancy, p. 643.

PHYSICAL CHARACTERISTICS,

- proof of, on question of identity, p. 628n.

PHYSICAL CONDITION,

- evidence as to feelings, *see* Feelings.
- direct testimony, p. 392.
- inspection, pp. 393, 394.
- of person making dying declarations, p. 507.
- photographs, p. 391.

PHYSICAL EXAMINATION,

- compulsory exhibition or examination of person, pp. 393, 394.
- of child on issue of pregnancy, p. 891.
- on issue of pregnancy, p. 921.

PHYSICIANS AND SURGEONS,

- admissibility of account books in evidence, p. 104.
- burden of proof in action for malpractice, p. 309.
- declarations by injured person to physician examining him, p. 154.
- experiment in court in action for malpractice, p. 43n.
- opinion of, as to sanity, *see* Insanity.
- presumption of consent to operation, p. 409.
- privileged communications to, pp. 660, 928.
- testimony of, as to manifestations of pain by injured person, *see* Feelings.
- testimony of, as to effect of injury or operation, pp. 516 et seq.

PIERS,

- evidence as to condition at other time, p. 401n.
- presumption as to condition of, years before accident, p. 401n.

PILOT,

opinion as to negligence in towing, p. 296n.

PLACE,

evidence as to condition of, pp. 397 et seq.

inferring from proximity, p. 910.

of tender, p. 973.

PLAN,

admissibility in evidence, pp. 407, 903.

PLATS,

admissibility in evidence generally, pp. 407, 903.

admissibility on question of boundaries, p. 276.

presumption of acceptance of highway from proof of execution of plat,
p. 60.

unrecorded plat as evidence of abandonment of homestead, p. 28n.

PLEADING,

admissions in, see *Admissions and Declarations*.

amending pleading to meet proof, p. 963.

evidence admissible under, see *Evidence*.

necessity of alleging order of court substituting party, p. 948.

presumption that complaint was filed prior to entry of judgment, p.
539n.

variance between pleading and proof, see *Evidence*.

Denials,

explanation of, p. 529.

form of, p. 491.

general denial, pp. 480, 491.

specific denial, p. 493.

Admissibility in evidence.

admissions against interest, p. 913.

containing self serving declarations.

general rule, p. 910.

parties for whom admissible, p. 912.

weight and conclusiveness, p. 912.

purpose.

impeachment, p. 913.

to prove nature of issue and claims of parties, p. 914.

miscellaneous purposes, p. 914.

PLEDGE AND COLLATERAL SECURITY,

assignment of principal obligation as implying assignment of col-
lateral, or *vice versa*, p. 260.

parol evidence to show that written assignment was intended as, p. 262.

presumption of abandonment of collateral security by pledgeor, p. 34n.

POLICE,

- acquiescence by police captain in removal from office, p. 130.
- judicial notice of duties, p. 719.

POLITICAL MATTERS,

- judicial notice as to, p. 731.

POLITICAL PARTIES,

- burden of proving that election officer is not member of, p. 787.
- judicial notice of custom and usages of, p. 731.

POPULATION,

- judicial notice as to, p. 719.

POSITION,

- direct testimony as to position of object, p. 915.
- opinion as to position of body when blow was struck, p. 345

POSITIVENESS,

- of testimony of witness to handwriting, p. 585.

POSSESSION,

- as evidence of ownership, p. 884.
- as notice of right or title, pp. 824 et seq.
- continuance, presumption of, p. 918.
- direct testimony as to, p. 916.
- judgment as to, competency against third person, p. 917.
- payment of license fee or tax as evidence of, p. 917.
- surrender of, p. 963.

Presumptions.

- of continuance of possession, p. 918.
- of good faith of transfer to possessor, p. 569.
- of grant from possession, pp. 570, 571.
- of payment from possession of instrument, p. 897.
- of possession from evidence of title, p. 916.
- of title from possession, pp. 570, 571, 991.

POSSIBILITY,

- see also Care; Cause.
- evidence as to what might have been done, pp. 301, 919.

POSTAL MONEY ORDER,

- procured in fictitious name, p. 538n.

POSTMARK,

- conclusiveness of date on, p. 464n.

POSTOFFICE,

as to mailing and receipt of letters and their admissibility in evidence,
see Letters.

best evidence as to date of establishment of office, p. 760.

judicial notice of time taken by mails between principal cities, p. 757.

postal money order procured in fictitious name, p. 538n.

proof of handwriting on trial for depositing scurrilous postal cards
in the mail, p. 617.

POWER,

as to horse power, see Horse Power.

POWER OF ATTORNEY,

executed by married woman, admissibility in evidence, p. 125.

PRECAUTIONS,

evidence of, pp. 305, 306.

• PREGNANCY,

inspection, p. 921.

judicial notice as to possibility of, p. 920.

opinion, p. 921.

presumption as to incapacity, p. 921.

PREMATURE BIRTH,

see Birth.

PRESENCE,

constructive presence of accused, p. 923.

presumption of, p. 923.

PRÉSIDENT,

judicial notice of proclamations and messages by, p. 855n.

PRESUMPTIONS,

accounting, p. 120.

account, rendering of, p. 111.

time of entry in, p. 107.

acknowledgment as presumptive evidence that instrument was duly
executed, p. 123.

abandonment of rights, p. 33.

of homestead, pp. 24, 25.

of invention, pp. 31, 32.

of mill privilege, p. 24.

of mining rights, p. 34.

of patent or trademark, p. 31.

of water rights and easements of drainage, p. 19.

absence of persons, p. 48.

PRESUMPTIONS—(*continued*).

acceptance of beneficial instrument or grant, pp. 56, 58.

of bill of exchange, p. 59.

of gift, p. 563.

of goods for transportation by carrier, p. 59.

of highways, p. 60.

of land patent, p. 64.

accident, p. 68.

accord and satisfaction, pp. 72, 73.

acquiescence in account stated, pp. 115 et seq.

adultery, p. 172.

adverse possession, p. 176.

age, p. 182.

agency, pp. 199, 200, 209, 210.

alteration of instrument, p. 221.

approval of instrument by person or corporation, p. 249.

assent to contents of instrument, pp. 253, 255, 256.

authority of agent of insured to abandon policy, p. 30.

authority to administer oath, p. 853.

award, p. 249.

bias of witness, p. 266.

boundaries, p. 275.

burden of proof, see Burden of Proof.

cause of death, p. 69.

change of domicil, p. 6.

child's capacity to appreciate danger, p. 293.

citizenship, p. 375.

compromise, p. 383.

consent, pp. 253, 256, 408.

consideration, pp. 410, 415.

continuance of absence from state, p. 47.

of agency, p. 210.

of defective condition, p. 352.

of domicil, pp. 6, 496.

of habit, p. 574.

of insanity, p. 654.

of life, pp. 406, 469, 470.

of lucid interval, p. 658.

of membership, p. 787.

of ownership, p. 889.

of possession, p. 918.

of relation of employer and employee, p. 524.

of residence, p. 947.

contributory negligence, p. 332.

correctness of declarations of age, p. 182.

credit, p. 455.

PRESUMPTIONS—(*continued*).

- date of delivery of instrument, p. 488.
 - of instrument or document, p. 463.
 - of term of order of court, p. 881.
- death, pp. 466, 473.
 - cause of, p. 69.
- delivery of instrument, p. 482.
 - of telegram, p. 968.
 - of written contract or deed, p. 424.
- domicil, pp. 6, 496.
- effect of presumption that defective condition continued to let in evidence of other subsequent injuries, p. 351.
- employment, p. 521.
- foreign law, p. 544.
- fraud, pp. 424, 425, 559.
- from absence of evidence that person did or did not die childless, p. 269.
- genuineness of acknowledged instrument, p. 559.
- genuineness of writing on proof of signature and delivery, p. 227.
- gift, validity, p. 560.
 - acceptance of, p. 563.
- good character, p. 365.
- good faith, pp. 565 et seq.
- grant, pp. 176, 570, 571.
 - from possession and use, p. 571.
- gratuitous character of services rendered by relative, pp. 522 et seq.
- ground for order of court, p. 882.
- identity, from identity of name, p. 630.
- in favor of award, p. 249.
- innocence, p. 817.
- insanity, pp. 645, 654.
- intent as to consequences of act, p. 698.
 - of testator, p. 699.
 - that payment shall apply on earlier of several debts, p. 247.
 - to abandon family, p. 29.
 - to abandon life insurance policy, p. 30.
 - to abandon railway easement, p. 13.
 - to create monopoly, p. 700.
 - to evade law, p. 699.
- intoxication of testator at time of executing will, p. 716.
- knowledge of common fact, p. 739.
 - of contents of instrument or contract, pp. 256, 423, 424, 740, 741.
 - of corporation or its officers, p. 739.
 - of facts by person making new promise, p. 821.
 - of law, p. 744.

PRESUMPTIONS—(*continued*).

- of newspaper contents, p. 743.
- of one dealing with corporation, p. 740.
- of one ousted from possession, p. 176.
- of servant, of danger, p. 740.
- of usage, p. 1000.
- malice, p. 763 et seq.
- marriage, p. 775.
- meaning of words in contract, p. 424.
- membership in association or corporation, p. 786.
- merger, p. 789.
- naturalization, p. 811.
- navigability of stream, p. 813.
- necessity for condemning land, p. 815.
- negligence, p. 308.
- noncapacity to bear children, p. 801.
- ownership, pp. 884, 888.
- payment, p. 896.
- performance of duty by officer, p. 855.
- place of occurrence from proximity, p. 910.
- possession from evidence of title, p. 916.
- ratification, p. 935.
- rebuttal of presumption that party receiving instrument assented to its terms, p. 255.
- regularity in performance of bank business, p. 940.
- rendering of account, p. 111.
- repeal of law from existence of usage, p. 547.
- residence, p. 945.
- solvency or insolvency, p. 688.
- suicide or accident, p. 69.
- survivorship, p. 964.
- tax deed as prima facie evidence of regularity of proceedings, p. 125.
- that complaint was filed prior to entry of judgment, p. 538n.
- that corporate seal was affixed by proper authority, p. 953.
- that deed absolute in form is a conveyance and not a mortgage, p. 471.
- that fugitive has gone out of state to remain, p. 946.
- that letter properly mailed reached destination, p. 758.
- that limitation of municipal indebtedness has not been exceeded, p. 637.
- that meeting of board of officers was regularly called, p. 856.
- that one abandoning possession, held in subordination to title of true owner, p. 34.
- that parties contracted with reference to law, p. 423.
- that person acting in official capacity was duly appointed, p. 851.
- that person enjoys normal condition of mind and body, p. 41.
- that seal was affixed to instrument, p. 952n.

PRESUMPTIONS—(continued).

- that things in action are worth their face value, p. 1011.
- that two newspapers were printed by same person, p. 924.
- that wife adopted seal opposite signature of husband, p. 952n.
- time of alteration of instrument, p. 221.
- time of entries in account books, p. 107.
- of title from possession, pp. 570, 571, 991.
- validity of gift, p. 560.
- vessel at sea belonging to a nation whose law is different from ours,
p. 810.
- what included in compromise, p. 383.

PRINCIPAL AND AGENT,

see Agency.

PRINCIPAL AND SURETY,

- parol evidence as to obligation which sureties intended to assume,
p. 702n.
- of independent agreement between sureties and obligees of bond,
p. 380n.
- that sureties did not intend to deliver bond without principal's
signature, p. 702n.

PRINTING,

- of newspaper, see Newspapers.
- judicial notice of printers' abbreviations, p. 822.

PRIOR APPROPRIATION,

- loss or abandonment of right to, p. 20.

PRIVILEGE,

- against self incrimination, p. 924.
- refusal to testify on grounds other than self incrimination, p. 926.

PRIVILEGED COMMUNICATIONS,

- see Confidential Communications.

PROBABLE CAUSE,

- see Malice.

PROBATE,

- of will, see Wills.

PROCLAMATIONS,

- judicial notice of, pp. 726n, 729, 855.

PROPRIETORSHIP,

- evidence to show, p. 290.

ABB. FACTS—72.

PRUDENCE,

see Care.

PUBLIC GRANT,

presumption of acceptance of, p. 58.

PUBLIC LANDS,

acceptance of land patent, p. 64.

filing of lease of lands selected by state as indemnity for loss of school lands, p. 539n.

judicial notice of orders and regulations of land department, p. 855n.

recitals in letter from United States land commissioner as evidence against third person, p. 858n.

PURPOSE,

see Motive and Purpose.

Q**QUALITY,**

comparison; reference to other specimen, p. 931.

direct question, p. 930.

inspection in court, p. 931.

opinion evidence as to quality of work, p. 420.

QUANTITY,

comparison, p. 932.

direct testimony, p. 932.

recount to show mistake in count, p. 932.

R**RAILROADS,**

admissibility in evidence of entries in records as to time of passing of train, p. 990.

burden of proof as to necessity of removal of track, p. 814.

expert testimony as to proper construction of, pp. 366n, 419n, 421n.

judicial notice as to business of, pp. 287, 718.

as to acceptance by, of provisions of statute, p. 55.

of Federal control, p. 718.

that certain railroad runs through given county, p. 731.

presumptition as to necessity of condemning land for, p. 815.

presumptions in action to compel change of track, p. 815.

presumption of acceptance of rights under joint resolution of Congress, p. 59n.

Abandonment of right of way.

inference of intent, p. 13.

materiality of evidence, p. 13.

RAILROADS—(continued).

mode of proof, p. 13.

weight of facts, p. 13.

Personal injuries.

burden of proof in action for, p. 309n.

care in flagging trains, p. 298n.

cause of derailment pp. 331 et seq.

condition of track at other place, p. 402n.

contributory negligence, opinion as to, pp. 296n, 301n.

distance at which objects on track could be seen, p. 986.

how far rear lights of train can be seen, p. 986.

measurements of switch taken after accident, p. 783.

negligence as to turntables, p. 306n.

position of person at time of injury, p. 915n.

presumption of negligence, p. 313n.

from fall of door from moving train, p. 314n.

statute making injury prima facie proof of negligence, p. 324.

speed of trains or hand cars, p. 957.

time or distance within which train can be stopped, p. 986.

what engineer might have done, p. 301.

Injuries to animals.

admissibility of evidence for purpose of corroboration, p. 450n.

expert testimony as to condition of fence, p. 399.

presumption of negligence from happening of injury, pp. 314n, 315n.

statute making failure to fence prima facie evidence of negligence,
p. 325.

statute making injury prima facie proof of negligence, p. 325.

Fires.

evidence as to distance within which sparks from engine will set fire,
p. 988.

judicial notice as to necessity of spark arrester, p. 814.

opinion as to sufficiency of spark arrester, p. 420n.

other fires set by defendant's engines, p. 305.

presumption of negligence from setting of fire, p. 314n.

statute making occurrence of fire prima facie evidence of negli-
gence, p. 325.

Diversion of water.

opinion as to proper construction of embankment, p. 419n.

opinion as to whether embankment caused overflow of water, p. 338n.

RAPE,

opinion evidence as to probability of pregnancy, p. 921n.

RATIFICATION,

admissibility of evidence of ratification under allegation of authority,
p. 933.

RATIFICATION—(continued).

- executory contract, p. 934.
- express ratification, p. 215.
- how proved, generally, pp. 215, 934.
- knowledge of facts, p. 934.
- knowledge of legal effect of facts, p. 935.
- parol evidence of ratification of contract under seal, p. 217.
- presumption of ratification generally, pp. 215, 935.
- right of one who dealt with notice of agent's lack of authority to show ratification, p. 217.
- silent acquiescence, pp. 215, 935.
- slight evidence sufficient where agency exists, p. 935.
- what may be ratified, p. 936.

REAL PROPERTY,

- abandonment of, see Abandonment.
- abstracts of title, see Abstracts.
- deeds, see Deeds.
- devise of, see Wills.
- direct testimony as to claim in, p. 377.
- easements in, see Easements.
- fixtures, see Fixtures.
- intent of testator to charge with payment of legacies, p. 707.
- ownership, see Ownership.
- possession of, see Possession.
- title, see Title.
- value of, see Value.

REASON,

- right to prove reason for act, p. 936.

REASONABLENESS,

- as question for court or jury, p. 937.

REBUTTAL,

- the right, generally, p. 938.
- admissibility of evidence in, under pleadings, p. 939.
- anticipatory rebuttal, p. 939.
- cumulative testimony in rebuttal, p. 939.
- of evidence as to intent, p. 711.
- of evidence as to identity, p. 634.
- of presumption of credit, p. 459.
- of presumption of knowledge of contents of instrument, p. 141n.
- of presumption of receipt of letter, p. 758.

RECEIPT,

- as proof of payments, p. 894.
- oral evidence to vary, p. 901.

RECEIVERS,

consent to appointment of, as abandonment of contract, p. 4n.
proof of authority of, to sue, p. 746.

RECORDS,

abstracts made from destroyed records, p. 52.
church record, pp. 270, 465.
copy of filed or recorded instrument, p. 439.
date of filing, p. 464.
explaining alterations in official record, p. 234.
extracts from, pp. 52, 54.
failure of clerk to record certificate left for that purpose as impairing
its effect as notice, p. 852.
judicial notice of contents of judicial record, p. 729.
mode of proving filing or nonfiling, p. 539.
necessity of recording cattle brand to make it evidence of ownership,
p. 886.
omission of seal from record, p. 953.
possession as notice of rights under unrecorded deed, pp. 824 et seq.
presumption and burden of proof as to good faith of purchaser claiming
under prior unrecorded conveyance or encumbrance, pp. 565
et seq.
presumption of delivery from fact that deed was recorded, p. 483.
proof of age by, p. 182.
proof of date by, p. 460.
proof of death by, pp. 465, 474.
proof of delivery of instrument by, p. 482.
proof of lack of entry in, p. 819.
proof of seal by, p. 953.
record and index as notice, p. 851.
records in ordinary course of business, p. 990.
record of unacknowledged deed, p. 123.

RECOUNT,

to show mistake in count, p. 932.

REFERENCE,

right of referee to compare handwriting with standards of comparison,
p. 611.
use by referee of magnifying glass to determine genuineness of hand-
writing, p. 616.

REFORMATORY,

evidence to show motive for detention of person in, p. 805.

REFRESHING MEMORY,

see Witnesses.

REFUSAL,

see Demand and Refusal.

REGISTERS,

see Records.

REGULARITY,

of bank business, p. 940.

RELATIONSHIP,

presumption of agency from, pp. 208 et seq.

RELATIVES,

implied contract to pay for services of, pp. 423, 522.

RELEASE,

mental capacity to give, p. 647.

oral evidence of lack of consideration, p. 410n.

as to intent of parties, p. 703n.

presumption of consideration from seal, p. 410.

RELIGIOUS SOCIETIES,

judicial notice as to, pp. 718, 786.

REMEDY,

election, see Election of Right or Remedy.

REMONSTRANCE,

against desertion, p. 494.

REPAIRS,

as proof of acceptance of highway, p. 65.

REPAIRS AFTER INJURY,

as proof of cause, p. 358.

REPEAL,

of law by custom, p. 547.

REPLEVIN,

evidence admissible under pleading, p. 431n.

evidence as to character, pp. 365, 366.

presumption of defendant's receipt of written demands by plaintiff,
p. 760n.

REPORTS,

by agent or employee to employer as evidence, p. 168.

evidence of extracts from, p. 53.

REPUTATION,

- admissibility of general reputation to show knowledge of fact, p. 745.
- as to agency, p. 191.
 - revocation of, p. 218.
- as to absence from state, p. 45.
- as to boundaries, p. 281.
- as to care and skill, p. 372.
- as to character, pp. 365, 368, 452.
- as to death, p. 471.
- as to financial condition, pp. 390, 458, 687.
- as to insanity, p. 682.
- as to marriage, p. 774.
- as to ownership, p. 886.
- as to residence, p. 944.
- as to solvency or insolvency, pp. 458, 687.
- as to title, pp. 178, 991.

RESCISSION,

- delay in rescinding as an election to affirm, p. 941.

RES GESTÆ,

- see Hearsay; Res Gestæ.

RESIDENCE,

- see also Domicil.
- absence from state, p. 946.
- burden of proof, p. 947.
- declarations and conduct, p. 945.
- deposition, residence of deponent, p. 947.
- direct testimony, p. 944.
- distinguished from citizenship, p. 375.
- fugitive from justice, p. 946.
- general reputation, p. 944.
- instrument executed out of the jurisdiction, p. 946.
- place of business, p. 945.
- presumption as to, pp. 945 et seq.
- presumption of continuance, p. 947.
- what is, p. 941.
 - student voting, p. 943.
 - teachers, ministers and soldiers, p. 943.
 - transient workmen, p. 944.
 - voting residence, p. 942.

RES IPSA LOQUITUR,

- automobile accidents, p. 316.
- doctrine of, pp. 310 et seq.

RES IPSA LOQUITUR—(continued).

explosion of gases, p. 316.

fall of persons, p. 316.

injury of servant, p. 321.

REVIVAL,

see Abatement and Revival.

order of court substituting parties as evidence of, p. 948.

REVOCATION,

of agency, see Agency.

RIVERS,

judicial notice as to, p. 732.

ROBBERY,

finding of stolen property on person, p. 629n.

ROMAN CATHOLIC CHURCH,

judicial notice as to nature and powers of, p. 718.

RULES,

admissibility to show duty and as to performance thereof, pp. 499 et seq.

RUNAWAY,

opinion as to care in leaving horse in action for injury to, while running away, p. 298n.

presumption of negligence in case of injury by runaway horse, p. 312n.

S**SAFETY DEPOSIT BOXES,**

judicial notice of use, p. 719.

SALE,

acceptance by principal of order obtained by agent, p. 217n.

acceptance of goods purchased, pp. 60 et seq.

burden of proving, p. 55.

burden of rebutting apparent acceptance, p. 56.

admissibility of account books in evidence, pp. 76 et seq.

consideration, oral evidence as to, pp. 414, 416.

consideration in bill of sale as evidence of value, p. 1007.

delivery, p. 55.

negating presumption that there was no implied warranty, p. 800n.

parol evidence as to intent of parties to contract, p. 701.

parol evidence of warranty, p. 381.

quality of article sold, pp. 420, 930.

SALESMAN,

notice to, as notice to employer, p. 841.

SANITY,

see Insanity.

SATISFACTION,

burden of proof, p. 948.

stipulation to satisfy, p. 949.

variance, p. 949.

SCHOOL LANDS,

filing of lease of lands selected by state as indemnity for loss of, p. 539n.

SCHOOLS,

intent to abandon school building, p. 35n.

SEALS,

affixing, authority, pp. 952, 953.

corporate seal, p. 951.

direct testimony, p. 951.

impression on paper, p. 950.

judicial notice, p. 951.

necessity that authority of agent be under seal, p. 193.

omission from record, p. 953.

one for several persons, p. 952.

parol assent to departure from sealed contract, p. 3.

presumption of consideration from use of, p. 410.

record as proof of, p. 953.

waiver of contract under, by executed parol agreement, p. 3.

SEAMAN,

opinion of, as to distance at which light can be seen on water, p. 986.

SEDUCTION,

competency against offspring, of judgment in seduction, p. 960.

evidence as to character in action for, p. 366.

inspection of child on issue of paternity, p. 891.

SELECTIVE DRAFT ACT,

judicial notice of regulations under, p. 726.

SEPARATION,

see Divorce and Separation.

SERVICE,

of notice, proof of, p. 954.

SERVICES,

opinion evidence as to value of, p. 1007.

presumption of employment from rendering of, p. 522.

SET-OFF AND COUNTERCLAIM,

recoupment for breach of oral agreement collateral to written contract, p. 379.

SEWER,

expert evidence as to construction of, p. 419n.

SHAMMING,

expert testimony as to whether person was feigning pain, p. 535.

SHIPPING,

expert testimony as to necessity of jettison, p. 815.

nationality of vessel, p. 810.

presumption that articles were necessary to fit out a vessel, p. 815.

right to abandon insured vessel, p. 31.

SHORTHAND NOTES,

proof of testimony in former proceeding by transcript of, p. 982.

SIDEWALKS,

see Highways.

SIGNATURE,

authority to sign, p. 955.

document produced on notice, p. 954.

genuineness of, see Handwriting.

oral evidence to explain, p. 955.

SIGNBOARDS,

evidence of inscription of names on, p. 886.

SIGNS AND SIGNALS,

dying declarations by, pp. 512, 956.

understanding of witness as to meaning of, p. 956.

SILENCE,

estoppel by, p. 526.

presumption of consent from, p. 408.

presumption of ratification from, p. 935.

SINGLE INSTANCE,

to prove habit, p. 572.

SKILL,

see Competency and Skill.

SLANDER,

see Libel and Slander.

SLEEPING CARS,

presumption and burden of proof in case of loss by passenger, pp. 312, 313.

SMALLPOX,

judicial notice of common belief that vaccination prevents, p. 718.

SOCIETIES,

record of, to show membership, p. 784.

SOLVENCY,

see Insolvency; Solvency, and Financial Condition.

SOUNDS,

direct testimony as to hearing of, p. 622.

opinion as to the nature of, p. 865.

SPAIN,

judicial notice of laws of, p. 727n.

SPECIFIC DENIAL,

see Denial.

SPEED,

comparison by combining witnesses, p. 959.

declarations as part of the *res gestæ*, p. 959.

direct testimony, opinion, p. 957.

experimental evidence, p. 960.

opinion evidence as to, see Opinions and Conclusions.

SPELLING,

evidence of mistake in, on question of genuineness of handwriting, p. 617.

SPIRITUALISM,

belief in, as evidence of insanity, p. 684.

STAGE COACH,

presumption of negligence from overturning of, p. 321n.

STAMP,

intent to evade statute requiring stamp on instrument, p. 700.

STANDARD OIL COMPANY,

presumption of intent to create monopoly, p. 700.

STANDARDS,

of weight, p. 1017.

STANDARDS OF COMPARISON,

on question of disputed handwriting, see **Handwriting**.

STATUTE OF FRAUDS,

see **Contracts**.

STATUTES,

admissibility of evidence to show mistake in, p. 794n.

as to admission of books of account in evidence, p. 78.

books of deceased person, p. 83.

entries by bookkeeper, p. 87.

effect of statute making party competent witness for self on right to introduce account books in evidence, p. 87.

effect of statute prohibiting party from testifying on admissibility of account books in evidence, p. 87.

foreign statute, see **Foreign Law**.

judicial notice of, p. 724.

making certified copy evidence equally with original, p. 442.

making injury prima facie evidence of negligence, p. 324.

recitals in, as evidence against party in whose favor passed, p. 858n.

requiring actual notice of unrecorded deed as equivalent of registration, p. 826.

STENOGRAPHER'S NOTES,

proof of testimony in former proceeding by means of, p. 981.

STIPULATED DAMAGES,

recovery of, on abandonment of contract, p. 5.

STIPULATIONS,

stipulation to satisfy party to contract, p. 949.

STOCK CERTIFICATES,

proof of genuineness of, p. 559.

STOCK IN TRADE,

judicial notice of, p. 719.

STREET RAILWAYS,

as carriers, see **Carriers**.

abandonment of franchise, p. 14n.

judicial notice as to business and operation of, p. 718.

opinion as to safety of appliance on horse car, p. 299n.

opinion as to possibility of stopping car in time to avoid collision, p. 298n.

as to speed, p. 957.

STRENGTH,

estimates of, p. 864.

SUBSCRIBING WITNESS,

opinion of, as to sanity or insanity, p. 678.

SUBSTITUTION,

of parties as prima facie evidence of death, p. 472.

SUDDEN STARTS OR STOPS,

presumption of negligence from injury by, to passenger, p. 321n.

SUICIDE,

findings of coroner on question of, p. 356.

opinion evidence as to, p. 340.

as to cause of, p. 346.

presumption and burden of proof as to, p. 69.

presumption of insanity from, p. 651.

weight of opinion as to sanity of one giving, p. 677.

SUN,

proof of rising or setting of, by almanac, p. 961.

SUPERIMPOSITION,

superimposing disputed signature on genuine one, p. 616.

SURETYSHIP.

see also Principal and Surety.

SURPRISE,

right of parties surprised by evidence, p. 962.

SURRENDER,

oral surrender, p. 963.

presumption of, p. 963.

SURVEY,

admissibility in evidence, pp. 276, 813.

judicial notice of abbreviations in, p. 37n.

SURVEYORS,

declarations of deceased surveyor as to boundaries, p. 282.

opinion of, on question of boundary, p. 280.

SURVIVORSHIP,

presumptions and burden of proof, p. 964.

SWITCH,

evidence as to measurements of, p. 783.

SYMBOLS,

interpreting symbols in account books, p. 107.

judicial notice of meaning of, p. 718.

oral evidence to explain, pp. 107, 235.

T

TABLES,

- admissibility in evidence of tide tables, p. 734n.
- of days, p. 462.
- of years p. 462.

TAMPERING,

- with witness, jurors, or evidence, pp. 965, 966.

TAXES,

- admissibility in evidence of tax deed not acknowledged or recorded, p. 124.
- competency of assessment roll to show title, p. 993.
- failure to pay, as proof of abandonment of title, p. 33.
- judicial notice as to customary rate of taxation, p. 719.
- payment of, as evidence of possession, p. 917.
- proof of payment of, on question of adverse possession, pp. 179n, 180.
- receipt as evidence of payment of, p. 895.
- recitals in tax deed, pp. 857n, 858n.
- tax valuation and assessment as evidence of value, p. 1010.
- unacknowledged tax deed as prima facie evidence of regularity of proceedings, p. 125.

TEARS,

- evidence as to shedding of, p. 533.

TECHNICAL TERMS,

- oral evidence to explain, p. 242.

TELEGRAMS,

- admissibility in evidence to show absence of person, p. 46.
- best and secondary evidence, p. 967.
- connected correspondence, p. 968.
- judicial notice that messages must be written, p. 719.
- not privileged, p. 966.
- presumption of delivery, p. 968.
- presumption of negligence from mistake in message, p. 313n.

TELEPHONES,

- conversation as false pretense, p. 972.
- judicial notice as to, p. 969.
- Evidence of conversation over.*
 - agency of operator, p. 971.
 - burden of proof, p. 969.
- identification of speaker, pp. 969, 970.
- recognition of speaker, p. 969.
- third party as witness, p. 971.

TEMPERATURE,

- estimates of, p. 864.

TENANTS IN COMMON,

see Cotenancy.

TENDER,

actual production, p. 973.

burden of proof, p. 972.

formal tender dispensed with where it would be useless, p. 1002.

having in sight, p. 973.

necessity of alleging excuse for not tendering, p. 528.

offer and readiness, p. 972.

place of, p. 973.

waiver, p. 973.

"willingness" to pay, p. 973.

TEST,

of knowledge of witness to handwriting, p. 589.

TESTAMENTARY CAPACITY,

see Insanity.

TESTIMONY GIVEN IN FORMER PROCEEDING,

admissibility of proof of former testimony generally, p. 974.

deposition, p. 977.

diligence in procuring deposition, p. 980.

identity of parties and subject-matter, p. 978.

impeachment of witness by, p. 980.

oath, p. 979.

opportunity to cross-examine, p. 978.

proof of death, absence, or disqualification, p. 979.

proving by bill of exceptions, p. 982.

by official reporter's transcript, p. 982.

by stenographer reading notes, p. 981.

by witness who heard, p. 982.

refreshing recollection, p. 981.

THEOSOPHY,

belief in, as evidence of insanity, p. 684.

THINGS,

evidence as to condition of, pp. 397 et seq.

THREATS,

as evidence of state of mind, p. 984.

proof of, by acts, p. 984.

TIDE,

flow of, p. 984.

judicial notice as to, p. 732.

TIDE TABLES,

admissibility in evidence, p. 734n.

TIME,

see also Date.

comparison, p. 985.

effect of time at which entries are made on admissibility of account
books in evidence, p. 95.

elapsing between dying declarations and death, p. 511.

entries and records as proof of, p. 990.

estimates of, p. 864.

judicial notice as to computation of, p. 719.

judicial notice as time necessary for transportation of express matter,
p. 719.

of acknowledgment of deed, p. 124.

of alteration of instrument, p. 222.

of death, p. 469.

of entries in account books, p. 107.

of taking oath of office, p. 854.

presumption as to time of entries in account books, p. 107.

presumption of accord and satisfaction from lapse of, p. 72.

of grant from lapse of, pp. 570, 571.

of payment from lapse of, p. 898.

reasonableness as question for jury, p. 937.

reasonableness of time for return of account stated, p. 119.

to which opinion as to sanity relates, p. 675.

Direct testimony; opinion.

time necessary for specified distance, p. 988.

time necessary for specified work, p. 988.

time of entries in account books, p. 107.

time or distance to stop train, p. 986.

time spent, p. 985.

time to get off train, p. 987.

TITLE,

abandonment of, p. 33.

admissibility of abstract of, in evidence, p. 52.

admissions, p. 994.

assessment roll, p. 993.

conveyance by one in possession, p. 992.

declarations, pp. 160, 994.

deed founded on judicial proceedings, p. 992.

direct testimony, p. 990.

as to claim of, p. 377.

general reputation, p. 991.

opinion as to marketableness, p. 995.

TITLE—(continued).

- oral evidence to supply defects, p. 994.
- presumption of, from possession, pp. 916, 991.
- presumption of possession, from evidence of title, pp. 916, 991.
- refusal of others to pass, p. 996.

TOMBSTONE,

- evidence as to inscription on, to show age, p. 183.
- evidence of inscription on, to show death, p. 465.

TOWING,

- evidence on question of negligence in towing, p. 296n.

TOWNS,

- judicial notice as to size of, p. 732.
- of nonexistence of town of given name, p. 732n.
- of population of, p. 719.
- of township line, p. 732n.

TRACING,

- proof of deposit in bank in order to trace funds, p. 493.

TRACKS,

- made by shoes, as evidence of identity, p. 629n.
- opinions as to, p. 865.

TRADE DESIGNATION,

- testimony of expert as to, p. 809.

TRADEMARKS,

- abandonment, presumption, p. 32.

TRADE SCHEDULE,

- of prices as evidence of value, p. 1009.

TRADE TERMS,

- oral evidence to explain, p. 242.

TRADE USAGE,

- see Usage and Custom.

TRAFFIC POLICEMEN,

- judicial notice of duties, p. 719.

TRANSCRIPT,

- of official reporter's notes, proof of testimony in former proceeding by, p. 981.

TREATIES,

- judicial notice of, p. 724.
- ABB. FACTS—73.

TREATMENT,

direct testimony as to whether treatment of person was kindly, p. 996.

TRESPASS,

photograph of rocks and rubbish deposited by, p. 407n.

to try title, evidence as to character, p. 365n.

TRESPASSERS,

judicial notice as to brakeman's authority to eject, from freight train,
p. 719.

TRESTLE,

opinion as to proper manner of constructing, p. 297n.

TRIAL,

comparison by jury or referee of disputed handwritings, p. 611.

inspection by jury of altered instrument, p. 227.

taking to jury room standards of comparison on question of disputed
handwriting, p. 612.

waiver of objection by taking another, p. 1015.

Sufficiency of evidence to go to jury.

as to account stated, p. 118.

on question of agency, p. 202.

on question of person's knowledge of presence of articles in his room,
p. 739.

Questions of law and fact.

assent as question for jury, p. 256.

as to whether proper foundation for admission of dying declarations
has been made, p. 513.

credibility of dying declarations, p. 515.

genuineness of standards of comparison in case of disputed writing,
p. 605.

materiality of alterations in instrument, p. 226.

reasonable diligence, p. 937.

reasonable time, p. 937.

TRUST DEED,

presumption of assent of creditors to deed of trust beneficial to them,
p. 57.

TRUSTS,

identity of *cestui que trust*, p. 633.

possession of *cestui que trust* as notice, p. 835.

TURNTABLE,

evidence on question of negligence as to, p. 306n.

U

UNDATED ENTRIES,

in account books, effect on admissibility in evidence, p. 96.

UNDUE INFLUENCE,

presumption and burden of proof as to, pp. 561, 650.

UNEXPRESSED WILLINGNESS,

equivalent to consent, p. 408.

UNSIGNED WRITING,

as evidence of terms of contract, p. 429.

USAGE AND CUSTOM,

burden of proving ignorance of, p. 780.

cogency of evidence, p. 1001.

common consent as basis of, p. 1001.

contradicting existence of usage on which witness bases belief, p. 290.

direct testimony, p. 999.

as to knowledge of, p. 1001.

judicial notice of, pp. 287, 718, et seq.

parol evidence as to usage arising out of foreign edict, p. 1000.

presumption of knowledge, p. 1000.

single cases, p. 1000.

single witness, p. 1000.

Admissibility of evidence of.

competency generally, p. 997.

general usage as to abbreviations, p. 38.

proof of usage peculiar to party to explain abbreviation, p. 39n.

in force in territories acquired by United States, p. 547.

not competent to create contract, p. 998.

of officer, p. 819.

of particular business house, p. 289.

of trade as to quantity called for by measure, p. 780.

on question of agent's authority, pp. 208 et seq.

on question whether contract was made, p. 380.

proof of business custom where details of fact are forgotten, p. 551.

to contradict contract, pp. 435, 997.

to contradict rule of law, p. 997.

to control meaning, p. 998.

to corroborate hearsay, p. 446.

to explain ambiguous contract, pp. 240, 997.

to prove scope of particular trade, p. 289.

usages of language on question of genuineness of document, p. 617.

WASSERMAN BLOOD TEST,

evidence of, p. 271.

WATERS,

abandonment of water rights, pp. 19, 20.

judicial notice as to, pp. 732, 812.

as to artesian wells, p. 718.

of necessity of irrigation, p. 814.

diversion; opinion evidence as to cause of, p. 346n.

government survey of water as evidence on question of navigability,
p. 813.

navigability, presumptions and burden of proof as to, p. 813.

what effect log floating in, had in changing current, p. 346n.

Obstruction; overflow.

loss or abandonment of right of flowage, p. 20.

opinion evidence as to cause of overflow, p. 338n.

opinion evidence as to effect of obstruction, p. 346n.

precautions subsequent to injury to prevent flooding, p. 307n.

WAX,

necessity of wax seal, p. 950.

WAYS,

Abandonment of easement of.

declarations, p. 19.

deviation or use of substituted way, p. 16.

nonuser generally, p. 14.

obstruction of, or cutting off access to, p. 17.

whose acts in attempting to abandon are binding on dominant owner,
p. 18.

WEALTH,

evidence to show, p. 1015.

WEATHER,

comparison of, p. 1016.

freezing of other articles, p. 1016.

records as to, p. 1015.

WEIGHT,

see also Measure.

estimates of, p. 864.

proof of incorrectness of, p. 1017.

underweight as evidence of intent to deceive, p. 1017.

WILLS,

ambiguity in, generally, see Ambiguity.

admissibility in evidence on question of change of domicile, p. 7.

WILLS—(continued).

admissibility in evidence of copy of lost or destroyed will, p. 445
 burden of proof as to time of alterations in, p. 224n.
 declarations on issue as to forgery of, p. 169.
 declarations of testator to prove existence or contents of lost or destroyed will, p. 164.
 intent of testator generally, see *Intent*.
 mental capacity of testator, see *Insanity*.
 oral evidence to explain description of premises in, p. 922n.
 parol evidence as to whether instrument was intended as will, p. 709.
 presumption and burden of proof as to intoxication of testator at time of executing will, p. 716.
 presumption of acceptance of provision made by, p. 58.
 presumption of testator's knowledge of contents, p. 741.
 probate of, as proof of death, p. 473.
 proof of disputed handwriting, see *Handwriting*.
 testamentary capacity, declarations of deceased subscribing witness as to, p. 164.

Undue influence.

declarations of testator to show, p. 162.
 evidence to show motive for discriminating against child where will is attacked on ground of undue influence, p. 805n.

Revocation.

presumption and burden of proof, p. 693.
 presumption of knowledge that marriage revokes will, p. 744n.
 proof of declarations of testator on issue of his intention in destroying will, p. 162.
 proof of testator's declarations to overcome or sustain presumption of revocation where will cannot be found, p. 163.

WITCHCRAFT,

belief in, as evidence of insanity, p. 684.

WITNESSES,

as to bias generally, see *Bias*.
 corroboration of, see *Corroboration*.
 evidence as to character in action for attempted subornation of witnesses, p. 367.
 failure of witness to identify person to whom testimony refers, p. 626.
 inspection of, by jury to determine qualifications and intelligence, p. 375.
 right to read to illiterate witness in presence of jury writing signed with his mark, p. 556.
 tampering with, proof of, p. 965.
 tampering with, as admission of bad case, p. 268.

WITNESSES—(continued).**Competency.**

evidence to show contingent interest in assignor of cause of action,
p. 261.

judge as witness, p. 392.

of one of several physicians conducting autopsy to testify to fact observed by another, p. 262.

of witness as to character or reputation, p. 371.

of witness to handwriting, see Handwriting.

of witness giving opinion as to sanity, see Insanity.

of witness giving opinion generally, see Opinions and Conclusions.

opinion as to capacity, see Capacity, p. 291.

to explain alteration in instrument, p. 231.

Examination.

asking witness what he would have done if certain representations had not been made, p. 641.

asking witness who refused to answer positively if he "thinks" fact was so, p. 264.

form of question to witness giving opinion, p. 300.

interrogating witness to discover name of person from whom information was obtained, p. 808.

of expert witness as to insanity, see Insanity.

of expert witness, generally, see Opinions and Conclusions.

of witness to handwriting, see Handwriting.

Cross-examination.

as to capacity to judge age of person, p. 187.

by documents used to refresh memory of witness, p. 555.

for purpose of contradicting, pp. 354, 433, 591, 597.

of expert generally, pp. 867, 875.

of expert as to sanity, p. 666.

of nonexpert giving opinion as to sanity, p. 676.

of party testifying to his belief at given time, p. 264.

of witness to handwriting, pp. 589, 591, 597.

opportunity to examine witness whose testimony in former proceeding is offered, p. 978.

requiring witness whose writing is in dispute to write for purpose of comparison, p. 577.

to show bias, p. 267.

Refreshing memory:

as to date, p. 460.

as to forgotten name, p. 808.

by otherwise irrelevant inquiry, p. 550.

cross-examination by documents used for, p. 555.

use of accounts to refresh memory, p. 110.

use of memoranda to refresh memory, p. 551.

WITNESSES—(continued).

of witness to handwriting on cross-examination, p. 590.

Impeachment; discrediting; contradiction.

contradiction generally, p. 433.

bias, hostility, interest, p. 433.

by former testimony, p. 980.

character or reputation, p. 433.

declarations to impeach testimony; calling witness's attention, p. 268.

effect of contradiction to let in corroborative evidence, p. 447.

of answer given by adversary's witness on cross-examination, p. 966.

of dying declarations, p. 514.

of expert as to sanity, p. 666.

of nonexpert opinion as to insanity, p. 676.

of one's own witness, pp. 435, 966.

of testimony as to date, p. 461.

of testimony of witness given on former proceeding, p. 980.

on cross-examination, pp. 354, 433, 591, 597.

right to explain impeaching evidence, p. 530.

Credibility.

credibility of dying declarations, p. 514.

proof of hostility, bias, interest, or character, pp. 266, 433.

WORDS,

judicial notice of meaning of, p. 718.

WORK,

evidence on question of acceptance of, p. 63.

WOUND,

opinion as to cause of, p. 340.

WRIT AND PROCESS,

presumption that single copy of notice directed to two defendants was delivered by postal authorities to each, p. 759n.

proof of service of notice, p. 954.

WRITING IN COURT,

by person whose writing is in dispute, p. 576.

X**X-RAY PHOTOGRAPHS,**

admissibility in evidence pp. 392, 909n.

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